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WHAT IS A "MERETRICIOUS RELATIONSHIP"?: AN ANALYSIS OF COHABITANT PROPERTY RIGHTS UNDER *CONNELL v. FRANCISCO*

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Abstract: In the 1995 case *Connell v. Francisco*, the Supreme Court of Washington adopted an innovative and groundbreaking rule to resolve the property rights of cohabitants upon separation. After *Connell*, upon termination of a "meretricious relationship," a trial court must perform a just and equitable distribution of the property acquired during the relationship that would have been community property had the parties been married. In adopting this rule, the supreme court sought to resolve property rights arising out of cohabitation in a predictable and equitable manner while maintaining the distinction between marriage and cohabitation. Unfortunately, the meretricious relationship fiction the court adopted as a prerequisite to a just and equitable distribution tends to frustrate these goals. This Comment proposes that the supreme court replace the meretricious relationship fiction with a rule requiring trial courts to perform a just and equitable distribution on the termination of any "intimate cohabitation."

Although Washington is a frontrunner in resolving property rights of unmarried cohabitants upon separation, the rule the Supreme Court of Washington adopted to resolve such rights creates uncertainty and inequity. The court of appeals' holding in *Pennington v. Pennington*[1] illustrates these problems. In *Pennington*, the parties cohabited without marriage for ten years, although they lived separately on two occasions during the last four years of their relationship.[2] The man owned their residences, but each party contributed to furnishing and improving them, and they shared household expenses.[3] The local phone book listed them together under the man's surname, and members of the community testified that they cared for each other "as a husband and wife would."[4] The woman even quit her job to care for the man after he suffered a stroke.[5] Nevertheless, relying primarily on three factors, the court of appeals held that there was not substantial evidence of a "meretricious relationship" and reversed the trial court's just and equitable distribution of property.[6] First, the man had been legally married to, although separated from, another woman during the first five years of the

1. 93 Wash. App. 913, 971 P.2d 98 (1999).
2. *See id.* at 914–16, 971 P.2d at 99–100.
3. *See id.* at 914–15, 971 P.2d at 99–100.
4. *Id.* at 915–16, 971 P.2d at 99–100.
5. *See id.* at 915, 971 P.2d at 99–100.
6. *See id.* at 920, 971 P.2d at 102.

cohabitation.[7] Second, the man denied the woman's testimony that they were engaged and testified that he had repeatedly refused her requests that they marry.[8] Third, the parties lived separately on two occasions during the latter part of their relationship, including one month during which the woman lived with another man.[9] In any other state, the court's refusal to apply equitable principles to divide property acquired during the parties' cohabitation would be par for the course; in Washington, the result is illustrative of the shortcomings in the state's innovative but flawed law in this area.

In *Connell v. Francisco*,[10] the Supreme Court of Washington adopted a rule requiring courts to perform a "just and equitable distribution" on the termination by separation of certain intimate, nonmarital cohabiting relationships.[11] However, the court announced that the rule would apply only when the parties had lived in a "meretricious relationship," a legal fiction defined as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[12] The court also limited the property that courts should distribute to property acquired during the meretricious relationship that would have been community property had the parties been married.[13]

Connell places Washington at the forefront of recognizing the legal rights of cohabitants. However, the rules *Connell* adopted fail to achieve fully the court's goals. Parts I and II of this Comment discuss Washington courts' historical treatment of the property rights of intimate, nonmarital cohabitants and how *Connell* changed that treatment. Part III argues that because the meretricious relationship fiction promotes both uncertainty and inequity, it defeats the very goals of *Connell*. Part IV urges the supreme court to replace the *Connell* meretricious relationship fiction with a rule that requires courts to perform a just and equitable distribution upon the termination of any "intimate cohabitation."

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7. *See id* at 918–19, 971 P.2d at 101.

8. *See id.*

9. *See id.*

10. 127 Wash. 2d 339, 898 P.2d 831 (1995).

11. *Id.* at 351, 898 P.2d at 836.

12. *Id.* at 346, 898 P.2d at 834.

13. *See id.* at 350, 898 P.2d at 836.

I. WASHINGTON COURTS' HISTORICAL TREATMENT OF THE PROPERTY RIGHTS OF INTIMATE, UNMARRIED COHABITANTS

Washington courts' approach to resolving cohabitant property rights has evolved over time. Initially, courts applied a bright-line rule and awarded property acquired during cohabitation to the title-holding party. However, courts routinely criticized this rule, suggesting and carving out a number of alternative theories. Ultimately, the supreme court expressly overruled the bright-line rule and applied certain dissolution-of-marriage statutes by analogy.

A. Creasman v. Boyle *and the* Creasman *Presumption*

In *Creasman v. Boyle*,[14] the Supreme Court of Washington applied a bright-line rule regarding the property rights of intimate, unmarried cohabitants.[15] In that case, the couple cohabited for seven years, holding themselves out as husband and wife until the woman's death.[16] During their cohabitation, the woman entered into a contract to purchase their mutual residence, making the down payment by exchanging the man's automobile.[17] She took title to the residence in her name alone, but made payments using money the man earned while they lived together.[18] After the woman's death, the man brought an action to obtain title to the residence.[19] The trial court awarded him a one-half interest in the property, noting that although he had been the sole financial contributor, the woman had contributed by way of her "thrift" and "housekeeping."[20]

On appeal, the supreme court reversed and ordered the trial court to award the residence to the woman's estate.[21] 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 relation, belongs to the one in whose name the

14 31 Wash. 2d 345, 196 P.2d 835 (1948).

15. *See id.* at 351–52, 196 P.2d at 838.

16. *See id.* at 347–49, 196 P.2d at 836–37.

17. *See id.* at 348, 196 P.2d at 836–37.

18. *See id.* at 348–49, 196 P.2d at 836–37.

19. *See id.* at 346, 196 P.2d at 836.

20. *Id.* at 350–51, 196 P.2d at 838.

21. *See id.* at 358, 196 P.2d at 841.

legal title to the property stands."[22] Furthermore, in what became known as the "*Creasman* presumption," the court refused to find a resulting trust in favor of the man, holding that "under these circumstances and in the absence of any evidence [of intent] to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it."[23]

B. Erosion of Creasman: *The Various Exceptions Recognized*

Within a few years, the supreme court began routinely to criticize the logic and effect of *Creasman*. In a concurring opinion in 1957, Justice Finley stated: "The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship."[24] The court later suggested in dictum that "*Creasman* should be overruled and its archaic presumption invalidated."[25]

Consistent with this criticism, courts created several exceptions to *Creasman*'s "title rule." One exception was the so-called "innocent relationship," where either or both parties in good faith enter into a marriage that proves to be void.[26] In such cases, a court in equity would protect the rights of the innocent party or parties by performing a just and equitable disposition of property on the annulment of the void marriage as if the parties had been married.[27] Similarly, other cases held *Creasman* inapplicable where the parties were involved in a joint venture or implied partnership,[28] or where they had entered into a valid contract.[29] Finally, two courts refused to apply *Creasman* where they could trace title to

22. *Id.* at 351, 196 P.2d at 838.

23. *Id.* at 356, 196 P.2d at 841.

24. West v. Knowles, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957).

25. *In re* Estate of Thornton, 81 Wash. 2d 72, 79, 499 P.2d 864, 867 (1972).

26. *See Creasman*, 31 Wash. 2d at 352, 196 P.2d at 838–39.

27. *See* Poole v. Schrichte, 39 Wash. 2d 558, 566, 236 P.2d 1044, 1049–50 (1951); *Creasman*, 31 Wash. 2d at 352, 196 P.2d at 838–39.

28. *See Thornton*, 81 Wash. 2d at 75, 499 P.2d at 865 (holding prima facie case of implied partnership was established where woman helped manage and operate ranch); *Poole*, 39 Wash. 2d at 564–65, 236 P.2d at 1048–49 (holding tavern to be "joint venture" entitling woman to just and equitable distribution irrespective of meretricious relationship where man held title but both parties contributed money and labor).

