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## Cohabiting with Property in Washington: Washington's Committed Intimate Relationship Doctrine

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COHABITING WITH PROPERTY IN WASHINGTON:  
WASHINGTON'S COMMITTED INTIMATE  
RELATIONSHIP DOCTRINE<sup>1,2</sup>

December 2, 2018

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1. Significant portions of this paper were prepared for a presentation in Texas in 2013 and were published following that presentation. *See generally* Thomas Andrews, *Not So Common (Law) Marriage: Notes from a Blue State*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 1 (2013) (comparing the way Texas resolves property disputes between unmarried cohabitants with the way Washington resolves such disputes). In contrast to the Texas presentation and related article, this article is directed at Washington lawyers and is intended to provide an overview of Washington's Committed Intimate Relationship "CIR" doctrine; portions drawn from the author's previous article have been updated to take account of developments occurring after 2012.

2. Until 2007, Washington referred to unmarried relationships as "meretricious relationships." But in 2007, the Court replaced "meretricious," which was considered to be offensive, demeaning, and sexist, with the more accepting phrase "committed intimate relationship." *Olver v. Fowler*, 161 Wash. 2d 655, 657 n.1, 168 P.3d 348, 350 (2007). Accordingly, I use the expression "committed intimate relationship" and the acronym "CIR" as a short form for this expression throughout this paper and when quoting, I replace the term "meretricious" with "committed intimate" where the decision quoted uses old terminology. I also use the expression "CIR Property" to describe property that is accumulated by effort during such a relationship. Here, the terminology that our courts use has remained confusing. A recent court of appeals decision, for example, referred to such property as "quasi-community property." *In re Washburn*, No. 74977-3-I, 2017 WL 4773442, at \*2 (Wash. Ct. App. 2017) (unpublished). But the Supreme Court has expressly rejected use of that phrase to refer to such property:

For purposes of this opinion, we refer to property jointly held by putative meretricious partners as 'community-like.' We decline the invitation to call it 'quasi-community property' because that term has other meanings in Washington statutory law, *see, e.g.*, chapter 26.16[.220–.250] RCW, or to call it 'pseudo-community property' because that term implies that the property is not actually jointly held.

*Soltero v. Wimer*, 159 Wash. 2d 428, 430 n.1, 150 P.3d 552, 553 (2007); *accord* *Defoor v. Defoor*, No. 62519-5-II, 2010 WL 3220165, at \*4 n.5 (Wash. Ct. App. 2010) (unpublished). Nine months later, the *Olver* court referred to such property as "the property of committed intimate partners." *Olver*, 161 Wash. 2d at 664, 168 P.3d at 353. In this paper, "CIR property" is used as short form of that expression.

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## INTRODUCTION

Washington has followed a community property system since at least 1869—twenty years prior to statehood.<sup>3</sup> However, Washington rejected the doctrine of common law marriage quite early in 1892.<sup>4</sup> For over one hundred years, in order to receive the advantages of the community property laws, a Washington couple has needed to have their relationship blessed with a ceremonial marriage or have a valid common law marriage in another state.<sup>5</sup>

Accompanying these requirements for the formal establishment of a community property regime was the so-called “Creasman Presumption,” which provided 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 legal title to the property stands.”<sup>6</sup> There were, nonetheless, some common law property work-arounds. Over the years, the Washington Supreme Court has identified a number of legal bases for dividing property that do not depend on

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3. See Act of Dec. 2, 1869, 1895 Wash. Laws 895; see also Kelly M. Cannon, *Beyond the “Black Hole”—A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 GONZ. L. REV. 7, 8 (2004) (acknowledging “[t]here has been a system of community property in Washington since 1869.”). For our purposes, we can ignore some of the nuances that troubled the Territorial Legislature. See generally Cyril Hill, *Early Washington Marital Property Statutes*, 14 WASH. L. REV. 118 (1939).

4. *In re McLaughlin’s Estate*, 4 Wash. 570, 591, 30 P. 651, 658 (1892).

5. *In re Gallagher’s Estate*, 35 Wash. 2d 512, 515, 213 P.2d 621, 623 (1950).

