The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem

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I. INTRODUCTION

The meretricious relationship doctrine has received increased attention in recent years largely due to its application to same-sex couples and the national debate on same-sex marriage. However, the importance of the doctrine, applicable also to heterosexual couples, extends beyond this recent focus. The number of unmarried, committed persons cohabitating has been increasing rapidly. Over eleven million people reported being unmarried but living with a partner in 2000, an increase of seventy-two percent since 1990. As the number of unmarried persons cohabitating increases, so will the importance of the doctrine.

The meretricious relationship doctrine is a judicially-created equitable doctrine that allows unmarried committed persons who cohabitate to acquire an interest in property accumulated during the relationship, regardless of which partner holds legal title. Upon

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4. Id.

5. Presumably, this is because, as the number of unmarried persons cohabiting increases, the claims brought under the meretricious relationship doctrine will likewise increase.

6. Although the term “meretricious” historically had a demeaning connotation, presently the word is a term of art and is in no way intended to be demeaning. See Peffley-Warner v. Bowen, 113 Wash. 2d 243, 247 n.5, 778 P.2d 1022, 1024 n.5 (1989).

7. See Lindsey, 101 Wash. 2d at 306, 678 P.2d at 331.
termination of the relationship, a court will apply this doctrine to divide the property equitably.  

The current status of the meretricious relationship doctrine in Washington State is fundamentally underdeveloped and leaves many questions unresolved. For example, does the meretricious doctrine create a present inchoate property interest in the non-title-holding partner? Does a non-title-holding meretricious partner have management rights over property jointly-acquired? Does a tort claim against the non-title-holding partner create a third party creditor’s interest in the property of the title-holding partner that was jointly-acquired? Does the meretricious doctrine apply post mortem?

This Article, primarily concerned with the last question posed above, will illustrate that the meretricious relationship doctrine should be applied post mortem. Specifically, the meretricious relationship doctrine should apply (1) to the survivor of a meretricious relationship when the relationship terminates by the death of the other partner, (2) to the estates of the meretricious partners when both partners have died simultaneously, and (3) to the estate of a meretricious partner when the relationship terminates by that partner’s death. The debate over whether the meretricious relationship doctrine should be applied post mortem centers on whether applying the doctrine post mortem will contravene Washington’s intestacy laws, which do not provide any inheritance rights for unmarried cohabitants.

This Article does not argue that a surviving meretricious partner can inherit under Washington’s intestacy laws, nor does it argue that the Washington State Legislature should amend intestacy laws so that a surviving meretricious partner could inherit directly from a decedent’s estate. Rather, this Article argues that the meretricious relationship doctrine creates a present inchoate unliquidated property interest in the non-title holding partner which cannot be dissolved at death. When the relationship terminates by the death of one of the partners, the inchoate

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8. Id.


10. Peffley-Warner, 113 Wash. 2d at 253, 778 P.2d at 1027; see infra Part III.

11. Such an argument would clearly conflict with Peffley-Warner, which held that a meretricious partner is not a “spouse” for purposes of inheritance under Washington’s intestacy laws. Id. at 253, 778 P.2d at 1027.

12. Although this might be a good idea, such an argument is beyond the scope of this article. For an article addressing this issue, see E. Gary Spitko, An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners, 81 OR. L. REV. 255 (2002).

13. See discussion infra Part V.D.1.
interests of the non-title holding partner vest. Property subject to the
inchoate interest, having vested, does not become part of the title-holding
decedent’s estate. The surviving partner, therefore, does not inherit from
the estate, but is rather liquidating his or her property interest created
under the meretricious relationship doctrine. Since the surviving partner
does not inherit from the decedent’s estate, applying the doctrine post
mortem does not conflict with intestacy laws. Additionally, to apply the
document post mortem advances its purpose because the doctrine was
created to prevent unjust enrichment. To apply the doctrine post
mortem prevents unjust enrichment of either the title-holding survivor or
the title-holding decedent’s estate, as the case may be. Further, the
document should apply post mortem because it is an equitable doctrine,
and the equities involved do not change simply because a relationship
terminates by death rather than by separation or marriage.

To not apply the doctrine post mortem would cause a non-title-
holding survivor to suffer severe inequities while unjustly enriching the
estate of the deceased partner. If two people live in a meretricious
relationship in which all the assets of the couple are held in one partner’s
name and that partner dies, the survivor would lose his or her equitable
interest in property jointly-acquired, and thus own absolutely nothing.
The title-holding decedent’s assets, absent a valid will, will be distributed
to the decedent’s issue, parents, siblings, grandparents, or cousins.

Likewise, if a meretricious relationship terminates by the death of
the non-title-holding partner and the meretricious doctrine does not apply
post mortem, the title-holding survivor will be unjustly enriched at the
expense of the decedent’s heirs. Similarly, if a meretricious relationship
terminates by the simultaneous deaths of the partners, the estate of the
title-holding partner will be unjustly enriched to the detriment of the non-
title-holding partner’s estate if the doctrine does not apply post mortem.

Imagine a man and woman who cohabitated for many years, but all
of the couple’s assets were in the male partner’s name. Imagine further
that each partner had a child from a previous relationship. If both
partners later die in a car accident, and if the meretricious relationship
document does not apply post mortem, the woman’s child will not inherit

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15. Peffley-Warner, 113 Wash. 2d at 252, 778 P.2d at 1026 (discussing In re Marriage of
Lindsey, 101 Wash. 2d 299, 678 P.2d 328 (1984)).
17. See discussion infra Part V.D.4.
18. See discussion infra Part III (discussing property distribution under Washington’s intestacy
laws, WASH. REV. CODE § 11.04 (2004)).
anything, since the woman did not own anything in her name.19 The child of the male partner will inherit all of the assets.20 If, on the other hand, the doctrine applies post mortem, the woman's inchoate interest in the assets will have vested upon the termination of the relationship (i.e., the death of the male partner), and thus, will pass to her child either through a valid will or intestacy laws.21

In Section II, this Article will examine the evolution of the meretricious relationship doctrine beginning with the abolition of common law marriage, the adoption of the Creasman presumption,22 the creation of the modern meretricious relationship doctrine in In re Marriage of Lindsey,23 and finally to the present state of the doctrine. Section III explores Washington's intestacy laws and argues that those laws do not preclude applying the meretricious relationship doctrine post mortem. In Section IV, this Article addresses the possibility of creating a will to control property disposition at death and demonstrates that the option of drafting a will is not an adequate solution to the problem meretricious relationship equity was meant to address. Finally, Section V argues that the meretricious relationship doctrine should apply post mortem.

II. THE MERETRICIOUS RELATIONSHIP DOCTRINE

A. Evolution of the Doctrine

An understanding of why the meretricious relationship doctrine should be applied post mortem requires an appreciation of the evolution and purposes of the doctrine. The historical inequities that the doctrine was created to address demonstrate that these same inequities continue to exist in the post mortem context.

1. Common Law Marriage

The meretricious doctrine evolved from the Creasman presumption, which developed after the abolition of common law marriage.24 Common law marriage was based on the concept of a civil contract,25 and its rules

19. See discussion infra Part III.
20. See discussion infra Part III.
21. See discussion infra Part V.
25. In re Estate of McLaughlin, 4 Wash. 570, 573, 30 P. 651, 652 (1892) (citing Meister v. Moore, 96 U.S. 76 (1877)).
varied depending on the jurisdiction. Some states only required evidence that a couple was capable of contracting and that the couple did in fact agree, either orally or in writing, to be husband and wife. Other states required that there be some ceremony or celebration in addition to an implicit contract. In a few jurisdictions courts held that a common law marriage existed when there was evidence of cohabitation and additional evidence showing the couple held themselves out to the public as husband and wife.

There were various reasons why the courts adopted the doctrine of common law marriage. One reason was the belief that marriage derived from a natural right that every human possessed. This belief, coupled with the concept of freedom of contract, commanded that a person’s right to marry need not depend on a government license. Another reason was that public policy favored marriage over illicit relationships, and therefore, courts should resolve uncertainty about cohabitants’ marital status in favor of finding them married. A third reason for the doctrine of common law marriage was to protect children. If a court found a cohabiting couple was not married, then any children the couple had were born out of wedlock, and thus illegitimate.

Despite the reasons favoring common law marriage, some state legislatures enacted statutes severely limiting common law marriage; others eliminated the institution completely. Many of these statutory limitations included a requirement of some form of solemnization by a person authorized to perform such ceremony, a ceremony to take place in front of two witnesses, and/or a certificate of marriage.