29. *See* Dahlgren v. Blomeen, 49 Wash. 2d 47, 54, 298 P.2d 479, 483 (1956) (upholding trust for benefit of surviving partner where decedent promised, for valid consideration, to devise and bequeath property to survivor).

property acquired during cohabitation to the separate property of either or both parties.[30]

Alternatively, the non-title-holding party in a meretricious relationship could avoid *Creasman* by establishing that a trust relation existed.[31] A constructive trust generally requires a showing of fraud, overreaching, breach of fiduciary duty, or other inequitable conduct on the part of the title-holding party;[32] however, one court found a constructive trust solely because of the unconscionable result that application of *Creasman* would have achieved.[33] A resulting trust requires evidence that the parties intended one party to hold the property in trust for the other who had furnished the consideration for its purchase.[34] The supreme court affirmed application of this theory in *Walberg v. Mattson*,[35] where the man purchased property with his own funds but placed title in the woman's name to avoid potential difficulties in encumbering or transferring the property because he was married to another woman.[36]

C. *Advent of the Meretricious Relationship Concept*

While criticizing *Creasman* and often avoiding its effects, the supreme court also explored two new theories. One was that courts might apply community property laws by analogy to determine property ownership at the end of a meretricious relationship.[37] The other theory was that courts

30. *See* Shull v. Shepherd, 63 Wash. 2d 503, 507, 387 P.2d 767, 769–70 (1963) (holding that parties were cotenants in proportion to their respective contributions when they took title as husband and wife and made mortgage payments with separate funds); West v. Knowles, 50 Wash. 2d 311, 313, 311 P.2d 689, 691 (1957) ("No presumptions arise as to property which can be traced to one or the other. It belongs to the original owner.").

31. *Creasman*'s title rule did not apply where a trust relation existed between the parties. *See supra* note 22 and accompanying text.

32. *See* Humphries v. Riveland, 67 Wash. 2d 376, 389–90, 407 P.2d 967, 974 (1965).

33. *See* Omer v. Omer, 11 Wash. App. 386, 393, 534 P.2d 957, 961 (1974). The parties had formerly been husband and wife and divorced solely for purposes of gaining U.S. citizenship. Once divorced, they continued to combine their earnings for the benefit of the community and their children until separating ten years later. Under the parties' arrangement, the woman turned her paychecks over to the man, who used the funds to pay for living expenses and to purchase property to which he took title. *See id.* at 388, 534 P.2d at 958–59.

34. *See* Walberg v. Mattson, 38 Wash. 2d 808, 812, 232 P.2d 827, 829 (1951).

35. 38 Wash. 2d 808, 232 P.2d 827 (1951).

36. *See id.* at 813, 232 P.2d at 830.

37. *See* Latham v. Hennessey, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059 (1976); *In re* Estate of Thornton, 81 Wash. 2d 72, 76–77, 499 P.2d 864, 866 (1972).

could distribute property acquired during such a relationship on a just and equitable basis.[38]

In *In re Marriage of Lindsey*,[39] the supreme court adopted these two new theories. The parties had lived together for twenty months prior to their marriage, during which time they built a barn/shop on the man's separate property.[40] After a six-year marriage, the parties divorced.[41] For purposes of performing a just and equitable disposition pursuant to RCW 26.09.080,[42] the trial court applied *Creasman* to characterize fire insurance proceeds from the barn/shop as the man's separate property.[43] The supreme court reversed and remanded, holding the characterization a manifest abuse of discretion.[44] Expressly overruling the *Creasman* presumption, the court held that courts must "examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property."[45]

II. CURRENT LAW: *CONNELL V. FRANCISCO*

In *Connell v. Francisco*,[46] the supreme court extended *Lindsey* to certain cohabitations that end in separation without marriage. The court

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38. *See Latham*, 87 Wash. 2d at 554, 554 P.2d at 1059; *see also* West v. Knowles, 50 Wash. 2d 311, 320, 311 P.2d 689, 695 (1957) (Finley, J., concurring).

39. 101 Wash. 2d 299, 678 P.2d 328 (1984).

40. *See id.* at 300–01, 678 P.2d at 329.

41. *See id.*

42. The statute provides:

> In a proceeding for dissolution of the marriage, . . . the court shall . . . make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:
>
> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage; and
>
> (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

Wash. Rev. Code § 26.09.080 (1998).

43. *See Lindsey*, 101 Wash. 2d at 301, 678 P.2d at 329.

44. *See id.* at 307, 678 P.2d at 332.

45. *Id.* at 304, 678 P.2d at 331 (quoting Latham v. Hennessey, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059 (1976)) (alteration in original).

46. 127 Wash. 2d 339, 898 P.2d 831 (1995).

most likely intended to make the resolution of cohabitant property rights more equitable and predictable than it had been under *Creasman*. However, under *Connell* and *Lindsey* the legal consequences of cohabitation depend on how cohabitation ends and whether or not it was a meretricious relationship.

A. The Connell *Decision*

After *Lindsey*, the extent to which the just and equitable disposition principle applied to cohabitations that ended in separation without marriage was unclear.[47] In 1994, the court of appeals considered this issue in *Connell v. Francisco*. The trial court found the parties' relationship sufficiently long-term and stable to come within the *Lindsey* rule.[48] Consequently, it performed a just and equitable disposition of property that would have been community property had the couple been married,[49] applying by analogy RCW 26.09.080.[50] The court of appeals reversed, holding that all property of the parties should have been before the court,[51] and that the trial court erred in not applying the community property presumption to property acquired during the meretricious relationship.[52]

On appeal, the supreme court announced several principles for courts to apply on the termination of cohabitation, presumably in the absence of an enforceable agreement to the contrary.[53] First, a trial court must

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47. Several court of appeals decisions purported to apply *Lindsey* to such relationships before the *Connell* decision. *See* Zion Constr., Inc. v. Gilmore, 78 Wash. App. 87, 91, 895 P.2d 864, 866 (1995); Connell v. Francisco, 74 Wash. App. 306, 316–17, 872 P.2d 1150, 1156 (1994), *rev'd in part*, 127 Wash. 2d 339, 898 P.2d 831 (1995); Foster v. Thilges, 61 Wash. App. 880, 885, 812 P.2d 523, 526 (1991).

48. *See Connell*, 74 Wash. App. at 310, 872 P.2d at 1153.

49. *See infra* note 59. In Washington, community property is any property acquired during marriage by husband or wife that is not separate property. *See* Wash. Rev. Code § 26.16.030 (1998). Separate property is property owned by either spouse prior to marriage, property acquired by either spouse during marriage by gift or inheritance, and the rents and profits of the separate property of either spouse. *See* Wash. Rev. Code §§ 26.16.010–.020 (1998).

50. *See Connell*, 74 Wash. App. at 315–16, 872 P.2d at 1156; *supra* note 42.

51. *See Connell*, 74 Wash. App. at 316–17, 872 P.2d at 1156.

52. *See id.* at 318, 872 P.2d at 1157. Courts presume that property acquired during marriage is community property. *See* Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 56 (1986).

53. No court has considered whether *Connell* is mandatory law or whether it applies only where parties have not entered into an enforceable contract to the contrary. Assuming the latter, courts also have not considered the type of agreement needed to contract into or out of *Connell*'s equitable

perform a "just and equitable distribution"[54] of property on the termination of cohabitation, but only if the relationship was "meretricious."[55] *Connell* defined "meretricious relationship" as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[56] Relevant factors include: "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[57] Second, the court's just and equitable distribution is limited to property that would have been community property had the parties been married[58]—in other words, the relationship's "pseudo-community property."[59] Third, *Connell* held that courts should apply by analogy the statutory definitions of separate and community property[60] and should presume that property onerously acquired during a meretricious relationship is pseudo-community property.[61]

B. *The Goals of* Connell

Though not expressly stated in its opinion, the court's goals in *Connell* were most likely to make the resolution of cohabitant property rights equitable and predictable without equating cohabitation with marriage. In

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principles. Presumably courts will apply by analogy the two-part test used to determine the enforceability of prenuptial agreements. *See In re* Marriage of Matson, 107 Wash. 2d 479, 482–83, 730 P.2d 668, 671–72 (1986).

54. Although RCW 26.09.080 characterizes a trial court's action on dissolution as a "disposition," *see supra* note 42, *Connell* used the language "distribution" to characterize a trial court's action on termination of a meretricious relationship. *See* Connell v. Francisco, 127 Wash. 2d 339, 352, 898 P.2d 831, 837 (1995). Presumably, the court intended to emphasize the distinction between these processes.

55. *See Connell*, 127 Wash. 2d at 347, 898 P.2d at 834–35. Because judicial intervention is not required to terminate a meretricious relationship, as it is for marriage, a just and equitable distribution will occur only where either or both parties petition the court after the relationship ends.

56. *Id.* at 346, 898 P.2d at 834.

57. *Id.*

58. *See id.* at 349–50, 898 P.2d at 836.

59. Courts have not named income and property acquired by parties during a meretricious relationship that would be community property had the parties been married. It is inappropriate to label it "community property" because courts apply the definitions of community and separate property to meretricious relationships only by analogy. Moreover, the legislature already uses the term "quasi-community property" for other purposes. *See infra* note 66. Consequently, this Comment refers to such property as "pseudo-community property."

60. *See Connell*, 127 Wash. 2d at 351, 898 P.2d at 836; *supra* note 49.