6. *Creasman v. Boyle*, 31 Wash. 2d 345, 351, 196 P.2d 835, 838 (1948), *overruled by In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984).

legal title, including tracing, partnership, resulting and constructive trust, co-tenancy, and contract.<sup>7</sup>

In 1984, the Court ushered in a new equitable doctrine for adjudicating property disputes between unmarried cohabitants. First, in *In re Marriage of Lindsey*, the Court overturned the Creasman Presumption. In its place, it embraced a new approach: “[W]e adopt the rule that courts must ‘examine the [committed intimate] relationship and the property accumulations and make a just and equitable disposition of the property.’”<sup>8</sup> Because the parties did not dispute the existence of a long-term marriage-like relationship, the Court did not provide much guidance for the exercise of its newly asserted equitable powers, except to state “we do not believe [the various criteria offered] should be adopted as a rigid set of requirements but rather that courts should examine each case on its facts.”<sup>9</sup> *Lindsey* quickly gave rise to a number of cases that equitably divided property acquired during such a non-marital relationship.

Before too long, the Court felt a need for more clarity. In 1995, the Court explained in *Connell v. Francisco* that, “[r]elevant factors establishing a [committed intimate] relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”<sup>10</sup> More importantly, “[t]he critical focus is on property that would have been characterized as community property had the parties been married. This property is properly before a trial court and is subject to a just and equitable distribution.”<sup>11</sup> Bringing this new common law even further into the orbit of community property law, the Court went on to explain:

[A]ll property acquired during a [committed intimate] relationship is presumed to be owned by both parties. This presumption can be rebutted . . . . All property considered to be owned by both parties is before the court and is subject to a just and equitable distribution . . . . The fact title

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7. “The most common means of avoidance include: (1) tracing source of funds . . . ; (2) implied partnership/joint venture . . . ; (3) resulting/constructive trust . . . ; (4) co-tenancy . . . ; [and] (5) contract theory . . . .” *Lindsey*, 101 Wash. 2d at 303–04, 678 P.2d at 330–31 (internal citations omitted).

8. *Id.* at 304, 678 P.2d at 331 (citations omitted).

9. *Id.* at 305, 678 P.2d at 331.

10. *Connell v. Francisco*, 127 Wash. 2d 339, 346, 898 P.2d 831, 834 (1995). As is clear from *Connell*, the first four of these factors actually first appeared in *Latham v. Hennessey*, 87 Wash. 2d 550, 554–55 (1976), although only in dictum, making the point that there was a “viable alternative approach to the Creasman presumption” which had not been challenged in that case. The “intent” factor seems to have been added by the *Connell* court.

11. *Id.* at 349, 898 P.2d at 836.

has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership . . . .

For the purpose of dividing property at the end of a [committed intimate] relationship, the definitions of “separate” and “community” property found in [Washington’s community property statutes] are useful and we apply them by analogy. Therefore, property owned by one of the parties prior to the [committed intimate] relationship and property acquired during the [committed intimate] relationship by gift, bequest, devise, or descent with the rents, issues and profits thereof, is not before the court for division. All other property acquired during the relationship would be presumed to be owned by both of the parties . . . . Furthermore, when the funds or services owned by both parties are used to increase the equity or to maintain or increase the value of property that would have been separate property had the couple been married, there may arise a right of reimbursement in the “community”. [sic] . . . . A court may offset the “community’s” right of reimbursement against any reciprocal benefit received by the “community” for its use and enjoyment of the individually owned property.<sup>12</sup>

The logical question to ask at this point is how this new “committed intimate relationship” (CIR) regime differs from common law marriage. Unsurprisingly, this issue was addressed by the Court:

Until the Legislature, as a matter of public policy, concludes [CIRs] are the legal equivalent to marriages, we limit the distribution of property following a [CIR] to property that would have been characterized as community property had the parties been married. This will allow the trial court to justly divide property the couple has earned during the relationship through their efforts without creating a common law marriage or making a decision for a couple which they have declined to make for themselves. Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal obligations

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12. *Id.* at 351–52, 898 P.2d at 836–37 (citations omitted). It is important to note the court of appeals in *Warden v. Warden* held that the dissolution statute applied to adjudicate property division at the end of a CIR. *Warden v. Warden*, 36 Wash. App. 693, 676 P.2d 1037 (1984). In reaching this decision the court noted, “[w]e believe the time has come for the provisions of RCW 26.09.080 to govern the disposition of the property acquired by a man and a woman who have lived together and established a relationship which is tantamount to a marital family except for a legal marriage.” *Id.* at 698, 676 P.2d at 1039. In *Connell*, however, the state supreme court made clear that this was error when it recognized “the laws involving the distribution of marital property do not directly apply to the division of property following a meretricious relationship. Washington courts may look toward those laws for guidance.” *Connell v. Francisco*, 127 Wash. 2d 339, 349, 898 P.2d 831, 835 (1995).