State legislatures and courts provided four main reasons for limiting or abolishing common law marriage. One reason was to secure reliable evidence by which the marriage could be proved to prevent fraud and litigation. Another reason for establishing formalities for a valid

26. See id.
27. Id. at 581, 30 P. at 655 (citing Norcross v. Norcross, 29 N.E. 506 (Mass. 1892)).
28. Id. at 578, 30 P. at 654 (citing Beverlin v. Beverlin, 3 S.E. 36 (Va. 1887)).
29. Id.
30. Id. at 576, 30 P. at 657 (citing Askew v. Duree, 30 Ga. 173 (1860)).
31. Id.
32. Id. at 584, 30 P. at 656 (citing Dickerson v. Brown, 49 Miss. 357 (Miss. 1873)).
33. Id. at 574, 30 P. at 653 (citing Parton v. Hervey, 67 Mass. (1 Gray) 119 (Mass. 1854)).
34. See Meister v. Moore, 96 U.S. 76 (1877) (holding that a state statute requiring persons to obtain a marriage license to be validly married abrogated common law marriage).
35. McLaughlin, 4 Wash. at 581, 30 P. at 655 (citing Holmes v. Holmes, 12 F. Cas. 405 (C.C. Or. 1870)).
36. Id. at 575, 30 P. at 653 (citing Meister, 96 U.S. 76).
37. Id. at 581, 30 P. at 655 (citing Holmes, 12 F. Cas. 405).
marriage was that doing so did not seem unreasonable;\textsuperscript{38} since there were formalities required for simple transactions, such as transferring personal property, courts and legislatures believed it was not unreasonable to require formalities for marriage.\textsuperscript{39} Further, marriage was viewed as sacred, and therefore, not be entered into lightly.\textsuperscript{40} Requiring certain procedures encouraged people to consider the importance of the commitment before entering into a marriage.\textsuperscript{41}

Third, imposing statutory requirements for a valid marriage was also used as a means to enforce public policy. For example, many legislatures and courts disfavored illicit relationships and cohabitation.\textsuperscript{42}

It was thought that abolishing common law marriage would actually reduce the number of illicit and cohabitory relationships.\textsuperscript{43} These courts assumed that many couples cohabitated for the purpose of getting married. These courts also assumed that social stigma would encourage people to abide by the statutory requirements.\textsuperscript{44}

Washington State outlawed common law marriage\textsuperscript{45} in \textit{In the Matter of the Estate of McLaughlin}.\textsuperscript{46} \textit{McLaughlin} involved a statute establishing requirements for marriage.\textsuperscript{47} The court held that the statute provided the exclusive manner in which Washington State citizens could legally marry; therefore, it deemed that the statute abolished common law marriage.\textsuperscript{48}

2. The Creasman Presumption

Although one of the purposes of abolishing common law marriage was to discourage cohabitation and strengthen the institution of marriage,\textsuperscript{49} people continued to cohabitate despite the fact that the law

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 590, 30 P. at 658.
\textsuperscript{41} \textit{Id.} at 591–92, 30 P. at 658–59.
\textsuperscript{42} See \textit{id.} at 584, 30 P. at 656 (citing Lewis v. Ames, 44 Tex. 319 (1875)).
\textsuperscript{43} \textit{Id.} at 590, 30 P. at 658.
\textsuperscript{44} \textit{Id.} at 588, 30 P. at 657 (citing Askew v. Dupree, 30 Ga. 173 (1860)).
\textsuperscript{45} Washington State recognizes common law marriages validly entered into in other states. \textit{In re Pennington}, 142 Wash. 2d 592, 600 n.6, 14 P.3d 764, 769 n.6 (2000).
\textsuperscript{46} \textit{McLaughlin}, 4 Wash. 570, 30 P. 651 (1892).
\textsuperscript{47} Wash. Gen. St. §§ 1381–1389 (required persons performing marriage ceremonies be authorized to do so; persons getting married must obtain a license; and if the female is under eighteen or the male is under twenty-one years of age, the State shall not issue a license except on the consent of under aged person's parent or guardian). One of the purposes of the statute was to prevent illicit relationships between men and underage girls. \textit{See McLaughlin}, 4 Wash. at 589–90, 30 P. at 658–59.
\textsuperscript{48} \textit{Id.} at 589–90, 30 P. at 658–59.
\textsuperscript{49} \textit{Id.} at 576, 30 P. at 653 (citing Askew v. Dupree, 30 Ga. 173 (1860)).
would not recognize them as being married.\textsuperscript{50} This unexpected response created a new problem. Often a couple would cohabitate and jointly acquire property, but the title to the property would be held in only one partner's name. When the couple later separated, the non-title-holding partner would desire to receive his or her alleged interest in such property.\textsuperscript{51} Thus, due to the fact the legislature abolished common law marriage, the courts had to address the issue of how to distribute property that non-married cohabitants jointly accumulated during their relationship.\textsuperscript{52}

The Washington State Supreme Court addressed this issue in \textit{Engstrom v. Peterson},\textsuperscript{53} where the court held that property acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and in the absence of some trust relationship,\textsuperscript{54} the property belongs to the one who held legal title.\textsuperscript{55}

The supreme court was confronted with a similar question in \textit{Buckley v. Buckley}.\textsuperscript{56} In that case the issue was whether a woman had any interest in jointly-acquired property that was in her partner's name when she believed they were legally married, but, unbeknownst to her, the marriage was void because her husband was legally married to another woman.\textsuperscript{57} The court made an exception to the \textit{Engstrom} rule and held that, even though there was no lawful marriage between the parties, if either or both of them, in good faith, entered into a marriage with the other, and such marriage proves to be void, a court of equity will protect the rights of the innocent party in the property accumulated by their joint efforts.\textsuperscript{58}

\textit{Engstrom} and \textit{Buckley} provide the framework for the birth of the \textit{Creasman} presumption. In \textit{Creasman v. Boyle}, the court adopted a bright-line rule: in the absence of evidence to the contrary, it is presumed

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\textsuperscript{50} \textit{See} Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908) (involving a couple who cohabitated despite the abolition of common law marriage).

\textsuperscript{51} \textit{See id}.

\textsuperscript{52} \textit{See Engstrom v. Peterson, 107 Wash. 523, 182 P. 623 (1919)}.

\textsuperscript{53} \textit{Id}.

\textsuperscript{54} A trust relationship is a fiduciary relationship regarding property and subjecting the person with title to the property to equitable duties to deal with it for another's benefit. A trust arises as a result of a manifestation of an intention to create it. \textit{BLACK'S LAW DICTIONARY} 1513 (7th ed. 1999). \textit{See also} Omer v. Omer, 11 Wash. App. 386, 393, 407 P.2d 957, 961 (1965).

\textsuperscript{55} \textit{Engstrom}, 107 Wash. 531, 182 P. 562. This was the original case creating the meretricious doctrine.

\textsuperscript{56} 50 Wash. 213, 96 P. 1079 (1908).

\textsuperscript{57} \textit{Id} at 214–15, 96 P. at 1080.

\textsuperscript{58} \textit{Id} at 217, 96 P. at 1081.
as a matter of law that the parties intended to dispose of the property exactly as they did. Thus, the party who held title to the property in question was the only party that had a legal interest in it, absent a showing of intent to dispose of the property otherwise. In that case, Harvey Creasman and Caroline Paul cohabitated for seven years holding themselves out as husband and wife. When their relationship terminated at Caroline’s death, they owned, among other miscellaneous items, a parcel of land and a savings account worth a substantial amount of money, both in Caroline’s name. However, the real property was paid for with Harvey’s earnings, and the savings account was wholly comprised of Harvey’s earnings. Harvey petitioned the court to obtain title to the property and bank account. The trial court found that the couple lived in a marital-like relationship, and each materially contributed to the accumulation of the assets. Therefore, it partitioned the property as if it were community property, distributing a one-half interest in the real property and bank account to Harvey and a one-half interest to Caroline’s estate. The supreme court reversed, reasoning that the Buckley exception did not apply since there was no question of good faith or innocent mistake on the part of Harvey or Caroline. Furthermore, the court held that the parties clearly did not intend to enter into a marriage. The parties were deemed fully aware of their unmarried status, and therefore, the Engstrom rule prohibited the trial court from distributing the property to Harvey. The court reasoned that since the parties presumably knew the current state of the law and chose to put their jointly-acquired property in the name of only one of them, they must have intended that person to be the separate legal owner of such property.