61. *See Connell*, 127 Wash. 2d at 351, 898 P.2d at 836; *supra* note 52.

overruling *Creasman*, the *Lindsey* court found the "constricting dictates" of the *Creasman* presumption to have made the law "unpredictable and at times onerous."[62] It follows that *Lindsey*'s goals were to make the law more predictable and less onerous, and that these goals also motivated *Connell*'s extension of *Lindsey*. The *Connell* court itself characterized the various exceptions to the *Creasman* presumption as having the purpose of avoiding "inequitable results."[63] Because *Connell* replaced these exceptions, it presumably has this same goal. The *Connell* court also explained that its rule would prevent unjust enrichment at the end of meretricious relationships.[64] Finally, the court reasoned that its holding would achieve an equitable result "without creating a common-law marriage or making a decision for a couple which they have declined to make for themselves."[65]

C. *The Legal Consequences of Involvement in a Meretricious Relationship*

Courts have delineated many, but not all, of the legal consequences of involvement in a meretricious relationship. It is largely uncertain what consequences arise during the meretricious relationship itself. There are clear legal consequences on the termination of a meretricious relationship; however, the consequences depend on how the relationship ends.

1. *Legal Consequences During a Meretricious Relationship*

The supreme court has not considered whether parties involved in a meretricious relationship, or their creditors, have a present interest in the pseudo-community property of the relationship, or if the interest is inchoate until the court performs a just and equitable distribution.[66] The

62. *In re* Marriage of Lindsey, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

63. *Connell*, 127 Wash. 2d at 347, 898 P.2d at 834.

64. *See id.* at 349, 898 P.2d at 836.

65. *Id.* at 350, 898 P.2d at 836.

66. If the interest is inchoate until the court performs a just and equitable distribution, pseudo-community property is analogous to quasi-community property. *See* Wash. Rev. Code §§ 26.16.220–.250 (1998). "Quasi-community property" is real or personal property that is not community property because the decedent acquired it while domiciled in a non-community-property state, but which would have been the community property of the decedent and his or her spouse had the decedent been domiciled in Washington at the time he or she acquired the property. *See* Wash. Rev. Code § 26.16.220(1). As with pseudo-community property, the legal presumptions and principles applicable to characterizing community and separate property apply to characterizing

court of appeals held that property onerously acquired during a meretricious relationship has a pseudo-community property character from inception.[67] However, it is uncertain whether this holding merely articulates a tracing principle, or if it confers on the non-acquiring party an actual present interest in the pseudo-community property. On a different note, courts have consistently held that cohabitants do not have the same rights as spouses under state statutes.[68]

2. *Legal Consequences on Termination of a Meretricious Relationship*

The legal consequences of involvement in a meretricious relationship depend on how cohabitation ends: marriage that ends in the death of one or both parties, the death of one or both parties without marriage, marriage that the parties later dissolve, or separation without marriage. No court has considered the effect of *Connell* where a marriage preceded by premarital cohabitation ends in the death of one or both spouses. Furthermore, no reported case has decided whether *Connell* applies to a meretricious relationship that ends in death. One unreported decision has suggested in dictum that the trial court should perform a just and equitable distribution of pseudo-community property in this situation.[69]

If the parties' cohabitation ends in a marriage that they later dissolve, RCW 26.09.080 already requires the trial court to perform a just and equitable disposition of all property of the parties.[70] As a result, there is

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quasi-community property. *See* Wash. Rev. Code § 26.16.220(3). However, in contrast to true community property, the non-acquiring spouse has no present interest in quasi-community property. Instead, courts use the characterization solely for the purpose of disposition of such property on the decedent's death. *See* Wash. Rev. Code § 26.16.250.

67. *See* Koher v. Morgan, 93 Wash. App. 398, 403–04, 968 P.2d 920, 922 (1998); *In re* Marriage of Lindemann, 92 Wash. App. 64, 73, 960 P.2d 966, 971 (1998).

68. *See, e.g.*, Waggoner v. Ace Hardware Corp., 134 Wash. 2d 748, 750, 953 P.2d 88, 89 (1998) (holding that "marital status" under employment discrimination statute does not include meretricious relationship); Peffley-Warner v. Bowen, 113 Wash. 2d 243, 253, 778 P.2d 1022, 1027 (1989) (holding that surviving partner to meretricious relationship is not "widow" under Washington intestacy statute); Davis v. Department of Employment Sec., 108 Wash. 2d 272, 273, 737 P.2d 1262, 1264 (1987) (holding that meretricious relationship is not within "marital status" exception to disqualification from unemployment compensation); Roe v. Ludtke Trucking, Inc., 46 Wash. App. 816, 819, 732 P.2d 1021, 1023 (1987) (holding that unmarried cohabitant is not "wife" under wrongful death statute); *see also* Foster v. Thilges, 61 Wash. App. 880, 888, 812 P.2d 523, 527 (1991) (holding that party petitioning court for property distribution on termination of meretricious relationship is not entitled to attorney fees); Western Community Bank v. Helmer, 48 Wash. App. 694, 699, 740 P.2d 359, 362 (1987) (same).

69. *See In re* Estate of Anderson, No. 14572-7-III, 1997 WL 6984, at *3 (Wash. Ct. App. Jan. 9, 1997).

70. *See supra* note 42.

no need to apply the statute by analogy. Thus, *Lindsey* requires a court simply to consider the cohabitation and the property accumulations therein as relevant factors when making the statutory just and equitable disposition of the parties' separate and community property.[71]

An unanswered question is whether *Connell*'s meretricious relationship test independently affects the statutory just and equitable disposition. The *Lindsey* court did not decide whether all premarital cohabitations are relevant in the statutory disposition, or if only meretricious relationships as defined in *Connell* are relevant.[72] Moreover, *Lindsey* did not instruct courts how to apply the cohabitation factor other than to say that courts must examine the relationship and the property accumulations.[73]

In practice, the court of appeals applies the *Connell* meretricious relationship test in dissolution actions solely to characterize property acquired during the parties' premarital cohabitation.[74] Under this line of cases, a trial court may not simply tack the period of premarital cohabitation onto the length of the marriage; rather, it must engage in a three-step analysis. First, it must examine the parties' premarital cohabitation to determine if it was meretricious.[75] Second, based on this determination, it must characterize property acquired during the parties' premarital cohabitation as separate or pseudo-community property pursuant to *Connell*.[76] Third, it must perform a just and equitable disposition of all property of the parties pursuant to RCW 26.09.080, treating as community property the pseudo-community property from the parties' premarital cohabitation, and treating as separate property the property that is neither community nor pseudo-community property.[77] Under this line of cases, it is uncertain whether nonmeretricious

71. *See supra* note 45 and accompanying text.

72. *See In re* Marriage of Lindsey, 101 Wash. 2d 299, 304–05, 678 P.2d 328, 331 (1984) (passing on issue because parties did not contest existence of meretricious relationship).

73. *See supra* note 45 and accompanying text.

74. *See In re* Marriage of Kinzer, No. 16035-1-III, 1998 WL 151795, at *2 (Wash. Ct. App. Apr. 2, 1998) (affirming trial court's determination that parties' premarital cohabitation was meretricious); *In re* Marriage of Damon-Rau, No. 4831-II-1, 1997 WL 671997, at *2 (Wash. Ct. App. Oct. 24, 1997) (holding that trial court did not err in finding parties' premarital cohabitation meretricious); *see also In re* Marriage of DeHollander, 53 Wash. App. 695, 698–99, 770 P.2d 638, 641 (1989) (holding that because parties' premarital cohabitation was meretricious, trial court did not err in characterizing property acquired during relationship as community).

75. *See supra* notes 55–57 and accompanying text.

76. *See supra* notes 58–61 and accompanying text.

77. *See supra* note 42.

cohabitation, in itself, is a factor courts may consider in making the statutory just and equitable disposition.

If the parties simply cohabited without ever marrying, the effect of *Connell* is three-fold when they separate. First, the trial court must examine the parties' cohabiting relationship and determine if it was meretricious.[78] Second, if the relationship was meretricious, the trial court must characterize the income and property acquired during the relationship as pseudo-community or separate property by analogizing the cohabitation to marriage and applying community property principles.[79] However, if the relationship was nonmeretricious, all income and property acquired during the relationship is the separate property of the acquiring party.[80] Finally, if the parties' relationship was meretricious, the trial court must perform a just and equitable distribution of all pseudo-community property of the parties.[81]

Although no court has considered what remedies are available to a non-title-holding party after termination of a nonmeretricious relationship in the *Connell* era, the *Creasman* presumption and its various exceptions would likely apply. In purporting to overrule *Creasman*, *Connell* adopted a rule that applies only to parties involved in a meretricious relationship. If the supreme court intended to overrule *Creasman* with regard to nonmeretricious relationships, it presumably would have announced a rule in its stead. Therefore, *Connell*'s limited holding would almost certainly recognize a cause of action under one of the *Creasman* exceptions.[82]

D. What Is a Meretricious Relationship?

Despite the important legal consequences of involvement in a meretricious relationship, the supreme court has not precisely defined when such a relationship exists. Instead, it is a question of application of

78. *See supra* notes 55–57 and accompanying text.