are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080 apply to property distributions following a marriage.<sup>13</sup>

How does this distinction between what would have been community and separate property prevent the CIR doctrine from being the functional equivalent of common law marriage? The answer depends on understanding that, under RCW 26.09.080 (Washington's division of property provision for dissolutions), courts are required to determine what assets constitute community and separate property, then divide *all the property* as is "just and equitable."<sup>14</sup> Stated bluntly, Washington divorce courts may—and do—divide both community and *separate property* "equitably" at divorce. But, at the end of a CIR—under the *Connell* rule—the courts may not divvy up separate property unless there is an alternative legal theory providing a basis for a party to claim a share. That is the first difference, which was touched upon in *Connell*.

It is possible to conclude that this difference with true "common law marriage" is not very great, especially if, as is commonly believed, our divorce courts do not typically divide up separate property but instead tend to leave it with the separate property owner.<sup>15</sup> As it turns out, there are a lot more differences between a CIR and marriage, differences which will be addressed near the end of this paper. However, prior to that discussion, this article chronicles the further development of the CIR doctrine.

To begin, it should be pointed out that the legislature has not seen fit to disturb this common law development, which was first set in motion more than

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13. *Connell*, 127 Wash. 2d at 350, 898 P.2d at 836.

14. The full text of the statute notes:

In a proceeding for . . . disposition of property following dissolution of the marriage . . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to: (1) The nature and extent of the community property; (2) the nature and extent of the separate property; (3) the duration of the marriage or domestic partnership; and (4) the economic circumstances of each spouse . . . .

WASH. REV. CODE § 26.09.080 (2018).

15. Although it is outside the scope of this paper, a study of Washington dissolution appellate cases shows that the trial courts frequently do take separate property from one divorcing spouse and give it to the other as part of their "equitable division" powers. Until 1949, there seems to have been a legal doctrine providing that awards of one spouse's separate property to another was only to be done in exceptional cases. However, the Supreme Court has suggested that this is no longer the rule, whatever its status may have had earlier. *Marriage of Konzen*, 103 Wash. 2d 470, 477–78 (1985).

30 years ago.<sup>16</sup> Indeed, as is probably well-known, the legislature has had more important fish to fry. The legislature has been much more concerned with broadening the legal rights of same-sex couples than with worrying about those couples who choose not to take advantage of formal status opportunities. Thus, in 2008, Washington formally recognized “registered domestic partnerships” between same-sex couples and between persons one of whom is 62 years of age or older and gave them the same property rights as a married couple.<sup>17</sup> Further, in 2012, the legislature took the next step and legalized gay marriage.<sup>18</sup> That legislation was tested in Washington’s referendum process, but the people of the state voted to sustain the legislature’s gay marriage statute.<sup>19</sup>

As the legislature has not overturned Washington’s common law CIR doctrine, how has it fared in the courts? In addition to *Marriage of Lindsey and Connell*, the doctrine has given rise to five state Supreme Court decisions of note.<sup>20</sup>

#### SUPREME COURT DECISIONS EXPOUNDING UPON THE DOCTRINE ESTABLISHED IN *LINDSAY AND CONNELL*

In 1989, a surviving partner of a CIR appeared before the Federal District Court for the Eastern District of Washington requesting social security survivor’s

16. For the suggestion that in enacting the Registered Domestic Partnership (RDP) Act, the legislature might have preempted the CIR doctrine, see the discussion in *Walsh v. Reynolds*, 183 Wash. App. 830, 848–50 (2014). The court concluded that the statute did not *retroactively* preempt application of the CIR doctrine to the Walsh/Reynolds relationship which long pre-dated it. But some of the language in the decision seems to leave open the possibility that the RDP Act might have preempted the CIR doctrine going forward, notwithstanding that today, only relationships in which at least one member is 62 or older, can qualify as RDPs.

17. 2008 Wash. Sess. Laws 53–57. Among the rights thus bestowed on RDPs was, of course, community property rights. WASH. REV. CODE § 26.16.030 (2018).

18. 2012 Wash. Sess. Laws 200; *see also* § 26.16.030.