59. 31 Wash. 2d 345, 358, 196 P.2d 835, 841–42 (1948).
60. Id. at 356–57, 196 P.2d at 841–42.
61. Id. at 346–47, 196 P.2d at 836–37.
62. Id. at 348, 196 P.2d at 837.
63. Id. at 346–47, 196 P.2d at 836–37.
64. Id. at 348, 196 P.2d at 837.
65. Id. at 348–50, 196 P.2d at 837–38.
66. Id. at 350, 196 P.2d at 838.
67. Id. at 351, 196 P.2d at 838.
68. Id. at 358, 196 P.2d at 842.
69. Id. at 352–53, 196 P.2d at 839.
70. Id. at 353, 196 P.2d at 839.
71. Id.
72. Id.
3. Exceptions to the Creasman Presumption

The Creasman presumption was in effect for thirty-six years with regard to disposition of cohabitants’ property after separation.\(^73\) However, the presumption was rarely used to prohibit an equitable distribution to a non-title-holding partner. Rather, courts created the following exceptions to the presumption to allow for such distributions: (1) where the title to property accumulated during a meretricious relationship could be traced to the separate property of one of the parties,\(^74\) (2) where the parties were involved in a joint venture or implied contract,\(^75\) (3) where the court found a constructive equitable trust,\(^76\) or (4) where the cohabitants had entered into a valid contract.\(^77\) These exceptions were, in one way or another, justified by the actual or inferred intent of the parties. In fact, the supreme court stated that the Creasman presumption only arises “when there is an absence of evidence as to intention.”\(^78\)

4. The Current Meretricious Relationship Doctrine

The Creasman presumption was explicitly overruled in In re Marriage of Lindsey, and the meretricious relationship doctrine was created, for the most part, as it exits today.\(^79\) In that case, the parties had

\(\text{\textsuperscript{73}}\) The case created the Creasman presumption in 1948, and the presumption was not overruled until In re Marriage of Lindsey in 1984.

\(\text{\textsuperscript{74}}\) Shull v. Shepherd, 63 Wash. 2d 503, 508, 387 P.2d 767 (1963) (when property is acquired by contributions of two or more parties, courts will presume that they intended to share the property in proportion to the amount contributed when the funds can be traced, otherwise they share the property equally).

\(\text{\textsuperscript{75}}\) In re Estate of Thornton, 81 Wash. 2d 72, 81–82, 499 P.2d 864 (1972) (to establish an implied partnership a plaintiff need only show that a contract of partnership can be implied from the facts and circumstances of the case. No express contract needs to be proven. The fact that a meretricious relationship cannot give rise to community property does not prevent a plaintiff from establishing an implied partnership contract. The existence of a meretricious relationship does not affect the application of the general law of partnerships).

\(\text{\textsuperscript{76}}\) Omer v. Omer, 11 Wash. App. 386, 393–94, 407 P.2d 967 (1965) (holding that the male partner held title to property in a constructive trust for the benefit of his female partner. The couple was previously married in a foreign country and subsequently divorced to gain U.S. citizenship. The couple then lived in a meretricious relationship until they separated ten years later. During the meretricious relationship, the female partner gave her paychecks to the male who then purchased property. The court concluded that the male partner had an equitable duty to convey some of the property to the female partner).

\(\text{\textsuperscript{77}}\) Dahlgren v. Vlomeen, 49 Wash. 2d 47, 54–55, 298 P.2d 479 (1956) (holding that, absent some form of trust relationship, courts will presume that meretricious partners have placed title to their property exactly where they want it to be. Since this presumption is rebuttable and the respondent relies on a written agreement made out by the decedent to bequeath her property to him, Creasman v. Boyle did not apply).

\(\text{\textsuperscript{78}}\) West v. Knowles, 50 Wash. 2d 311, 313, 311 P.2d 689 (1957).

\(\text{\textsuperscript{79}}\) In re Marriage of Lindsey, 101 Wash. 2d 299, 678 P.2d 328 (1984).
cohabitated for over a year and a half before they were married. After approximately four and one-half years of marriage, the couple filed for divorce. After this filing but before the dissolution was granted, the barn burned down, and Mr. Lindsey recovered over $85,000 in insurance proceeds. Ms. Lindsey claimed she had an interest in the insurance proceeds because she assisted in building and painting the barn. The trial court, relying on the Creasman presumption, held that the barn and thus the insurance proceeds belong solely to Mr. Lindsey since the barn was constructed prior to marriage. Because the barn was built on his separate property, the court chose not to examine whether Ms. Lindsey had an equitable interest in the property. Ms. Lindsey appealed and argued that the Creasman presumption should be overruled. The Washington State Supreme Court agreed, concluding that the presumption was "unpredictable" and "onerous." The court adopted a new rule and stated that "courts must examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property." The court listed several factors that should be considered when determining whether a meretricious relationship existed, which include continuous cohabitation, the duration of the relationship, the purpose of the relationship, and the pooling of resources and services. These factors were not intended to create any "rigid set of requirements," but were to assist courts on a case-by-case basis. The court also stated that RCW 26.09.080 should be used by analogy to distribute the

80. Id. at 300, 678 P.2d at 329.
81. Id. at 300, 678 P.2d at 329, 332.
82. Id. at 300, 678 P.2d at 329.
83. Id. at 301, 678 P.2d at 329, 332.
84. Id. at 306, 678 P.2d at 332.
85. Id. at 301-02, 678 P.2d at 329-30.
86. Id. at 301-02, 307, 678 P.2d at 329-30, 332.
87. Id. at 304, 678 P.2d at 331.
88. Id.
89. Id.
90. Id. at 304-05, 678 P.2d at 331 (in analyzing these factors, a court will look to see whether the relationship was stable, fairly established by longevity, whether the purpose was to enter into a committed relationship, and whether the partners used their resources and services for the couple's joint benefit).
91. Id. at 305, 678 P.2d at 331.
92. WASH. REV. CODE § 26.09.080 (2004) instructs how a court should distribute the community and separate property of a married couple after dissolution. It provides in relevant part: In a proceeding for dissolution of marriage . . . the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the properties,
property of meretricious partners who have separated.\textsuperscript{93} Since neither party contested that their relationship prior to marriage was meretricious, the court held that the trial court erred in not considering whether Ms. Lindsey had an equitable interest in the property.\textsuperscript{94}

The meretricious relationship doctrine as espoused in Lindsey was further developed in Connell v. Francisco \textsuperscript{95} where the court characterized a meretricious relationship as a stable, marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist.\textsuperscript{96} The court also added "intent of the parties"\textsuperscript{97} to the list of factors used to determine whether the facts of a particular case establish that a meretricious relationship existed.

With regard to what property may be distributed under the meretricious doctrine, the Connell court held that the meretricious doctrine applies to property acquired during the meretricious relationship, not separate property obtained prior to the relationship.\textsuperscript{98} The court reasoned that while RCW 26.09.080\textsuperscript{99} applies to property distribution under the meretricious relationship doctrine by analogy,\textsuperscript{100} the parties in such a relationship decided not to get married, and thus, property owned by each party prior to the relationship should not be subject to distribution.\textsuperscript{101} The implicit rationale of the court was that since the parties decided not to get married, they likely did not intend their partner to have an interest in their separate property.\textsuperscript{102} Additionally, the court

\begin{enumerate}
\item The nature and extent of the community property;
\item The nature and extent of the separate property;
\item The duration of the marriage; and
\item 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.
\end{enumerate}

\textsuperscript{93} Lindsey, 101 Wash.2d at 306, 678 P.2d at 332.
\textsuperscript{94} Id. at 307, 678 P.2d at 332.
\textsuperscript{96} Id. at 346, 898 P.2d at 834.
\textsuperscript{97} Id. (stating that the court will look to see if the parties intended to live in a stable, marital-like relationship).
\textsuperscript{98} Id. at 350, 898 P.2d at 836.
\textsuperscript{99} WASH. REV. CODE § 26.09.080 (1989) requires all the property owned by a couple seeking a divorce, both community and separate, to be before the court for an equitable distribution.
\textsuperscript{100} See Lindsey 101 Wash. 2d at 306, 678 P.2d at 332.
\textsuperscript{101} Connell, 127 Wash. 2d at 349, 898 P.2d at 835–36.
\textsuperscript{102} Id.
reasoned that equitable distribution of the separate property of the meretricious partners, which would afford such couples the same rights as married partners, came too close to re-creating common law marriage.\textsuperscript{103} The critical question, according to the court, is whether the property would have been characterized as community property had the parties been married.\textsuperscript{104} Once it is established that a meretricious relationship exists, there is a rebuttable presumption that all property acquired during the relationship is jointly owned by both partners, and thus, subject to a just and equitable distribution by the courts.\textsuperscript{105}

Therefore, under \textit{Connell}, a meretricious relationship doctrine analysis consists of three steps: (1) the trial court must determine whether a meretricious relationship existed, (2) if there was such a relationship, the trial court must evaluate the interest each party has in the property acquired during the relationship, and (3) the trial court then, based on the information obtained, makes a just and equitable distribution of such property.\textsuperscript{106}

The Washington Supreme Court has held that a meretricious relationship is not the same as a marriage.\textsuperscript{107} Thus, partners in such a relationship do not qualify for certain statutory or contractual benefits afforded to married persons.\textsuperscript{108} For example, a meretricious partner does not qualify for benefits triggered by a "marital status" provision under Washington’s unemployment compensation statute.\textsuperscript{109} Further, a meretricious partner is not entitled to attorney fees in a meretricious relationship property distribution case under Wash. Rev. Code § 26.09.140,\textsuperscript{110} which permits an award of attorney fees in a marriage dissolution cause of action.\textsuperscript{111} A cohabitant is also not considered a member of an insured’s “immediate family” for purposes of insurance benefits.\textsuperscript{112} Additionally, a meretricious partner is not considered a