79. *See supra* notes 58–61 and accompanying text.

80. This is a negative implication of *Connell*. *See* Pennington v. Pennington, 93 Wash. App. 913, 920, 971 P.2d 98, 102 (1999) (reversing trial court's just and equitable distribution of pseudo-community property and remanding for further proceedings because trial court erred in finding existence of meretricious relationship); Fletcher v. Olmstead, No. 19319-1-II, 1996 WL 734263, at *1 (Wash. Ct. App. Dec. 20, 1996) (affirming trial court order denying party involved in non-meretricious relationship any portion of winning lottery ticket purchased by her cohabitant).

81. *See supra* notes 55–61 and accompanying text.

82. *See supra* notes 26–36 and accompanying text.

law to fact determined on a case-by-case basis.[83] According to *Connell*'s definition, a relationship must satisfy three elements to be meretricious: (1) it must be "stable," (2) it must be "marital-like," and (3) the parties must "cohabit with knowledge that a lawful marriage between them does not exist."[84]

1. The Parties' Relationship Must Be Stable

To be meretricious, the parties' relationship must be stable. The supreme court has not elaborated on what is required by this element of the definition, other than to say that "continuous cohabitation" and "duration of the relationship" are two factors that courts should consider in determining whether a meretricious relationship exists.[85] In addition, a "stormy" relationship may militate against a finding of stability.[86]

a. Continuous Cohabitation

In evaluating the continuous cohabitation factor, case law appears to have focused on two questions: whether the parties ever separated during their cohabitation, and whether, during their relationship, either of the parties ever cohabited with another person. *Warden v. Warden*[87] and *Pennington v. Pennington*[88] illustrate courts' treatment of these factors.

In *Warden*, the court of appeals affirmed the trial court's just and equitable distribution, despite two periods of separation during the parties' relationship.[89] After meeting in Canada, the parties moved to California where they began cohabiting in 1963.[90] In early 1967, the man moved to New York for his employer, and the woman, pregnant with

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83. *See, e.g., Pennington*, 93 Wash. App. at 917–18, 971 P.2d at 101.

84. Connell v. Francisco, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995); *see supra* notes 55–57 and accompanying text. There is a question of whether the supreme court intended the same test to apply in evaluating premarital cohabitations and cohabitations that ended prior to marriage. *See supra* notes 70–77 and accompanying text. However, because the court of appeals has applied the same test to both situations, *see supra* note 74 and accompanying text, this Comment does the same.

85. *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834; *see* text accompanying *supra* note 57.

86. *See In re* Marriage of Rhoads, No. 4831-II-1, 645 P.2d 1153, 1153–54 (Wash. Ct. App. June 2, 1982) (not published in Washington Appellate Reports) (upholding application of *Creasman* presumption where relationship was "short-lived and stormy").

87. 36 Wash. App. 693, 676 P.2d 1037 (1984).

88. 93 Wash. App. 913, 971 P.2d 98 (1999).

89. *See Warden*, 36 Wash. App. at 698, 676 P.2d at 1039.

90. *See id.* at 694, 676 P.2d at 1037.

their child, returned to Canada to give birth.[91] They lived separately until their daughter's birth in June 1967, when the man returned to Canada.[92] In 1969, they moved to Washington.[93] In 1972, the man moved to California to secure employment and there married another woman.[94] The woman in Canada did not learn of this marriage until 1977 and believed that their relationship continued until that time.[95] Despite these two periods of separation and the man's marriage to another woman during the last five years of the relationship, the court affirmed the distribution of property, characterizing the relationship between 1963 and 1977 as "tantamount to a marital family except for a legal marriage."[96]

In *Pennington*, the court of appeals reversed the trial court's finding of a meretricious relationship.[97] The parties began living together in 1985, when the woman moved into the man's residence.[98] In April 1991, when the man refused to marry the woman, she moved out for a few weeks.[99] In March 1993, the woman again moved out, this time for eighteen months.[100] During this separation, she lived with another man for one month.[101] In October 1995, she moved out permanently.[102] On the issue of continuous cohabitation, the trial court found that the parties "had a continual and lengthy relationship during which there were two periods of separation similar to those that might be experienced by a married couple."[103] Even though the court of appeals held that these facts did not justify finding a meretricious relationship, in dicta it agreed with the trial court's conclusion that in analyzing the periods of separation, the court must consider the entire duration of the relationship rather than the

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*, 676 P.2d at 1037–38.

95. *See id.* at 694–95, 676 P.2d at 1038.

96. *Id.* at 698, 676 P.2d at 1039.

97. *See* Pennington v. Pennington, 93 Wash. App. 913, 920, 971 P.2d 98, 102 (1999).

98. *See id.* at 914, 971 P.2d at 99.

99. *See id.* at 915, 971 P.2d at 99.

100. *See id.* at 916, 971 P.2d at 100.

101. *See id.*

102. *See id.*

103. *Id.* at 917 n.1, 971 P.2d at 100 n.1 (quoting trial court's findings of fact and conclusions of law).

separate periods of cohabitation.[104] The court also cited *Warden* approvingly, characterizing it as holding that "a trial court may properly consider the length and purpose of the relationship in determining that a meretricious relationship existed, although the parties lived apart for prolonged periods."[105]

b. Duration of the Relationship

Duration is the other factor courts look at to determine if a relationship was sufficiently stable to have been meretricious.[106] In *Connell*, the supreme court stated: "While a 'long term' relationship is not a threshold requirement, duration is a significant factor" in determining whether a meretricious relationship exists.[107] No court has gone so far as to hold that a relationship must last a certain amount of time before it can be found to be meretricious. One court of appeals decision prior to *Connell* found a four-month premarital cohabitation to have been meretricious,[108] but no other court has cited that case as authority that a meretricious relationship can arise in that short a period. The meretricious relationship in *Lindsey* lasted twenty months, and *Connell* cited *Lindsey* for the proposition that "[a] 'short term' relationship may be characterized as meretricious, but a number of significant and substantial factors must be present."[109] More recently, three unreported court of appeals decisions found meretricious relationships to exist where cohabitation lasted between two and three years.[110] However, courts have found nonmeretricious relationships where cohabitation lasted five[111] and even ten years.[112]

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104. *See id.* at 920, 971 P.2d at 102.

105. *Id.*

106. *See supra* note 57 and accompanying text.

107. Connell v. Francisco, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995).

108. *See In re* Marriage of DeHollander, 53 Wash. App. 695, 698, 770 P.2d 638, 641 (1989).

109. *Connell*, 127 Wash. 2d at 346, 898 P.2d at 834.

110. *See In re* Marriage of Kinzer, No. 16035-1-III, 1998 WL 151795, at *1 (Wash. Ct. App. Apr. 2, 1998) (23 months); *In re* Marriage of Damon-Rau, No. 19860-6-II, 1997 WL 671997, at *1 (Wash. Ct. App. Oct. 24, 1997) (27 months); *In re* Estate of Anderson, No. 14572-7-III, 1997 WL 6984, at *1 (Wash. Ct. App. Jan. 9, 1997) (37 months); *see also* Chesterfield v. Nash, 96 Wash. App. 103, 106, 978 P.2d 551, 553 (1999) (51 months).

111. *See* Fletcher v. Olmstead, No. 19319-1-II, 1996 WL 734263, at *1 (Wash. Ct. App. Dec. 20, 1996).

112. *See* Pennington v. Pennington, 93 Wash. App. 913, 914–16, 971 P.2d 98, 99–100 (1999).

2. *The Parties' Relationship Must Be Marital-Like*

To be meretricious, the parties' relationship must be marital-like.[113] Four of the five *Connell* factors[114] appear to serve as proxies for determining whether a relationship is marital-like. "Cohabitation" distinguishes a meretricious relationship from situations where romantically involved parties do not live together at the same residence and from non-intimate living arrangements. "Intent of the parties" provides evidence as to whether the parties intend their relationship to be committed and enduring. "Purpose of the relationship" evidences whether the parties have undertaken the duties and responsibilities that normally attach to a husband and wife. Finally, "pooling of resources and services to accomplish common goals and projects" serves to determine whether the parties' relationship is economically similar to marriage.

a. Cohabitation

For a relationship to be marital-like, the parties must cohabit. Courts have not clearly defined what cohabitation means in the meretricious relationship context. However, in cases where the parties dated, were sexually intimate, and even frequently spent the night at each other's residences before they moved in together, courts have not considered the pre-moving-in-together period as part of the meretricious relationship.[115]

b. Intent of the Parties and Purpose of the Relationship

In analyzing the parties' intent and the purpose of the relationship to determine if the relationship is sufficiently marital-like, courts appear to have found several different factors important. The first is whether the parties' relationship was functionally equivalent to marriage. For example, one case found significant the woman's testimony that the parties lived together because they were "two people in love, creating a

113. *See supra* note 56 and accompanying text.