19. Washington Referendum Measure No. 74, approved November 6, 2012. With the introduction of gay marriage, the status of Registered Domestic Partnership for same-sex partners was phased out and now only exists for couples where at least one of the partners is 62 or older. WASH. REV. CODE § 26.60.030 (2018).

20. One Supreme Court case, decided in 1987, declined to extend the CIR doctrine to qualify a partner in a CIR to the “marital status” exception for unemployment benefits. *Davis v. Employment Sec. Dep’t*, 108 Wash. 2d 272, 278, 737 P.2d 1262, 1266 (1987). Another, decided in 2005, relied on the CIR doctrine to make clear that the trial court on remand was expected to reconsider property acquired during such a relationship as well as marital property where the trial court had erroneously considered the wife’s fault in dividing property. *In re Marriage of Muhammad*, 153 Wash. 2d 795, 806, 108 P.3d 779, 785 (2005). The doctrine did not play a significant enough role in either case to merit further discussion.

benefits in *Peffley-Warner v. Bowen*. After losing in the federal district court, Peffley-Warner appealed to the court of appeals for the ninth circuit. That court asked the state Supreme Court whether the surviving partner would have the same rights as a surviving spouse under Washington's law of intestate succession, which is apparently the test for purposes of social security survivors' benefits. The Supreme Court responded in the negative, as "a surviving partner in a [committed intimate] 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 cohabiting relationship is based on equity, contract or trust, and not on inheritance."<sup>21</sup>

In 2000, in *Marriage of Pennington*, the Court actually had before it two alleged CIR cases in each of which one partner challenged the finding below as to the existence of a CIR.<sup>22</sup> The Court took the occasion to show how it believed the five factors enumerated in *Connell* (continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties) should have been applied in these cases.<sup>23</sup> It noted, "[t]hese characteristic factors are neither exclusive nor hyper technical. Rather, these factors are meant to reach all relevant evidence helpful in establishing whether a [committed intimate] relationship exists."<sup>24</sup> Interestingly, the Court concluded that neither of the contested relationships qualified as a CIR, noting:

The first relationship was between Clark Pennington and Evelyn Van Pevenage. When they met, they were married to other people. Van Pevenage divorced her husband shortly after she met Pennington, but Pennington stayed married to his wife during the first five years of his relationship with Van Pevenage. Van Pevenage wanted to get married but Pennington consistently refused. They cohabitated in homes owned by Pennington, but there were periods where they broke up and lived apart. Van Pevenage at some point lived with another man for a brief

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21. *Peffley-Warner v. Bowen*, 113 Wash. 2d 243, 253, 778 P.2d 1022, 1027 (1989). Because of the posture of the case—a certified question from a federal court involving a social security matter—the Court did not have occasion to review what the state probate court had done with the property of the unmarried couple. But it did take occasion to mention that "the [probate] court concluded that the house in which appellant and Mr. Warner lived was Mr. Warner's separate property, but granted appellant an equitable lien of \$1,500 against it." *Id.* at 247, 778 P.2d at 1024. Implicit in that determination seems to have been a conclusion by the superior court that the CIR doctrine and equitable rights applied at death. But as I say, there seems to have been no appellate review of this conclusion.

22. *In re Marriage of Pennington*, 142 Wash. 2d 592, 14 P.3d 764 (2000).

23. *Id.* at 602, 14 P.3d at 770.

24. *Id.*



period. Van Pevenage contributed to some of the living expenses, but the court found no significant pooling of resources. Viewed as a whole, the facts did not indicate a committed intimate relationship. The second relationship was between James Nash and Diana Chesterfield. They lived together for four years, followed by two years of separation and reconciliation until the relationship finally ended. The court found that the duration of the relationship could support a finding of a committed intimate relationship. However, Chesterfield was married to another man for the first several years that she knew Nash, they did not hold themselves out as married, they owned no property jointly, and they kept their finances separate. The court found that the evidence regarding their mutual intent to be in a marital-like relationship was “equivocal,” and the lack of pooling their time and efforts did not justify an equitable division of assets.<sup>25</sup>

The following year, in *Vasquez v. Hawthorne*, the Court was asked whether a trial court had correctly granted summary judgment in favor of the surviving partner of an alleged gay partner on the ground that they had a CIR to which the equitable division theory applied.<sup>26</sup> The Court concluded that the grant of summary judgment was improper in light of the factual disputes regarding the mens’ personal and business relationships.<sup>27</sup> Remanding the decision, the Court also vacated a court of appeals decision which held that the fact that the men could not legally marry was fatal to the application of the CIR doctrine.<sup>28</sup> Further, the Court noted that “[e]quitable 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.”<sup>29</sup> As discussed below, the decision signaled that same-sex partners could take advantage of the CIR doctrine.