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\item \textsuperscript{103} \textit{Id.} at 349, 898 P.2d at 836.
\item \textsuperscript{104} \textit{Id.} at 349, 898 P.2d at 835-36.
\item \textsuperscript{105} \textit{Id.} at 351, 898 P.2d at 836. This presumption is basically the exact opposite of the Creasman presumption.
\item \textsuperscript{106} See \textit{In re Pennington}, 142 Wash.2d 592, 601, 14 P.3d 764, 770 (2000) (laying out these three factors citing \textit{Connell}).
\item \textsuperscript{107} \textit{Connell}, 127 Wash. 2d at 348, 898 P.2d at 835.
\item \textsuperscript{108} \textit{Id.} at 348, 898 P.2d at 835.
\item \textsuperscript{109} \textit{Id.} (citing Davis v. Dep’t of Employment Sec., 108 Wash. 2d 272, 278–79, 737 P.2d 1262, 1266–67 (1987)).
\item \textsuperscript{110} WASH. REV. CODE § 26.09.140 (1973).
\item \textsuperscript{112} \textit{Id.} at 349, 898 P.2d at 835 (citing Cont’l Cas. Co. v. Weaver, 48 Wash. App. 607, 612, 739 P.2d 1192 (1987)).
\end{itemize}
“spouse” for purposes of Washington’s wrongful death statute. Lastly, if a meretricious relationship is terminated by the death of one partner, the surviving partner cannot inherit from the estate of the decedent under Washington’s intestacy laws.

Since the meretricious relationship doctrine is not considered to be synonymous with marriage, it has been applied to same sex couples. The Washington State Court of Appeals strictly applied the factors and determined that they equally apply to heterosexuals and homosexuals because all of the factors espoused by Connell are neutral on the issue of same sex relationships and the capability of marrying legally.

Although the case law since Lindsey has clarified the meretricious relationship doctrine substantially, it is currently less than clear whether the doctrine can be applied post mortem. Although no reported appellate court opinion has explicitly held the meretricious relationship doctrine does or does not apply post mortem, two Washington State Supreme Court Justices believe that applying the meretricious relationship doctrine post mortem would thwart Washington’s intestacy laws. However, Washington’s intestacy laws create a framework which demonstrates that applying the meretricious relationship doctrine post mortem will not circumvent intestacy laws.

III. INTESTACY LAWS

Intestacy laws provide a scheme to distribute a person’s property when that person dies without a valid will and date back to biblical

113. Id. (citing Roe v. Lutzke Trucking, Inc., 46 Wash. App. 816, 732 P.2d 1021 (1987)).
115. See, e.g., Gormley v. Robertson, 120 Wash. App. 31, 83 P.3d 1042 (2004); see also Vasquez v. Hawthorne, 145 Wash. 2d 103, 107, 33 P.3d 735, 737 (2001) (in dictum the court stated that 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).
116. Gormley, 120 Wash. App. at 37, 83 P.3d at 1045. The court further reasoned that, although one of the factors is that the couple lived in a marital-like relationship, this factor referred to the behavior of the meretricious partners, not the legal ability to marry. In fact, one of the factors is that the partners know that they are not legally married.
117. See Vasquez, 145 Wash. 2d at 108–15, 33 P.3d at 738–41 (two members of the supreme court believe that the meretricious relationship doctrine is unavailable to a party who seeks relief when one party to the alleged meretricious relationship is deceased) (Alexander, C.J. and Sanders, J., in separate concurring opinions).
118. Id.
119. The two concurring justices in Vasquez believe that applying the meretricious doctrine post mortem violates Washington’s intestacy laws, a position more fully addressed in discussion infra Part V.A.
times when Israelites were afforded intestate succession rights. The primary purpose of creating intestacy laws is to distribute the decedent’s estate according to his or her probable donative intent. Other purposes include protecting the financially dependent family, rewarding economic investment, and ensuring a fast and fair distribution of property.

Under the vast majority of states’ intestacy laws, unmarried cohabitants who survive their partner do not have a right to inherit from their partner’s estate. As of 1998, eleven states and the District of Columbia recognized common law marriage, and afforded qualifying partners the right to inherit under the intestacy laws. Four states offer intestate succession rights to surviving meretricious partners who meet certain criteria.

In Washington, unmarried cohabitants have no right to inherit from their partners’ estates. A decedent’s property will be distributed according to Washington’s intestacy laws if such person dies without a valid will. A surviving spouse has the right to inherit the totality or a majority of the intestate’s property depending whether the intestate is survived by issue, parents, or siblings. The term “spouse” has been

121. The intestate scheme the Israelites followed was: If a man dies and leaves no son, turn his inheritance over to his daughter; if he has no daughter, give his inheritance to his brothers; if he has no brothers, give his inheritance to his father’s brothers; if his father had no brothers, give his inheritance to the nearest relative in his clan, that he may possess it. This is to be a legal requirement for the Israelites, as the Lord commanded Moses. Numbers 27:8–11 (NIV).

122. Id.


124. Id. at 946–47.

125. Id. at 947.

126. See, e.g. WASH. REV. CODE § 11.04.015 (2004); see infra note 131.


131. Id. This statute provides how property of a decedent will be distributed if such decedent dies intestate. The statute provides in its entirety:

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
strictly construed to include only legally married persons. If there is no surviving spouse, the property will be distributed to the decedent's issue, parents, siblings, grandparents, or cousins. If one partner in a meretricious relationship dies intestate, the surviving partner cannot inherit any of the decedent's estate through the intestate laws. In fact, the estate will escheat to the state if the decedent left no heirs rather than be distributed to the surviving meretricious partner.

IV. WILLS

A person is free to devise his or her property through a will. However, many people fail to make valid wills. This is likely due to

(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, 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, 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, those of more remote degree shall take by representation.

133. WASH. REV. CODE § 11.04.015(2) (2004); see infra note 134.
134. See WASH. REV. CODE § 11.04.015 (2004) (this statute does not provide any distribution rights in surviving meretricious partners, and the Pefley-Warner court held that surviving meretricious partners are not "spouses" for the purposes of intestate distribution).
136. WASH. REV. CODE § 11.12.010 (2004); In re Meagher's Estate, 60 Wash. 2d 691, 375 P.2d 148 (1962) (right to dispose of one's property by will is not only a valuable right, but is one assured by law and protected by statute).
the failure to plan ahead, procrastination, or to the erroneous assumption that intestacy laws are sufficient.138 While unmarried individuals can devise all their property to whomever they want,139 married persons can only devise their separately owned property and their one-half interest in community property.140 All property acquired during marriage is community property unless the property comes within a specifically enumerated exception (e.g., gift or inheritance).141

A couple in a meretricious relationship can protect each other’s interests by creating a valid will and devising all or part of each other’s estate to the other partner.142 Unfortunately, many people do not take such precautions.143 Further, a meretricious partner could devise all of his or her assets, including assets acquired through joint efforts during the relationship, to the exclusion of the meretricious partner.144 This would work an injustice to the survivor and would result in unjust enrichment of the devisees. A married person does not have this right; he or she cannot devise all of the property acquired during the marriage.145 Thus, if a meretricious relationship terminates in the death of one partner, absent a will devising the decedent’s assets to the surviving partner, the surviving partner has no legal recourse under Washington’s intestacy laws to protect assets he or she would otherwise be entitled to under the meretricious relationship doctrine. The decedent’s estate would therefore be unjustly enriched by property the surviving non-title holding partner helped accumulate. To apply the meretricious relationship doctrine post mortem would prevent this unjust enrichment.

V. ARGUMENT—APPLYING THE MERETRICIOUS DOCTRINE POST MORTEM

As previously stated, the meretricious relationship doctrine is an equitable tool used to distribute a non-married couple’s property after the relationship has terminated. A meretricious relationship can terminate in

139. See In re MacAdam's Estate, 45 Wash. 2d 527, 276 P.2d 729 (1954) (courts will seek for and give effect to the intention of testator if it be lawful); WASH. REV. CODE § 11.12.230 (2004). Since an unmarried person is not encumbered by WASH. REV. CODE § 26.16.030 (2004), there are no restrictions on to whom the testate can devise property.
142. See WASH. REV. CODE §§ 11.12.010, 015(2) (2004); see supra note 134.
143. See Lomenzo, supra note 123, at 943–45, 944 n.14.
three ways: (1) by marriage, (2) by separation, or (3) by the death of one or both partners. In the first two categories, the meretricious doctrine will grant legal protection to a non-title-holding meretricious partner’s equitable interests in property acquired during the course of the relationship. However, in the third category it is not settled whether the meretricious relationship doctrine will afford any protection to a non-title-holding meretricious partner. In fact, no “court has [ever] employed the doctrine to justify a post-demise distribution of property.” Two Washington State Supreme Court justices wrote separately in Vasquez specifically to state their views that the meretricious relationship doctrine should not apply post mortem. These two justices were concerned that, if the doctrine applied post mortem, it would circumvent the State’s intestacy laws. Further, the two justices are of the opinion that a person can only obtain property from the estate of an intestate through intestacy laws.