114. *See supra* note 57 and accompanying text.

115. *See, e.g., In re* Meretricious Relationship of Sutton & Widner, 85 Wash. App. 487, 489–91, 933 P.2d 1069, 1070–71 (1997) (characterizing meretricious relationship as existing only during parties' actual cohabitation and not time during which they "stayed at each other's homes regularly"); *see also Pennington*, 93 Wash. App. 913, 971 P.2d 98; *Kinzer*, 1998 WL 151795; *Damon-Rau*, 1997 WL 671997.

team relationship."[116] Some courts found significant that the parties worked together to build their residence,[117] made major career and residential moves based upon their committed relationship,[118] or made retirement or estate plans with each other in mind.[119] Finally, some cases discussed whether the parties were sexually intimate,[120] shared a bed,[121] or had or were planning to have children together.[122]

Another consideration appears to be whether the parties subjectively treated their relationship as a marriage. In *Warden*, the court noted that the parties had filed joint income tax returns as husband and wife.[123] Other courts have found important that the parties held themselves out as married.[124]

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116. *Damon-Rau*, 1997 WL 691997, at *2; *see also In re* Marriage of Hilt, 41 Wash. App. 434, 438, 704 P.2d 672, 675 (1985) (noting that man told woman that everything would be jointly owned).

117. *See, e.g.*, *Sutton*, 85 Wash. App. at 489–90, 933 P.2d at 1071; *In re* Estate of Anderson, No. 14572-7-III, 1997 WL 6984, at *2 (Wash. Ct. App. Jan. 9, 1997); Foster v. Thilges, 61 Wash. App. 880, 884, 812 P.2d 523, 526 (1991); *In re* Marriage of DeHollander, 53 Wash. App. 695, 696, 770 P.2d 638, 639–40 (1989).

118. *See* Connell v. Francisco, 127 Wash. 2d 339, 343–44, 898 P.2d 831, 833 (noting that parties made two major changes in residence together and jointly operated bed-and-breakfast establishment); *Damon-Rau*, 1997 WL 671997, at *2 (noting that woman earned college degree intended to help man's company); Zion Constr., Inc. v. Gilmore, 78 Wash. App. 87, 90, 895 P.2d 864, 866 (1995) (noting that parties made major change in residence); Warden v. Warden, 36 Wash. App. 693, 694, 676 P.2d 1037, 1037 (1984) (noting that parties made three major changes in residence). *But see Pennington*, 93 Wash. App. at 915–16, 971 P.2d at 99–100 (holding that relationship was not meretricious even though parties made several moves together).

119. *See Connell*, 127 Wash. 2d at 343, 898 P.2d at 833 (noting that man's will left corpus of estate to woman); Chesterfield v. Nash, 96 Wash. App. 103, 108, 978 P.2d 551, 554 (1999) (noting that parties made retirement plans together); *Anderson*, 1997 WL 6984, at *2 (noting that parties planned to spend rest of their lives together); *Foster*, 61 Wash. App. at 885, 812 P.2d at 525–26 (noting that parties made retirement plans together); *see also* Fletcher v. Olmstead, No. 19319-1-II, 1996 WL 734263, at *2 (Wash. Ct. App. Dec. 20, 1996) (noting that parties had not engaged in estate planning together).

120. *See Sutton*, 85 Wash. App. at 491, 933 P.2d at 1071; *Damon-Rau*, 1997 WL 671997, at *2.

121. *See Damon-Rau*, 1997 WL 671997, at *2.

122. *See Connell*, 127 Wash. 2d at 345, 898 P.2d at 833 (noting that parties had surgery to enhance fertility); *Chesterfield*, 96 Wash. App. at 108, 978 P.2d at 554 (noting that parties testified they planned on having children together); *Warden*, 36 Wash. App. at 694, 676 P.2d at 1037 (noting that parties had two children together); *see also Pennington*, 93 Wash. App. at 918, 971 P.2d at 101 (distinguishing facts from *Connell* on grounds that *Pennington* parties had not sought fertility treatment).

123. *See Warden*, 36 Wash. App. at 694, 676 P.2d at 1037.

124. *See Connell*, 127 Wash. 2d at 343, 898 P.2d at 832; *Foster*, 61 Wash. App. at 881, 812 P.2d at 524. *But see Pennington*, 93 Wash. App. at 916, 971 P.2d at 100 (holding that relationship was not meretricious even though members of community considered parties to be husband and wife).

Courts have also considered whether the parties intended to marry. Several courts found significant the parties' engagement during cohabitation.[125] Similarly, *Pennington* found important the man's testimony that he had repeatedly refused the woman's requests that they marry, and his testimony denying the woman's claim that they were engaged.[126] That the parties were later married is also important.[127]

c. Pooling of Resources and Services for Joint Projects

The pooling of resources and services for joint projects is another factor that *Connell* instructed courts to consider in determining whether a relationship is meretricious.[128] One type of pooling is sharing expenses. Sharing household expenses, such as food, utilities, and rent, is not very significant because it is common to both married couples and non-intimate roommates and relatives. However, some courts have considered it in determining whether a meretricious relationship exists.[129] Paying for the other party's separate expenses with one's separate property shows a slightly higher level of commitment between the parties.[130]

Commingling earnings and separate funds is another factor that courts consider. Several courts have considered joint bank accounts as evidence of marital-like commitment,[131] although it is not a requirement.[132] Other

125. *See In re* Estate of Anderson, No. 14572-7-III, 1997 WL 6984, at *2 (Wash. Ct. App. Jan. 9, 1997); Zion Constr., Inc. v. Gilmore, 78 Wash. App. 87, 91, 895 P.2d 864, 866 (1995); Connell v. Francisco, 74 Wash. App. 306, 309, 872 P.2d 1150, 1152 (1994), *rev'd in part*, 127 Wash. 2d 339, 898 P.2d 831 (1995); *In re* Marriage of DeHollander, 53 Wash. App. 695, 696, 770 P.2d 638, 639 (1989); *In re* Marriage of Hilt, 41 Wash. App. 434, 438, 704 P.2d 672, 675 (1985).

126. *See Pennington*, 93 Wash. App. at 918–19, 971 P.2d at 102.

127. *See In re* Marriage of Lindsey, 101 Wash. 2d 299, 300, 678 P.2d 328, 329 (1984); *In re* Marriage of Kinzer, No. 16035-1-III, 1998 WL 151795, at *1 (Wash. Ct. App. Apr. 2, 1998); *In re* Marriage of Damon-Rau, No. 19860-6-II, 1997 WL 671997, at *1 (Wash. Ct. App. Oct. 24, 1997); *DeHollander*, 53 Wash. App. at 696, 770 P.2d at 639; *Hilt*, 41 Wash. App. at 435, 704 P.2d at 673.

128. *See supra* note 57 and accompanying text.

129. *See, e.g.*, Chesterfield v. Nash, 96 Wash. App. 103, 106, 978 P.2d 551, 553 (1999) (noting that parties pooled resources to pay joint living expenses); *Pennington*, 93 Wash. App. at 915, 971 P.2d at 99 (noting that woman purchased food and other supplies while man paid mortgage and utilities); Fletcher v. Olmstead, No. 19319-1-II, 1996 WL 734263, at *1 (Wash. Ct. App. Dec. 20, 1996) (noting that although parties pooled money for rent, utilities, and groceries, they otherwise kept financial affairs separate).

130. *See, e.g., Zion Constr.*, 78 Wash. App. at 90, 895 P.2d at 866.