Additionally, in *Vasquez*, the Court found nothing inappropriate about applying the CIR doctrine at the death of a partner, as opposed to a “separation” of two living partners, but it spent no significant time discussing the issue.<sup>30</sup> However, in 2007 the Court was forced to address this very question. In *Olver v.*

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25. WASHINGTON COMMUNITY PROPERTY DESKBOOK § 2.7(5) (4<sup>th</sup> ed. 2014).

26. *Vasquez v. Hawthorne*, 145 Wash. 2d 103, 33 P.3d 735 (2001).

27. *Id.* At 107-08, 33 P.3d at 737-38.

28. *Id.* at 107, 33 P.3d at 737.

29. *Id.* One justice wrote separately to state that he thought the couple’s inability to marry was fatal to application of the doctrine and another thought the question should be left to another day. *Id.* at 108, 111, 33 P.3d at 738, 739 (Alexander, C.J., and Sanders, J., concurring).

30. Two justices were of the view that the doctrine should not apply at death. *Id.* at 108, 114, 33 P.3d at 738, 741. Had the majority of the court agreed with them, it seems likely it would have explained that to the court on remand, but it did not. As it happened, the case settled on remand so there was no further illumination on appeal.

*Fowler*, a couple (Cung Ho and Thuy Nguyen Ho), who had been in a fourteen-year committed relationship, were tragically killed (simultaneously) in an automobile accident.<sup>31</sup> A surviving passenger whose mother had also been killed in the accident and who had filed a tort claim against Cung, protested the trial court's determination that half the couple's assets should be in Thuy's estate. The Supreme Court affirmed this decision, tracing the trajectory of its previous cases laying the foundation for the CIR doctrine over 90 years:

By analogy to community property law, Thuy had an undivided interest in the couple's jointly acquired property, even though it was titled in Cung's name. The death of one or both partners does not extinguish that right; Thuy's estate merely steps into her shoes. . . . Cung's heirs should have no better rights than Cung would have, were he still alive.<sup>32</sup>

Notice that, given the workings of the simultaneous death act, this case effectively holds the estate of a deceased CIR partner can "capture" a share of CIR property titled in the name of the survivor. It may even permit the estate of a relatively "wealthy" CIR partner to capture a share of the property owned by a surviving, relatively less wealthy partner. This is because, for purposes of the simultaneous death act, each decedent's property is disposed of as if that decedent had survived the other. In the more complicated (and converse) statutory language:

if the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead, or family allowance depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by one hundred twenty hours is deemed to have predeceased the other individual.<sup>33</sup>

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31. *Olver v. Fowler*, 161 Wash. 2d 655, 658, 168 P.3d 348, 350 (2007).

32. *Id.* at 670–71, 168 P.3d at 356. On the other hand, the court declined to answer another important question in the case: whether the joint property of a CIR was all subject to a "community" tort claim. *Id.* at 672, 168 P.3d at 357. Prior to *Olver*, a few court of appeals decisions had already applied the CIR doctrine in the context of decedent's estates. See *Niemela v. Adderley*, No. 57900-2-I, 2007 WL 1181007 (Wash. Ct. App. 2007) (unpublished); see also *In re Estate of Anderson*, No. 14572-7-III, 1997 WL 6984 (Wash. Ct. App. 1997) (unpublished); John E. Wallace, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem*, 29 SEATTLE U. L. REV. 243, 258, 259, 264, 269, 270, 272, 274 (2005) (advocating for the application of the CIR at death).

33. WASH. REV. CODE § 11.05A.020 (2007).

In *Olver*, Thuy and Cung were deemed to have died simultaneously and this provision applied. Yet, Thuy's estate was held to contain half of their CIR property,<sup>34</sup> even though all the property was titled in Cung's name alone. Had her right to any of the property depended on having survived Cung, this result would not have been appropriate.