A. Applying the Doctrine Post Mortem to Cases Involving Meretricious Relationships Terminated by Death would be Consistent with Prior Case Law

In Washington case law, five published opinions discuss the question of property division after a meretricious relationship terminated by the death of one of the partners: Creasman v. Boyle, In re Estate of Thornton, Latham v. Hennessey, Peffley-Warner v. Bowen, and Vasquez v. Hawthorne. In these cases the court never indicated that the meretricious relationship doctrine could not be applied post mortem. To the contrary, these cases suggest that applying the doctrine post mortem would be consistent with the court’s prior treatment of the doctrine.

In Creasman, the meretricious relationship ended by the death of Caroline Paul, who held legal title to property accumulated during the meretricious relationship, mostly from the wages of Harvey Creasman. After the trial court awarded Creasman one-half of Paul’s estate, the

146. Vasquez v. Hawthorne, 145 Wash. 2d 103, 114, 33 P.3d 735, 741 (2001) (Sanders, J., dissenting in part). However, this statement is not entirely true; see discussion of Peffley-Warner, supra.
147. 145 Wash. 2d at 108–115, 33 P.3d at 738–41.
148. Id.
149. 31 Wash. 2d 345, 196 P.2d 835 (1948).
150. 81 Wash. 2d 72, 499 P.2d 864 (1972).
151. 87 Wash. 2d 550, 554 P.2d 1075 (1976).
152. 113 Wash. 2d 243, 778 P.2d 1022 (1989).
154. 31 Wash. 2d at 347–49, 196 P.2d at 836.
155. Id. at 350, 196 P.2d at 838.
Washington State Supreme Court reversed.\textsuperscript{156} Importantly, in reversing the appellate court, the supreme court did not express a concern that the relationship was terminated by death. The outcome in \textit{Creasman} would have been the same whether the relationship terminated by separation or death. Since the court based its decision on the newly created rebuttable \textit{Creasman} presumption, had the presumption been rebutted, the court presumably would have allowed Creasman to take some of the property in Paul’s estate. Thus, applying the meretricious relationship doctrine post mortem would be consistent with the \textit{Creasman} court’s treatment of the doctrine.

In \textit{Thornton}, Ron Thornton, although legally married, lived in a meretricious relationship with Lucy Antoine.\textsuperscript{157} That relationship terminated by the death of Mr. Thornton,\textsuperscript{158} and Antoine brought suit seeking a legal interest in Thornton’s assets.\textsuperscript{159} Although Antoine only advanced her claim on the theory of an implied partnership or joint venture, the court noted that she could have argued that she had a legal interest in the assets of Thornton’s estate because they lived in a meretricious relationship.\textsuperscript{160} The court noted that this argument would likely run afoul of the \textit{Creasman} presumption, but it also suggested that this presumption should be overruled;\textsuperscript{161} however, since Antoine did not advance that theory, the court could not rule on it.\textsuperscript{162} As in \textit{Creasman}, the court did not suggest that the meretricious relationship doctrine could not be applied post mortem. To the contrary, despite the fact the relationship terminated by death, in dictum the court suggests that it would have overruled the \textit{Creasman} presumption and equitably divided the property in question had Antoine advanced the meretricious relationship claim. Therefore, applying the meretricious relationship doctrine post mortem would be consistent with the \textit{Thornton} court’s statements regarding the doctrine.

In \textit{Latham}, the plaintiff, Don Latham, lived in a meretricious relationship with Loretta Latham prior to their marriage.\textsuperscript{163} In this case, the couple’s meretricious relationship actually terminated by marriage, not death. When the marriage terminated at Ms. Latham’s death, Mr. Latham attempted to apply the meretricious relationship doctrine to gain

\begin{footnotes}
\footnotetext[156]{156. \textit{Id.} at 353, 196 P.2d at 839.}
\footnotetext[157]{157. \textit{In re Estate of Thornton}, 81 Wash. 2d 72, 74, 499 P.2d 864, 865 (1972).}
\footnotetext[158]{158. \textit{Id.}}
\footnotetext[159]{159. \textit{Id.}}
\footnotetext[160]{160. \textit{Id.} at 76–77, 499 P.2d at 866.}
\footnotetext[161]{161. \textit{Id.} at 77, 499 P.2d at 866–67.}
\footnotetext[162]{162. \textit{Id.} at 78–79, 499 P.2d at 867–68.}
\end{footnotes}
legal interest in a house the couple acquired during their cohabitation prior to marriage. Legal title to the house was in Ms. Latham’s name. The trial court held that the property in question was the separate property of Ms. Latham, and therefore, under the Creasman presumption, Mr. Latham did not have an equitable interest in it. On appeal, Mr. Latham relied on dictum in Thornton and argued that the Creasman presumption should be overruled and that the court should equitably distribute the so-called separate property of his deceased wife. The court refused and held that the Creasman presumption was not applicable to the case at bar. The court stated that the facts of the case made clear that the parties intended to keep the house as separate property of Ms. Latham. The court, therefore, refused to distribute an equitable share to Mr. Latham and, once again, did not express a concern that Mr. Latham was attempting to use the meretricious doctrine post mortem. The court’s tacit acceptance of the meretricious relationship doctrine as applied post mortem leads to a reasonable inference that it would have overruled Creasman had there been evidence that the parties did not intend to keep the house the separate property of Ms. Latham.

In Peffley-Warner, appellant Marilyn Peffley-Warner lived in a meretricious relationship with Sylvan Warner. Their relationship was terminated by the death of Mr. Warner. Ms. Peffley-Warner attempted to obtain widow benefits under the Social Security Act. The Social Security Administration determined Ms. Peffley-Warner was not the decedent’s spouse, and therefore, denied the benefits. On appeal, the district court affirmed the Secretary of Health and Human Services decision. Ms. Peffley-Warner then appealed to the Ninth Circuit Court of Appeals, and the court certified the following question to the

164. Id. at 552, 554 P.2d at 1078.
165. Id.
166. Id.
167. 81 Wash. 2d 72, 499 P.2d 864 (1972).
170. Id. at 553, 554 P.2d at 1059.
171. Id. at 523–24, 554 P.2d at 1059.
173. Id. at 245, 778 P.2d at 1023.
174. Id. at 244, 778 P.2d at 1022.
175. Id. at 245–46, 778 P.2d at 1023.
176. Id. at 247, 778 P.2d at 1024.
177. Id. at 248, 778 P.2d at 1024.
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 property?" The supreme court answered in the negative and held that a meretricious partner was not a “surviving spouse” under Washington’s intestate laws, and therefore, is not entitled to inherit any assets of her partner’s estate through intestacy laws.

An important aspect of Peffley-Warner is that the opinion notes that Ms. Peffley-Warner sought to apply the meretricious doctrine post mortem to acquire an interest in property held in Mr. Warner’s name. Since the Creasman presumption was overruled five years earlier, the probate court, after finding that the couple had lived in a meretricious relationship, examined the equitable interests that Ms. Peffley-Warner and Mr. Warner had in the property they jointly-acquired during the relationship. The court concluded that Ms. Peffley-Warner had a $1,500 equitable interest in the property. This award was not disturbed on appeal. Further, the supreme court did not make the slightest indication that it was concerned about the probate court applying the meretricious relationship doctrine post mortem. Thus, applying the meretricious relationship doctrine post mortem would be entirely consistent with the court’s treatment of the doctrine in Peffley-Warner.