131. *See, e.g., Kinzer*, 1998 WL 151795, at *1; Foster v. Thilges, 61 Wash. App. 880, 881, 812 P.2d 523, 524 (1991).

courts found significant that the parties deposited their earnings or separate funds into each other's bank account.[133]

Where one or both parties purchase real estate or other large-scale assets during cohabitation, how the parties take title, secure the loan, or make payment can be very instructive in determining whether a meretricious relationship exists. If the parties take title to such property jointly, as cotenants, joint tenants, or even as "husband and wife," it is strong evidence supporting the existence of a meretricious relationship.[134] The same is true where parties jointly pay for property or sign loan documents.[135] Further, where both parties build or make improvements on a home during the relationship, regardless of who holds title, courts have found this to support finding a meretricious relationship.[136] The converse is also true; where a party purchases property during cohabitation with separate funds, takes title in his or her own name only, and exhibits no intention to share ownership of the property, it is evidence against finding a meretricious relationship.[137]

Finally, situations where the parties pool their labor also provide strong evidence of a meretricious relationship. Three cases found a

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132. *See In re* Meretricious Relationship of Sutton & Widner, 85 Wash. App. 487, 491, 933 P.2d 1069, 1071 (1997); *Damon-Rau*, 1997 WL 671997, at *2; *Zion Constr.*, 78 Wash. App. at 91, 895 P.2d at 866.

133. *See, e.g.*, *Zion Constr.*, 78 Wash. App. at 90, 895 P.2d at 866; *In re* Marriage of Hilt, 41 Wash. App. 434, 436, 704 P.2d 672, 674 (1985).

134. *See, e.g.*, *Foster*, 61 Wash. App. at 881–82, 812 P.2d at 524.

135. *See, e.g.*, Chesterfield v. Nash, 96 Wash. App. 103, 106, 978 P.2d 551, 553 (1999) (noting that parties pooled resources to make mortgage payments on residence in woman's name); *Zion Constr.*, 78 Wash. App. at 90–91, 895 P.2d at 866 (noting that woman contributed to closing costs on residence, landscaping, and home repair expenses, although title was taken in man's name); *Foster*, 61 Wash. App. at 881–82, 812 P.2d at 524 (noting that parties obtained joint loan to build home); *In re* Marriage of DeHollander, 53 Wash. App. 695, 696–97, 770 P.2d 638, 639–40 (1989) (noting that both parties contributed money toward monthly payments and improvements); *Hilt*, 41 Wash. App. at 435–36, 704 P.2d at 673 (noting that woman had made payments out of separate checking account toward real estate contract in man's name).

136. *See, e.g.*, *In re* Marriage of Lindsey, 101 Wash. 2d 299, 300–01, 678 P.2d 328, 329 (1984); *Sutton*, 85 Wash. App. at 491, 933 P.2d at 1071; *In re* Estate of Anderson, No. 14572-7-III, 1997 WL 6984, at *1 (Wash. Ct. App. Jan. 9, 1997); *DeHollander*, 53 Wash. App. at 696–97, 770 P.2d at 639–40.

137. *See, e.g.*, Pennington v. Pennington, 93 Wash. App. 913, 919, 971 P.2d 98, 99 (1999) (finding relationship not meretricious where man purchased new home, executed loan documents, took title in his name only, and paid solely with his separate property); Fletcher v. Olmstead, No. 19319-1-II, 1996 WL 734263, at *1–2 (Wash. Ct. App. Dec. 20, 1996) (finding relationship not meretricious where leases to parties' apartments were never in both names and man purchased time-share unit in his name, making clear to seller that woman would have no interest in property).

meretricious relationship to exist where the man was the sole wage earner in the relationship and the woman took care of the household.[138] Other cases found meretricious relationships to exist where the woman worked at the man's business for little or no pay,[139] or where the parties pooled labor to improve one party's separate property.[140]

d. Other Factors Relevant to the Marital-Like Requirement

In Washington, there are statutory limitations on who may marry that courts appear to have considered relevant in determining whether a relationship is sufficiently marital-like to be meretricious. To marry, parties must be over the age of eighteen and mentally competent.[141] Further, neither party may be married to another person, the parties must be of the opposite sex, and the parties must not be nearer of kin than second cousins.[142]

Four cases have considered whether a meretricious relationship existed where one of the cohabitants had separated from, but was still married to, another person.[143] Three of these cases held that a meretricious relationship existed.[144] *Pennington* held otherwise, finding significant the man's marriage to another woman during the first five years of cohabitation and his repeated refusal to marry after his divorce.[145]

No court has ruled on whether a same-sex couple could be involved in a meretricious relationship. However, in an unpublished decision the

138. *See Lindsey*, 101 Wash. 2d at 301, 678 P.2d at 329; *Zion Constr.*, 78 Wash. App. at 90–91, 895 P.2d at 866; Warden v. Warden, 36 Wash. App. 693, 694, 676 P.2d 1037, 1038 (1984).

139. *See* Connell v. Francisco, 127 Wash. 2d 339, 344, 898 P.2d 831, 833 (1995); *Chesterfield*, 96 Wash. App. at 108, 978 P.2d at 553–54; *In re* Marriage of Kinzer, No. 16035-1-III, 1998 WL 151795, at *1 (Wash. Ct. App. Apr. 2, 1998); *In re* Marriage of Damon-Rau, No. 19860-6-II, 1997 WL 671997, at *2 (Wash. Ct. App. Oct. 24, 1997).

140. *See supra* note 117 and accompanying text.

141. *See* Wash. Rev. Code § 26.04.010(1) (1998).

142. *See* Wash. Rev. Code § 26.04.020 (1998).

143. *See* Pennington v. Pennington, 93 Wash. App. 913, 917 P.2d 98 (1999); *Kinzer*, 1998 WL 151795; Foster v. Thilges, 61 Wash. App. 880, 812 P.2d 523 (1991); *Warden*, 36 Wash. App. 693, 676 P.2d 1037.

144. *See Kinzer*, 1998 WL 151795, at *2; *Foster*, 61 Wash. App. at 884, 812 P.2d at 525; *Warden*, 36 Wash. App. at 696, 676 P.2d at 1038–39.

145. *See Pennington*, 93 Wash. App. at 919, 971 P.2d at 102.

court of appeals addressed the issue in dictum, inserting the words "of the opposite sex" into the definition of meretricious relationship.[146]

3. *The Parties Must Cohabit with Knowledge That a Lawful Marriage Between Them Does Not Exist*

For a relationship to be meretricious, the parties must know that they are not lawfully married.[147] This presumably distinguishes a meretricious relationship from an "innocent relationship."[148] The distinction is significant because the property before the court on the annulment of an innocent relationship includes both separate and community property.[149]

III. ALTHOUGH *CONNELL* IS A STEP IN THE RIGHT DIRECTION, IT FALLS SHORT OF ITS GOALS

Though an improvement over the *Creasman* presumption and its various exceptions, *Connell* falls short of its goals. *Creasman* instructed courts to award property to the title-holding party at the termination of a meretricious relationship.[150] Although courts recognized several exceptions to *Creasman*'s title rule,[151] the doctrine continued to make the law "unpredictable and at times onerous."[152] *Connell* puts Washington at the forefront of recognizing the legal rights of cohabitants,[153] and in cases where a meretricious relationship exists, *Connell* achieves an equitable outcome by definition.[154] However, for nonmeretricious relationships, the meretricious relationship fiction promotes unpredictability and inequity.

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146. *See Kinzer*, 1998 WL 151795, at *2.

147. *See supra* note 56 and accompanying text.

148. *See supra* notes 26–27 and accompanying text.

149. *See supra* notes 26–27 and accompanying text; *see also* Wash. Rev. Code § 26.09.080 (1998).

150. *See supra* notes 22–23 and accompanying text.

151. *See supra* notes 26–36 and accompanying text.

152. *In re* Marriage of Lindsey, 101 Wash. 2d 299, 304, 678 P.2d 328, 331 (1984).

153. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21, 71–78 (1994).

154. *But see* Connell v. Francisco, 127 Wash. 2d 339, 354–55, 898 P.2d 831, 838 (1995) (Utter, J., dissenting) (arguing that it often may be impossible to carry out *Lindsey*'s "just and equitable distribution" requirement while limiting distribution to only pseudo-community property).

A. The Meretricious Relationship Fiction Causes Uncertainty

The meretricious relationship fiction creates a high degree of uncertainty for parties contemplating or currently cohabiting, for attorneys advising those parties, and for trial judges applying the concept. There are no clear rules delineating when a meretricious relationship begins. When parties marry, the marriage ceremony marks the precise moment when community property begins to accumulate and the other legal consequences of marriage arise. On the other hand, unless the parties contract to live in a meretricious relationship,[155] a relationship does not become meretricious until the court determines so, generally after the relationship has ended. Moreover, *Connell* requires courts to look at the entire cohabitation and determine whether, as a whole, it was sufficiently stable and marital-like to have been meretricious.[156] To make matters worse, the supreme court has not spoken on the respective weights of the relevant factors.[157] Finally, because courts must determine on a case-by-case basis whether a meretricious relationship exists,[158] precedent is of little value. Thus, short of an express agreement, cohabitants have little means of knowing whether their relationship is meretricious.