Finally, in 2007, the Court reaffirmed that the CIR doctrine only permitted equitable division of what would have been community property. In *Soltero v. Wimer*, a couple in a nine-year CIR broke up, and the trial court ordered Wimer to pay Soltero \$135,000 as the value of her services for "running the household and business/social matters."<sup>35</sup> The problem, acknowledged by the Court, was that the trial court had failed to identify any CIR property from which this amount was to come. Since it amounted to an order that Wimer pay some of his separate property to Soltero, it was error and had to be reversed.<sup>36</sup>

#### COURT OF APPEALS CIR DECISIONS

Such are the milestones set up by the Court in the development of its CIR jurisprudence; lower courts have not been shy about following these markers. A December 1, 2018 Westlaw search by the author yielded *eight* intermediate appeals cases applying the CIR equitable division doctrine that were decided prior

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34. The *Olver* court concluded that each was entitled to half of the CIR property, and did not examine whether this was the appropriate "equitable share" under the circumstances. *Olver*, 161 Wash. 2d at 661–62, 668, 672, 168 P.3d at 355, 357. As will be seen in the discussion of the *Langeland* case in the text below, courts applying the CIR doctrine at death have not concluded that "equity" at death always means "equal." *In re Estate of Langeland*, 177 Wash. App. 315, 318, 328–29, 312 P.3d 657, 659, 661 (2013), *cert. denied*, 180 Wash. 2d 1009, 325 P.3d 914 (2014).

35. *Soltero v. Wimer*, 159 Wash. 2d 428, 432, 150 P.3d 552, 554 (2007).

36. *Id.* at 436, 150 P.3d at 556. It might be that this conclusion resulted from imprecision or a misunderstanding by the trial court. During the nine-year CIR, the trial court had identified earnings by Wimer in a total amount of \$378,000 and by Soltero in a total amount of \$162,000; but as to this indisputably CIR property, the trial court had stated: "An equitable split is Mr. Wimer 70%, Ms. Soltero 30%, therefore, their individual earnings is a push." *Id.* at 432, 150 P.3d at 554. This gave the impression—perhaps accurately—that the court had already decided what the equitable split of the CIR property should be. But if this was not what the court had meant, and had the trial court instead ordered Wimer to pay another \$135,000 to Soltero from his CIR earnings (over and above her \$162,000 in earnings) as an equitable share of all the CIR, the Supreme Court might have affirmed or never taken the case: Had the court done so, Soltero's own earnings of \$162,000 plus \$135,000 of Wimer's would have given her 55% of all the CIR property earned during the relationship (\$540,000), a plausible equitable split of all the CIR property especially given Wimer's greater economic prospects at the end of the relationship. But whether Wimer had \$135,000 left from his CIR earnings is not clear from the decision.

to *Connell*.<sup>37</sup> Additionally, the search yielded *eighty-three* Washington intermediate court of appeals CIR cases applying or interpreting the CIR doctrine as announced in *Connell* (excluding those that gave rise to the supreme court decisions already discussed). Of these ninety-one decisions, including the cases decided before *Connell*, only twenty-four were published decisions; the other sixty-seven were unpublished, perhaps the strongest indication that the doctrine has become settled law in Washington.<sup>38</sup>

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37. All of these were published: *Zion Const., Inc. v. Gilmore*, 78 Wash. App. 87, 91, 895 P.2d 864, 866, 867 (1995) (concluding that the five-year relationship was a CIR and equitably divided property acquired during the relationship), *cert. granted, remanded*, 127 Wash. 2d 1022, 904 P.2d 1157; *In re Marriage of Pearson-Maines*, 70 Wash. App. 860, 865, 855 P.2d 1210, 1214 (1993) (taking into account community property principles during an undisputed CIR); *In re Marriage of Hurd*, 69 Wash. App. 38, 53, 848 P.2d 185, 195 (1993) (concluding that property that was separate before CIR does not change its character in a CIR), *criticized on other grounds*, *In re Estate of Borghi*, 167 Wash. 2d 480, 219 P.3d 932 (2009); *Foster v. Thilges*, 61 Wash. App. 880, 886, 812 P.2d 523, 526, 527 (1991) (holding that the trial court did not err in equitably dividing property acquired during a ten-year CIR); *In re Marriage of Shannon*, 55 Wash. App. 137, 140, 777 P.2d 8, 10 (1989) (holding that the trial court erred in treating property acquired during premarital relationship as if it were community property because “there was no continuous cohabitation prior to the acquisition of the residence, the relationship was of short duration, and there was little or no pooling of resources.”); *In re Marriage of DeHollander*, 53 Wash. App. 695, 699, 770 P.2d 638, 641 (1989) (holding that the trial court did not err in treating property acquired during a “meretricious relationship” two months before marriage as if it were community property); *In re Western Community Bank v. Helmer*, 48 Wash. App. 694, 696, 740 P.2d 359, 360 (1987) (holding that CIR will not support an award of attorneys’ fees); *see also Warden v. Warden*, 36 Wash. App. 693, 694, 697, 698, 676 P.2d 1037, 1038, 1039, 1040 (1984). As explained previously, the *Warden* case is something of an anomaly in this list because its basis for equitably dividing the property was later disapproved by the Court. Arguably, therefore, it was not applying the “CIR equitable sharing doctrine.”