The last and most recent case involving a meretricious relationship terminated by death is Vasquez. In this case, Frank Vasquez and Robert Schwerzler cohabitated for approximately twenty-six years until the relationship terminated by the death of Schwerzler. The two men had accumulated significant assets during their relationship, all of which were in Schwerzler’s name. Vasquez brought a claim arguing, inter alia, that he had an equitable interest in Schwerzler’s assets under the

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178. Id. at 245, 778 P.2d at 1023.
179. Id. at 253, 778 P.2d at 1027.
180. Id. at 246-47, 778 P.2d at 1023–24.
181. Id. at 246-47, 252, 778 P.2d at 1023–24, 1026–27.
182. Id. at 247, 252, 778 P.2d at 1024, 1026–27.
183. Id. at 252, 778 P.2d at 1026–27. As far as the opinion shows, this judgment was not appealed, but the court noted this ruling of the probate court with approval.
184. Id. at 246–47, 252, 778 P.2d at 1023–24, 1026–27. The court acknowledged that the probate court applied the meretricious relationship doctrine post mortem and granted an equitable lien in the amount of $1,500 to Ms. Peffley-Warner based on this doctrine and did not make any indication that applying the doctrine post mortem was improper. In fact, the opinion seems to approve of the probate court’s ruling.
186. Id. at 106, 33 P.3d at 737.
187. Id. at 107, 33 P.3d at 737.
meretricious relationship doctrine.\textsuperscript{188} The trial court applied the doctrine post mortem, and after determining the equitable interests of the parties, ordered a distribution of the assets.\textsuperscript{189} The administrator of Schwerzler's estate, Hawthorne, appealed.\textsuperscript{190} The appellate court reversed simply because it did not believe the doctrine applied to same sex couples\textsuperscript{191} and, further, did not indicate that the doctrine could not be applied post mortem. The Washington State Supreme Court reversed, finding that the issue of whether a meretricious relationship existed was improperly determined on a summary judgment motion,\textsuperscript{192} and remanded the case to the trial court for a trial on the issue of whether a meretricious relationship existed.\textsuperscript{193} Again, the majority did not indicate that the doctrine could not be applied post mortem. To the contrary, the fact that the supreme court remanded for trial, despite the fact that the relationship terminated by death, reveals the court's willingness to apply the doctrine post mortem. Hence, applying the meretricious relationship doctrine post mortem is entirely consistent with the \textit{Vasquez} court's treatment of the doctrine.

Two Justices in \textit{Vasquez}, however, dissented in part because they did not believe the meretricious relationship doctrine should apply post mortem.\textsuperscript{194} They argued that applying the doctrine post mortem would be inconsistent with the State's intestacy laws.\textsuperscript{195} Chief Justice Alexander wrote:

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 . . . the laws of intestacy, RCW 11.04.015-.290, dictate how property is to be distributed when an individual dies without a will. Accordingly, we have held that the meretricious relationship doctrine[] . . . does not apply when a relationship between unmarried cohabitants is terminated by the death of one cohabitant. \textit{Peffley-Warner v. Bowen} [citation omitted].\textsuperscript{196}

Justice Sanders wrote:

\begin{enumerate}
\item \textit{Id.} at 108, 33 P.3d at 738.
\item \textit{Id.} at 104-05, 33 P.3d at 736.
\item \textit{Id.} at 105, 33 P.3d at 736.
\item \textit{Id.}
\item \textit{Id.} at 107, 33 P.3d at 737.
\item \textit{Id.}
\item \textit{Id.} at 108-15, 33 P.3d at 738-41.
\item \textit{Id.}
\item \textit{Id.} at 108-09, 33 P.3d at 738.
\end{enumerate}
The first consideration involves the unavailability of the meretricious relationship doctrine to relationships terminated by death. This court has never employed the doctrine to justify a post-demise distribution of property. In Peffley-Warner v. Bowen [citation omitted], we answered the certified question in the negative, "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 property[.]" \(197\)

As the aforementioned discussion indicates, in every case where a meretricious relationship has terminated by death, courts have shown no hesitancy in applying the doctrine post mortem, notwithstanding the dissent in Vasquez. Hence, applying the doctrine post mortem would be entirely consistent with precedent.

**B. Contrary to the Dissenters' Argument in Vasquez, Applying the Doctrine Post Mortem will not Conflict with the State's Intestacy Laws or with Peffley-Warner**

Applying the meretricious relationship doctrine post mortem will not circumvent Washington's intestacy laws nor conflict with Peffley-Warner. First, it should be noted that Chief Justice Alexander utterly misstated the holding in Peffley-Warner. Chief Justice Alexander misconstrues Peffley-Warner as holding that "the meretricious relationship doctrine[] . . . does not apply when a relationship between unmarried cohabitants is terminated by the death of one cohabitant." \(198\) Not only is this a completely inaccurate characterization of Peffley-Warner's holding, but there is no dictum in that opinion that supports Chief Justice Alexander's proposition. A correct statement of the holding, according to the Peffley-Warner court itself, is:

[Under Washington law, 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. The division of property following termination of an unmarried cohabitating relationship is based on equity, contract or trust, and not on inheritance.\(199\)

This statement clearly reveals that the court's holding was simply that a meretricious partner does not qualify as a "surviving spouse" under the

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\(197\) Id. at 114, 33 P.3d at 741 (internal citations omitted).

\(198\) Id. at 109, 33 P.3d at 738.

State’s intestacy laws. Applying the meretricious doctrine post mortem is not synonymous with treating a meretricious partner as a spouse for purposes of the intestacy laws. Furthermore, under the Peffley-Warner court’s holding, a meretricious partner can obtain a distribution of a deceased partner’s assets under equitable doctrines.\textsuperscript{200} The meretricious doctrine is undoubtedly one of the equitable doctrines to which the court referred.\textsuperscript{201} Further, when writing this decision, the court clearly had in mind the situation of a meretricious relationship terminating by death.\textsuperscript{202} Lastly, Chief Justice Alexander neglected to mention that the probate court in Peffley-Warner had applied the meretricious relationship doctrine post mortem, and the supreme court gave notice to this without indicating any disapproval whatsoever.\textsuperscript{203}

Although Justice Sanders correctly quoted Peffley-Warner,\textsuperscript{204} he also stated that “this court has never employed the doctrine to justify a post-demise distribution of property.”\textsuperscript{205} While this statement is literally true, it is misleading. The supreme court has acquiesced in a lower court’s application of the doctrine post mortem, ironically, in the very case both Justice Sanders and Chief Justice Alexander cite to support their proposition—Peffley-Warner.\textsuperscript{206} Further, Justice Sanders quotes, without an explanation of how it supports his proposition, the following statement from Peffley-Warner: “Lindsey did not expand the rights of a surviving partner in an unmarried cohabitating relationship to the personal property of a deceased partner.”\textsuperscript{207} While this statement is accurate, it does not support the proposition that the meretricious doctrine should not be applied post mortem. Lindsey overruled the

\textsuperscript{200} Id.

\textsuperscript{201} There are only a few equitable doctrines that have been used to distribute property upon the termination of a meretricious relationship: meretricious relationship doctrine, constructive trust, traceable funds doctrine, and implied partnership. See supra Part II.A.3. The Peffley-Warner court specifically stated “The division of property following termination of an unmarried cohabitating relationship is based on equity, contract or trust, and is not on inheritance.” Since the court specifically stated “trust,” it could not have been referring to a constructive trust when it referred to “equity.” Further, since the Lindsey opinion, overruling the Creasman presumption and creating the current meretricious relationship doctrine, was published only five years before the court wrote the Peffley-Warner opinion, the Peffley-Warner court was surely referring to the meretricious relationship doctrine when it referred to “equity” as a means to distribute meretricious partners’ property.

\textsuperscript{202} This is evidenced by the fact that Ms. Peffley-Warner’s meretricious relationship terminated by the death of her partner.

\textsuperscript{203} See supra text accompanying notes 180–184.

\textsuperscript{204} Vasquez v. Hawthorne, 145 Wash. 2d 103, 114, 33 P.3d 735, 741 (2001).

\textsuperscript{205} Id.


\textsuperscript{207} Vasquez, 145 Wash. 2d at 114, 33 P.3d at 741 (emphasis added).
Creasman presumption, which was created in a case where the meretricious relationship was terminated by death.\textsuperscript{208} The supreme court in Creasman did not indicate any hesitancy in applying the doctrine post mortem.\textsuperscript{209} Thus, in 1948 when the Creasman presumption was created, the doctrine arguably applied post mortem if the Creasman presumption could be rebutted. When Lindsey overruled the Creasman presumption, the doctrine arguably continued to apply post mortem; thus, while it may be true that Lindsey did not expand the rights of a surviving cohabitant, it does not follow, as Justice Sanders’ unarticulated inference seems to suggest, that the meretricious relationship doctrine cannot apply post mortem.\textsuperscript{210} Applying the doctrine post mortem would not be expanding a cohabitant’s rights. Further, it is highly unlikely that the Peffley-Warner court intended the quoted statement to stand for the proposition that Justice Sanders seems to think it supports, since the court in that case acquiesced in the probate court’s application of the meretricious relationship doctrine post mortem.

Not only is the application of the meretricious relationship doctrine post mortem consistent with precedent, it is also consistent with Washington’s intestacy laws.

\textit{C. Applying the Meretricious Doctrine Post Mortem does not Conflict with Intestacy Laws}

1. Present Inchoate Unliquidated Interest

No reported Washington case has held that the meretricious relationship doctrine creates a present inchoate interest in the non-title-holding meretricious partner. However, when faced with this question, a court should hold that the doctrine creates such an interest.