Another source of uncertainty is that meretricious relationship property rights arise under common law and not statute. Consequently, many cohabitants may not realize they are incurring any legal obligations or gaining any legal rights. Further, parties are less able than married couples to predict which rights and obligations are triggered by involvement in a meretricious relationship. Courts have held that involvement in a meretricious relationship is not equivalent to "marital status" or "spouse" under a number of statutes.[159] However, no court has considered whether it may award separate maintenance on the termination of a meretricious relationship. No published opinion has squarely addressed whether *Connell*'s just and equitable distribution applies on the death of one or both parties to a meretricious relationship, whether each is entitled to one-half of the pseudo-community property, or whether each has no interest in the property that would be pseudo-

155. *See supra* note 53 and accompanying text.

156. *See supra* notes 55–57 and accompanying text.

157. *See supra* note 57 and accompanying text.

158. *See supra* note 83 and accompanying text.

159. *See supra* note 68 and accompanying text.

community if they separated, but which is the separate property of the other spouse.[160] Finally, no court has addressed whether parties or their creditors have a present interest in pseudo-community property, and whether the participants have the right to bequeath and devise any shares they may have in it.

The supreme court's definition of meretricious relationship includes several ambiguous terms that have resulted in conflicting interpretations by the court of appeals. One element of the definition requires that the parties' relationship be marital-like.[161] In applying this element, most cases have focused on whether the parties' relationship is functionally equivalent to marriage.[162] However, several cases have applied the marital-like element formalistically. Dictum from one case suggests that a same-sex relationship can never be meretricious, regardless of how functionally marital-like it is.[163] Similarly, *Pennington* considered one party's marriage to another during the first part of cohabitation and that party's rejection of the other's requests for marriage as evidence against the existence of a meretricious relationship.[164] These conflicting approaches tend to make the existence of a meretricious relationship dependent on the approach of a particular court.

Two cases illustrate the unpredictable results of these divergent approaches. In *Foster v. Thilges*,[165] the parties cohabited for approximately ten years, first in the woman's home and later in a home they built together.[166] They established joint bank accounts, pooled incomes, obtained a joint home loan, held themselves out as husband and wife at various social and community activities, and were engaged.[167] Even though the man was legally married to another woman for the first part of the cohabitation, the court of appeals affirmed a just and equitable distribution.[168]

The facts in *Pennington* are quite similar. The parties were sexually intimate, cohabited for ten years, made a major move together,

160. *See supra* note 69 and accompanying text.

161. *See supra* note 56 and accompanying text.

162. *See supra* notes 116–40 and accompanying text.

163. *See supra* note 146 and accompanying text.

164. *See* Pennington v. Pennington, 93 Wash. App. 913, 920, 971 P.2d 98, 102 (1999).

165. 61 Wash. App. 880, 812 P.2d 523 (1991).

166. *See id.* at 881, 812 P.2d at 524.

167. *See id.*

168. *See id.* at 885, 812 P.2d at 526.

entertained friends and family as a couple, and jointly made improvements to their residence.[169] The woman quit her job to care for the man after his stroke, worked at the man's business, sometimes for a low salary, and used the man's surname on her credit cards.[170] The local phone book listed them together under the man's surname and members of the community testified that they cared for each other as husband and wife.[171] In contrast to *Foster*, however, the court found that a meretricious relationship did not exist, largely because the man remained married to another woman during the first five years of their cohabitation and refused to marry the woman after his divorce.[172] Although *Pennington* purported to distinguish *Foster*,[173] it is difficult to see how a just and equitable distribution is appropriate in one case and not the other.

Two other elements of the definition also leave room for conflicting interpretations. *Connell* requires a meretricious relationship to be stable, but does not define stable.[174] In determining stability, courts have considered the duration of the relationship,[175] whether the parties continuously cohabited,[176] whether they ever cohabited with others during the relationship,[177] and whether the relationship was "stormy."[178] However, without a conclusive definition of stable from the supreme court, courts will continue to determine stability based on limited precedent and their own subjective definitions. *Connell* also requires that a meretricious relationship involve cohabitation, without defining the term.[179] Although court of appeals precedent suggests that cohabitation requires sexual intimacy[180] and sharing the same permanent address,[181] without a definition, a court could find cohabitation when the parties

169. *See Pennington*, 93 Wash. App. at 914–15, 971 P.2d at 99–100.

170. *See id.* at 915–16, 971 P.2d at 99–100.

171. *See id.* at 916, 971 P.2d at 100.

172. *See id.* at 920, 971 P.2d at 102.

173. *See id.* at 919, 971 P.2d at 102.

174. *See* Connell v. Francisco, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995).

175. *See supra* notes 106–12 and accompanying text.

176. *See supra* notes 87–105 and accompanying text.

177. *See supra* notes 87–105 and accompanying text.

178. *See supra* note 86 and accompanying text.

179. *See Connell*, 127 Wash. 2d at 346, 898 P.2d at 834.

180. *See supra* notes 120–22 and accompanying text.

181. *See supra* note 115 and accompanying text.

merely spent the night at each other's residences frequently, or even in the absence of intimacy.

B. The Meretricious Relationship Concept Is Inequitable

The meretricious relationship fiction is inconsistent with *Connell*'s goals of preventing unjust enrichment[182] and achieving equity.[183] These goals are met when the court performs a just and equitable distribution at the end of a meretricious relationship because the result is equitable by definition.[184] However, the negative implication of *Connell* requires courts to award property to the title-holding party at the end of a nonmeretricious relationship, unless the other party can assert a claim under another theory.[185] Thus, equity turns on whether a given relationship is meretricious or whether an alternate theory of recovery is available.

To the extent that courts require cohabitation to last a minimum duration before the relationship can be meretricious, an equitable outcome turns on satisfying the duration requirement rather than on the merits of the case.[186] For example, assume that a couple cohabited for six months before separating and in all other respects had a marital-like relationship. Assume further that the woman did not do paid work during that time, instead taking care of the household, while the man continued his paid work. If the man kept his earnings in a separate account, title will not reflect the woman's nonmonetary contributions to their relationship. It is unlikely that a court would find this hypothetical relationship meretricious under current law because cohabitation lasted only six months.[187] As such, there is no pseudo-community property and the woman is not entitled to a just and equitable distribution. Her sole remedy would lie in one of the various *Creasman* exceptions,[188] which would require tracing the purchase of assets to her separate funds; establishing a joint venture, implied partnership, or contract; or establishing that a trust relation exists between the parties. However, it is

182. *See supra* note 64 and accompanying text.

183. *See supra* notes 62–65 and accompanying text.

184. *But see supra* note 154.

185. *See supra* notes 80–82 and accompanying text.

186. *See supra* notes 106–12 and accompanying text.

187. *See supra* notes 106–12 and accompanying text.

188. *See supra* notes 26–36 and accompanying text.

unlikely she would prevail under any of these theories because her contributions did not relate to a mutual business endeavor, she cannot trace the major asset of the relationship—the man's earnings—to her separate property, and the elements of a constructive or resulting trust are not present. She might try to establish that their arrangement was an implied contract, but there is no precedent for such a claim in Washington. Moreover, even if she were able to establish such a claim, she would have a contractual remedy rather than the right to a just and equitable distribution.

A requirement that the relationship satisfy the statutory requirements of marriage also defeats *Connell*'s goals. Imagine a cohabitation of ten years, similar in all other respects to the previous hypothetical except that the parties are of the same sex. Under the Division Three Court of Appeals definition of meretricious relationship,[189] a court could not perform a just and equitable distribution of what would have been the parties' pseudo-community property, regardless of the relationship's functional and economic similarity to marriage. Such a result promotes rather than prevents inequity and unjust enrichment.

The *Pennington* decision further highlights the inequities of the meretricious relationship requirement. The court reversed the finding of a meretricious relationship on several grounds: the parties were legally unable to marry because the man was married to another woman for the first five years of their relationship; the man repeatedly refused the woman's requests that they marry, even after his marriage was dissolved; and the woman lived with another man for one month during their ten year cohabitation.[190] Thus, despite that these facts have little bearing on whether the manner in which assets were held at the end of their relationship was equitable, the court reversed the trial court's just and equitable distribution of property. *Pennington*'s approach elevates form over substance, disregards *Connell*'s instruction that "a meretricious relationship is not the same as a marriage,"[191] and makes equity partly dependent on the court's subjective moral attitudes towards the propriety of the relationship. To consider whether the parties are legally able to marry, actually intend to marry, or cohabit exclusively with one another

189. *See supra* note 146 and accompanying text.

190. *See* Pennington v. Pennington, 93 Wash. App. 913, 918–19, 971 P.2d 98, 101 (1995).