The meretricious relationship doctrine is analogous to the judicially created doctrine of dower.\textsuperscript{211} At common law, dower is an interest that a

\textsuperscript{208} In re Marriage of Lindsey, 101 Wash. 2d 299, 678 P.2d 328 (1984).
\textsuperscript{209} See supra text accompanying notes 73–78.
\textsuperscript{210} Vasquez, 145 Wash. 2d at 114, 33 P.3d at 741.
\textsuperscript{211} The doctrine of dower was originally a judicial creation, which some state legislatures have subsequently enacted by statute. See Carter v. King, 353 S.E.2d 738 (Va. 1987). This analogy is used only to show that the meretricious relationship doctrine creates an inchoate present interest. There are some aspects of dower that are not analogous to the meretricious relationship doctrine. For example, under the doctrine of dower, all real property acquired during marriage is encumbered, which affects the alienability of the property. The author of this Article does not argue that the meretricious relationship doctrine encumbers the property the couple acquires during the relationship. Under the meretricious relationship doctrine, if the title-holding partner squanders away joint property, the non-title-holding partner should receive a creditor’s interest against the title-holding partner.
wife acquires in the estate of her husband. When the husband dies, the wife has a right to one-third of all the real property of which her husband seised during marriage. A right to dower arises when the following factors are satisfied: (1) a valid marriage, (2) the seisin of real property by the deceased spouse during marriage, (3) by an estate of inheritance, and (4) the death of one spouse. During marriage, courts have held that dower creates a present inchoate interest. The inchoate interest arises when there is a valid marriage and seisin of real property by the husband during the marriage by an estate of inheritance. Although the inchoate interest is not a vested right, it is a present interest in real property. The inchoate interest constitutes an encumbrance on the title to the real property, and the inchoate interest vests or accrues when a spouse dies. Courts have also held that the right to dower is separate and distinct from rights under intestacy laws.

Similar to the doctrine of dower, the meretricious relationship doctrine gives a non-title-holding partner an interest in the couple’s property when the relationship later terminates. The meretricious relationship doctrine requires certain factors to exist for the creation of a property right in the non-title-holding partner. Those factors include (1) a stable marital-like relationship; (2) knowledge that a valid marriage does not exist; (3) intent to live in a meretricious relationship; (4) a pooling of resources and services; and (5) a termination of the relationship. As with the doctrine of dower, where courts have held the doctrine creates a present inchoate interest when all the factors of the doctrine are satisfied except the death of the spouse, Washington courts should hold that the meretricious relationship doctrine creates a present inchoate interest when all the factors are satisfied except the termination of the relationship.

This analysis makes sense when consideration is given to how courts apply the meretricious relationship doctrine. In applying the doctrine, a court will first look to see if the Connell factors were present.

during the relationship,\textsuperscript{222} and if those factors are present, the court will apply the doctrine, and then determine what equitable property rights the non-title-holding partner possesses.\textsuperscript{223} This application of the doctrine is entirely consistent with the idea that the doctrine creates a present inchoate property interest. When the Connell factors exist during a relationship, the relationship is legally defined as a meretricious relationship, even though the relation has not terminated. At the moment the Connell factors are met, a present inchoate interest arises in the non-title-holding partner. When the relationship terminates, the inchoate interest vests, and the non-title-holding partner then has a cause of action. When a cause of action is brought, a court will verify that the Connell factors existed, and then equitably distribute property the couple had acquired during the relationship.

Further, holding that the meretricious relationship doctrine creates a present inchoate interest will protect cohabitants' equitable rights and further the purpose of the doctrine. A non-title-holding partner will be protected from the title-holding partner giving, devising, or selling property without the consent of the non-title-holding partner. It is conceivable that a meretricious partner might create a will, which excludes the non-title-holding partner. If the meretricious relationship doctrine did not create a present inchoate interest, the surviving partner would be divested of his or her equitable interest in jointly-acquired property. This would be unconscionable, unfair, and result in the unjust enrichment of the devisees. A person can only devise what he or she owns.\textsuperscript{224} If the meretricious relationship doctrine creates a present inchoate interest, then one partner cannot devise property in which the other has an inchoate interest. Thus, before any will can be executed, the court must first determine, by applying the meretricious relationship doctrine, whether the property devised in the will belonged to the devisor. If the court finds that the non-title-holding partner has an equitable interest in such property, the court would be required to refuse to execute the will with regard to that property, thereby protecting the equitable interests of the surviving partner.

Additionally, holding that the meretricious relationship doctrine creates a present inchoate interest in which one partner cannot devise property the other has an equitable interest in is analogous to Wash. Rev. Code § 26.16.030. This statute prohibits married persons from devising,

\textsuperscript{222} See Vasquez v. Hawthorne, 145 Wash. 2d 103, 33 P.3d 735 (2001) (court first determines if there is a meretricious relationship).
\textsuperscript{223} See Connell, 127 Wash. 2d 339, 898 P.2d 831.
\textsuperscript{224} See WASH. REV. CODE § 11.04.
gifting or selling more than his or her one-half interest in community property without the consent of the other spouse. The purpose of this statute is indisputably to prevent one spouse from being divested of his or her community property interest without consenting thereto. This equitable purpose should apply equally to meretricious partners. The supreme court proclaimed in *Vasquez*, "when equitable claims are brought, the focus remains on the equities involved between the parties." It is undeniably inequitable to allow a title-holding partner to devise or sell property for his or her personal enrichment, when the non-title-holding partner has helped acquire the property and has not consented to the devise or sale. It is also inequitable to allow a title-holding partner to devise property in which another has an equitable interest. The devisee will be unjustly enriched by receiving property the devisor did not fully own, and the non-title-holding partner would be deprived of property in which he or she had an equitable interest. Courts should construe the meretricious relationship doctrine in such a way as to prevent such inequities. By creating a present inchoate property interest, the meretricious relationship doctrine would do just that.

2. Rights Granted under the Meretricious Relationship Doctrine are Independent and Distinct from Rights under Intestacy Laws

If the meretricious relationship doctrine creates a present inchoate interest in the non-title-holding partner, applying the doctrine post mortem will not circumvent intestacy laws. As with the doctrine of dower, courts should hold that the meretricious relationship doctrine creates property rights separate and distinct from intestacy laws. Intestacy laws control how the estate of a person who has died intestate will be distributed. Before a court can distribute an estate under intestacy laws, it must first determine what assets belong to the estate. An estate can only consist of property that belonged to the decedent. Hence, a court must first determine what the decedent owned. This is the point at which the meretricious relationship doctrine applies.

When a meretricious relationship terminates by the death of one of the partners, the inchoate property interest of the non-title-holding

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225. 145 Wash. 2d at 107, 33 P.3d at 737.
226. Carter v. King, 353 S.E.2d 738 (Va. 1987) (holding that the doctrine of right to dower is separate and distinct from rights under intestacy laws).
227. See discussion *supra* Part III.
partner will vest because the relationship has been terminated. If the decedent was the title-holding partner, the property subject to the inchoate interest will not pass to the decedent’s estate because such property does not belong to the decedent. Thus, a court must first apply the meretricious relationship doctrine to determine what belonged to the decedent. Only after applying the doctrine and making an equitable distribution is it possible to determine what the decedent owned. Once a court determines what belonged to the decedent, it can make a distribution of the estate under the intestacy laws. The survivor is receiving property under the meretricious relationship doctrine, not inheriting from the estate under intestacy laws; thus, the meretricious relationship doctrine does not run afoul of intestacy laws. Likewise, if the decedent is the non-title-holding partner, his or her inchoate interest will vest at the moment of death and will pass to his or her estate. The estate will then have a cause of action under the meretricious relationship doctrine for an equitable distribution.

D. The Policies Underlying the Meretricious Relationship Doctrine Compel Applying the Doctrine Post Mortem

Applying the doctrine post mortem further supports the purpose of the meretricious relationship doctrine, which is to prevent unjust enrichment. Termination of the relationship by death instead of separation or marriage does not eliminate the possibility of unjust enrichment. If a meretricious partner who has an equitable interest in the couple’s property cannot realize that interest because the relationship has terminated by death, then the estate of the decedent will be unjustly enriched. Likewise, if the survivor is the title-holding partner, the survivor will be unjustly enriched at the expense of the estate if the decedent’s estate cannot realize the decedent’s equitable interest.

In addition, a court would apply the doctrine if the parties had terminated their relationship by separating and the ex-non-title-holding partner brought suit under the meretricious relationship doctrine to realize his or her equitable interest in property. It is also evident that, if in the above scenario, the ex-title-holding-partner died subsequent to the non-title-holding partner bringing suit but before a court ruled on the division of property, a court would still apply the meretricious

relationship doctrine.\textsuperscript{231} The same logic suggests that, if the ex-title-holding partner died after the couple separated but before the ex-non-title-holding partner brought suit, a court would apply the doctrine. To stretch this logic further, imagine a meretricious relationship terminating by separation. Five minutes after the separation, the ex-title-holding-partner dies in a car accident. If the ex-non-title-holding-partner brings suit under the meretricious relationship doctrine, a court would likely apply it because the relationship terminated by separation.\textsuperscript{232}

Why should there be a different outcome if the couple separated five minutes before one of their deaths or the relationship was terminated by the death itself? How the relationship terminated does not affect the equities of the parties. It is utterly unjust to treat a relationship that terminates by separation differently than one that terminates by death. As the Washington State Supreme Court has stated, "when equitable claims are brought, the focus remains on the equities involved between the parties."\textsuperscript{233} Since the meretricious relationship doctrine is an equitable doctrine, and the equities between the partners do not change simply because the relationship terminates by death, the fact the relationship terminated by death should have no affect on the applicability of the doctrine.

Furthermore, if the court refuses to apply the meretricious doctrine post mortem, it will in effect be reinstating a Creasman-like presumption for meretricious relationships that terminate by death. This new presumption would be that when a meretricious relationship terminates by death, unless there is clear evidence that the plaintiff actually held title to the property, the court will presume that the property belongs to the person who holds title at the time the relationship terminated. Since the Washington State Supreme Court overruled the Creasman presumption because it believed the rule was too harsh\textsuperscript{234} and this new

\textsuperscript{231} See Niemela v. Kalkwarf, No. 53484-0-I, 2005 WL 519061, at *1 (Wash. Ct. App. Mar. 7, 2005); cf. In re Marriage of Lindsey, 101 Wash. 2d 299, 678 P.2d 328 (1984) (applying the meretricious relationship doctrine to divide property a couple had accumulated during their cohabitation prior to marriage. The couple cohabitated for less than two years when their meretricious relationship terminated by the fact they got married. After being married for approximately five years, the couple filed for divorce. The wife brought suit under the meretricious relationship doctrine to acquire a legal interest in property the couple had accumulated during their previous cohabitation. This case shows that events subsequent to the termination of the meretricious relationship are irrelevant. Although the cohabitation terminated five years earlier, the court only focused on the fact there was a meretricious relationship at one time, and during that time property was acquired by the couple).


presumption would be just as severe, it too would be overturned if implemented.

F. Applying the Meretricious Relationship Doctrine Post Mortem will not Re-Create Common Law Marriage

Applying the meretricious relationship doctrine post mortem will not re-create common law marriage, which Washington does not recognize.\textsuperscript{235} First, the parties will not be deemed married simply by applying the doctrine post mortem.\textsuperscript{236} Second, applying the doctrine post mortem will not result in treating meretricious partners the same as married persons. With regard to distribution of property after the death of an intestate, married persons and meretricious partners do not enjoy the same rights. A spouse of a decedent\textsuperscript{237} inherits from the decedent’s estate through the intestacy laws.\textsuperscript{238} The assets that the surviving spouse inherits are proscribed by statute.\textsuperscript{239} On the other hand, a survivor of a meretricious relationship does not inherit from the decedent’s estate. Rather, the meretricious survivor is entitled to receive a fair and equitable division of property accumulated by joint efforts.\textsuperscript{240}

Although it is impossible to determine whether or not the application of the meretricious relationship doctrine will be more advantageous to a cohabitant in comparison to a similarly situated spouse who inherits under the intestacy laws, the distribution under intestacy laws likely would be more advantageous. Under intestacy laws, the decedent’s separate property is before the court for distribution.\textsuperscript{241} Conversely, under the meretricious doctrine, only property that was acquired during the relationship is before the court for equitable distribution.\textsuperscript{242}

\begin{itemize}
\item \textsuperscript{235} See discussion supra Part II.A.1.
\item \textsuperscript{236} See Peffley-Warner v. Bowen, 113 Wash. 2d 243, 252, 778 P.2d 1022, 1027 (1989) (a meretricious relationship is not marriage).
\item \textsuperscript{237} Id.
\item \textsuperscript{238} See discussion supra Part III.
\item \textsuperscript{239} See discussion supra Part III.
\item \textsuperscript{240} See In re Marriage of Lindsey, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984) (property accumulated during a meretricious relationship will be distributed in a just and equitable manner).
\item \textsuperscript{241} WASH. REV. CODE § 11.04.015 (2004).
\item \textsuperscript{242} Connell v. Francisco, 127 Wash. 2d 339, 898 P.2d 831 (1995). It should be noted, however, that the application of the meretricious relationship doctrine post mortem could affect third party creditors. It is conceivable that parties may try to use doctrine to avoid third party obligations. For example, if a meretricious couple is involved in a car accident, killing themselves and causing severe injuries to third persons, the injured persons will have a tort claim against the negligent driver. If title to all the couple’s assets is in the driver’s name, the estate of the non-negligent partner may try to apply the meretricious doctrine post mortem in an attempt to protect the non-negligent driver.
\end{itemize}
There are additional advantages afforded to married persons that are not available to unmarried cohabitants. For instance, since a meretricious partner is not considered a "spouse," the partner does not qualify for many statutory and contractual benefits. A meretricious partner does not qualify for benefits triggered by a "marital status" provision under Washington's unemployment compensation statute. A meretricious partner is not entitled to attorney fees in a meretricious relationship property distribution case, although a married person is entitled to attorney fees in similar actions. A meretricious partner is not considered a member of an insured's immediate family for purposes of insurance benefits. Additionally, a meretricious partner is not considered a spouse for purposes of Washington's wrongful death statute.

There are many differences between marriage and meretricious relationships, and these differences will not be affected by applying the meretricious relationship doctrine post mortem. Applying the doctrine post mortem will in no way recreate common law marriage. Lastly, since there are so many advantages available only to married persons, applying the doctrine post mortem will not discourage the institution of marriage.

partner's equitable interest in the assets from being reached by the plaintiffs (the third party creditors). This is because there is currently no rule that the meretricious community will be liable for an unintentional tort committed by one meretricious partner, even if the tort was committed during an activity that benefited the meretricious community. If the negligent partner's estate is insolvent, this will create a serious problem. If the couple had been married and if the car was being used for the mutual benefit of the marital community, their joint property would have been reachable by the plaintiffs for the damages caused by the negligent driving. See Allen v. Univ. of Wash., 140 Wash. 2d 323, 336, 997 P.2d 360, 367 (2000) (marital community is liable for spouses' torts committed during the community activity) (citing deElche v. Jacobsen, 95, Wash. 2d 237, 245, 622, P.2d 835, 839-40 (1980), and characterizing deElche as having held that "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 Haley v. Highland, 142 Wash. 2d 135, 12 P.3d 119 (2000). Obviously, applying the doctrine to avoid third party creditors is unjust. A party should not be able to use the doctrine post mortem to avoid third party liability, a maneuver not available to married persons. Allowing the doctrine to apply to the detriment of third party creditors would undercut the purpose of the doctrine—to further just and equitable results. Additionally, allowing such a maneuver would result in treating cohabitants more favorably than married persons, thus undercutting and discouraging the institution of marriage. However, this issue is beyond the scope of this Article. This issue is raised here merely to stimulate thought and hopefully encourage future articles that will aid the courts in further developing the meretricious relationship doctrine.

VI. CONCLUSION

Although property rights of cohabitants have come a long way since the court created the Creasman presumption, the meretricious relationship doctrine, as it now stands, is still under-developed. No reported case has ever expressly held that the doctrine is applicable post mortem. However, as this Article has shown, the doctrine should be applicable post mortem. First, applying the doctrine post mortem would be consistent with precedent. Second, contrary to the dissent in Vasquez, applying the doctrine post mortem would not conflict with Peffley-Warner. Further, applying the meretricious relationship doctrine post mortem does not circumvent intestacy laws. Only property that belonged to a decedent becomes part of the decedent’s estate; thus, the first question is always, “What belonged to the decedent?” Since the meretricious relationship doctrine creates a present inchoate interest in the non-title-holding partner, a court must first apply the meretricious relationship doctrine to determine what the decedent owned. The intestacy laws come into play only after applying the meretricious relationship doctrine. At this stage, it is conceded that the meretricious partner cannot obtain property through the intestacy laws because the court in Peffley-Warner held a meretricious partner is not a “spouse.” In addition, the purpose of the meretricious doctrine—to prevent unjust enrichment—further supports applying the doctrine post mortem. If the doctrine is not applied post mortem, either the survivor or the estate of the decedent will be unjustly enriched by keeping property that the other partner helped accumulate. Lastly, applying the meretricious relationship doctrine post mortem will not re-create common law marriage. The meretricious doctrine should be applied post mortem to effectuate the purpose for which the court created the doctrine in the first place: a just and equitable distribution of property upon the termination of a meretricious relationship.