191. Connell v. Francisco, 127 Wash. 2d 339, 348, 898 P.2d 831, 835 (1995).

in determining whether a relationship is meretricious is to misunderstand *Connell*: it is an equitable doctrine, not a common-law marriage.[192]

IV. COURTS SHOULD PERFORM A JUST AND EQUITABLE DISTRIBUTION ON THE TERMINATION OF ANY INTIMATE COHABITATION

A. Proposal

Although *Connell* yields equitable results upon termination of those cohabitations determined to be meretricious,[193] the duration factor and a formalistic marital-like test frustrate equity. Moreover, the fiction renders all cohabitant property rights far too unpredictable. The supreme court should replace the meretricious relationship requirement with a rule requiring courts to perform a just and equitable distribution of pseudo-community property on the termination, by separation or death, of any "intimate cohabitation." The court should also clarify that the pseudo-community property concept should apply only for purposes of a just and equitable distribution. Similar to a non-acquiring spouse's interest in quasi-community property,[194] a cohabitant's right to pseudo-community property should be inchoate until one or both parties petition the court for a just and equitable distribution on the termination of cohabitation. There should not be a present interest in or right to bequeath or devise pseudo-community property. Moreover, pseudo-community property should accumulate only during periods in which the parties actually cohabit.

It is equally important that the supreme court identify factors that would guide lower courts in making a just and equitable distribution. In addition to the *Connell* factors,[195] trial courts should consider the parties' expectations upon beginning cohabitation, and any representations they made to each other. Courts should also consider "through whom the property was acquired, monetary and labor contributions, whether or not children were born of the relationship and who is to care for them, and

192. A few states recognize "common-law marriages," where parties may become legally married without a formal marriage ceremony or state licensure if they mutually agree to marry, have a permanent relationship, and hold themselves out publicly as husband and wife. *See, e.g., In re* Estate of Stinchcomb, 674 P.2d 26, 28–29 (Okla. 1983). Washington does not recognize common-law marriages. *See In re* McLaughlin's Estate, 4 Wash. 570, 591–92, 30 P. 651, 658–59 (1892).

193. *But see supra* note 154.

194. *See supra* note 66.

195. *See supra* note 57 and accompanying text.

the general condition in which the termination of the relationship will leave each of the parties."[196]

B. This Proposal Promotes Certainty

In at least three respects, this proposal will ensure that courts resolve property rights following cohabitation in a predictable manner. First, under this approach, a relationship must meet only three straightforward requirements for *Connell*'s equitable principles to apply. The parties must be intimate. While the presence or absence of sexual relations should not be determinative of intimacy, it is a weighty factor, as is the parties' holding themselves out as a couple and sharing the same bedroom. The parties must also cohabit. For purposes of this proposal, cohabitation requires living permanently and regularly in the same residence, and does not include dating where the parties spend the night at one another's residence, even if this occurs frequently. Finally, the parties must not have made a written and enforceable agreement to the contrary.[197]

The second advantage of this proposal over the meretricious relationship fiction is that intimate cohabitation, unlike a meretricious relationship, would begin at a precise moment: when two romantically involved persons begin living in the same permanent residence together. Therefore, there would be little doubt whether a relationship qualifies for a just and equitable distribution.

Finally, this proposal would clearly define the property rights of intimate cohabitants. There would be no present interest in pseudo-community property; rather, similar to courts' use of quasi-community property,[198] a court would perform the characterization solely for the purpose of determining the property before it for the just and equitable distribution.

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196. Latham v. Hennessey, 87 Wash. 2d 550, 554, 554 P.2d 1057, 1059–60 (1976) (quoting Note, *Meretricious Relationships—Property Rights: A Meretricious Relationship May Create an Implied Partnership*—In re Estate of Thornton, *81 Wn. 2d 72, 499 P.2d 864 (1972)*, 48 Wash. L. Rev. 635, 644 n.44 (1973)).

197. *See supra* note 53.

198. *See supra* note 66.

C. *This Proposal Promotes Equity*

This proposal would equitably resolve the property rights of cohabitants upon separation or death in all cases brought before courts.[199] Under this proposal, statutory restrictions on marriage, such as whether the parties are of the same sex or are married to other persons, would have no bearing on courts' ability to perform a just and equitable distribution.[200] While these statutory restrictions represent a clear public policy against allowing certain individuals to marry, *Connell* is an equitable doctrine and cohabitation is not the same as a marriage.[201]

This proposal would also require courts to perform a just and equitable distribution of pseudo-community property on the termination of all intimate cohabitations, not just those of a specific duration. This may seem burdensome at first glance. However, this proposal does not require that courts redistribute property in all cases. For some intimate cohabitations, a just and equitable distribution may result in the title-holding party retaining title. Moreover, for cohabitations that are of short duration and where there is no significant commingling of assets between parties, courts may instead, if equitable, attempt to place the parties in the position they would have occupied had no cohabitation taken place.[202]

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199. Not all parties will petition a court for distribution of property acquired during cohabitation. Some parties may mutually agree to a specific distribution without coming before a court. Other parties may simply walk away from the relationship without reaching agreements with their former cohabitants and without petitioning a court for distribution. In such cases, the doctrine of laches should apply to determine when a cohabitant may assert his or her rights under *Connell.*

200. Situations may arise where a legal wife (or husband) and the cohabitant partner of his or her spouse may have conflicting claims to the married cohabitant's earnings. Often in these circumstances the marriage will be defunct and the marital community will have ceased to exist. *See* Wash. Rev. Code § 26.16.140 (1998). This will not always be the case, however. Courts should protect the noncohabiting spouse's community property rights when making the *Connell* just and equitable distribution by distributing only the cohabiting spouse's one-half share of property that is both community property and "pseudo-community property," and by taking this factor into account when making the *Connell* just and equitable distribution.

201. *See supra* note 65 and accompanying text.

202. Courts in Alaska and Oregon apply a similar doctrine in dissolution of marriages. *See, e.g.*, Rose v. Rose, 755 P.2d 1121, 1125 (Alaska 1988) (holding that where parties' marriage lasted only 18 months, each brought substantial separate assets into marriage, there was minimal commingling of assets, the parties had no children together, both were employed, and they maintained separate checking accounts into which they deposited their earnings, trial court did not abuse discretion in treating property division in nature of rescission, aimed at placing parties in financial position they would have occupied had no marriage taken place); *In re* Marriage of Jenks, 656 P.2d 286, 290 (Or. 1982) ("[I]f the marriage is terminated before the parties' financial affairs become commingled or

Applying the intimate cohabitation rule to *Pennington*[203] illustrates its simplicity and equity. Under this proposal, the trial court would have the ability to perform a just and equitable distribution solely by virtue of the parties' mutual decision to cohabit. Neither the parties' having lived apart periodically during their cohabitation nor the woman's having lived with another man for one month would impede the parties' right to an equitable distribution. Rather, these facts would merely be factors considered by the court in making the just and equitable distribution. Moreover, because property earned during the periods of separation is separate rather than pseudo-community, it would not be before the court for the just and equitable distribution. Finally, during the one month when the woman cohabited with another man, she and the other man would be involved in an intimate cohabitation, for which a court should perform a just and equitable distribution of the pseudo-community property of that cohabitation.

V. CONCLUSION

In overruling *Creasman*, the Supreme Court of Washington sought to resolve in an equitable and predictable manner the property rights of cohabitants upon separation without equating cohabitation with marriage. However, the meretricious relationship fiction adopted by the *Connell* court propagates uncertainty because its definition and factors for consideration are subjective, ambiguous, and have been interpreted inconsistently by the court of appeals. The standard also promotes inequitable results in many cases. When courts hold a cohabitation nonmeretricious because it did not last long enough or because the parties were not legally able to marry or did not intend to marry, equity hinges on satisfying these arbitrary criteria that are only tangentially related to the merits of the case. Therefore, the supreme court should replace *Connell*'s meretricious relationship fiction with a rule requiring courts to perform a just and equitable distribution on the termination of any intimate cohabitation. Because the parties' mutual agreement to live together, not an after-the-fact determination, would trigger application of *Connell*'s equitable principles, the intimate cohabitation rule would enhance the predictability of cohabitant property rights. The rule would

committed to the needs of children to the point that the parties cannot readily be restored to their premarital situations, then property division is a relatively simple task in the nature of rescission.").

203. *See supra* notes 1, 97–103, 169–71, 190, and accompanying text.

also make these rights more equitable because a court would perform a just and equitable distribution at the termination of any intimate cohabitation. The adoption of this proposal would not only compensate for *Connell*'s shortcomings, but more importantly, it would solidify Washington's position as a frontrunner in recognizing and protecting the legal rights of all cohabitants.