38. If the *Warden* case, discussed at the end of the previous footnote, is added to the tally, there have been 92 court of appeals decisions, of which 25 were published. Among these decisions there were two pairs of repeat appearances in the court of appeals: one pair of published decisions: *In re Estate of Langeland*, 177 Wash. App. 315, 318, 327, 331, 312 P.3d 657, 663, 665 (2013), *cert. den.*, 180 Wash. 2d 1009 (2014); and *In re Estate of Langeland*, 195 Wash. App. 74, 78, 380 P.3d 573, 576 (2016), *cert. den. sub nom.*, *In re Estate of Langeland*, 187 Wash. 2d 1010, 388 P.3d 488 (2017). There is also one pair of unpublished decisions: *Harjo v. Hanson*, Nos. 70562-8-I, 71260-8-I, 2015 WL 249782, at \*1, \*2 (Wash. Ct. App. 2015) (unpublished); *Hanson v. Harjo*, No. 66749-1-I, 2012 WL 4335455, at \*1, \*2 (Wash. Ct. App. 2012) (unpublished). Even this tally requires some judgment calls. The tally does not, for example, include *Veliz v. Dep’t of Labor & Industries*, No. 33303-5-III, 2017 WL 2957740, at \*3, \*5 (Wash. Ct. App. 2017) (unpublished) (Fearing, C.J., dissenting), in which a dissenting judge argued that the Department of Labor and Industries should have considered the CIR doctrine before denying disability marriage benefits to a couple who believed themselves to be married under both Mexican and U.S. law. Nor does it include *Tatham v. Rogers*, 170 Wash. App. 76, 80, 81, 283 P.3d 583, 587 (2012) in which the court of

## PUBLISHED COURT OF APPEALS DECISIONS

A review of the cases shows that the court of appeals has accepted the CIR doctrine and run with it. Of the published court of appeals decisions, three have squarely applied the doctrine to same-sex cases.<sup>39</sup> Two cases have found that a CIR continued notwithstanding infidelity by one of the partners.<sup>40</sup>

Evidence of infidelity weighs against a court's determination that the unfaithful party intended to form a CIR, but is not solely determinative.... The word "intimate" in the term "committed intimate relationship" was not intended to make sexual intimacy the litmus test for whether courts should equitably divide property at the end of the relationship... Sex is not a threshold requirement for intimacy . . . [and] the word "committed" does not mean that infidelity triggers the end of a CIR.<sup>41</sup>

At least two have applied established community property remedies to deal with the commingling of CIR property and labor with a separate property business during the relationship.<sup>42</sup> One appeals court addressed the question when a cause of action for equitable division under the CIR doctrine accrues and held that it accrues when the CIR ends, and must be brought within three years

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appeals granted relief from a judgment dividing property at the end of a CIR based on a violation of the appearance of fairness doctrine by the trial judge. It also excludes cases like *In re Marriage of Jones*, No. 73367-2-I, 2016 WL 3456863, at \*1 (Wash. Ct. App. 2016) (unpublished), in which the petitioner's appeal of a dismissal of her CIR petition was rejected where she had admitted in the trial court that their relationship would not qualify as a CIR. In addition, it could well be that this research failed to discover some relevant cases. Several of the cases found, for example, cite no legal authority for the CIR doctrine, but use the appropriate terminology and doctrine. *In re Estate of Herrin*, No. 32051-1-III, 2015 WL 5124758, at \*1, \*3 (Wash. Ct. App. 2015) (unpublished); *Arroyo v. Fischer*, No. 31586-0-III, 2014 WL 5215583, at \*1, \*10 (Wash. Ct. App. 2014) (unpublished); *In re Riley*, No. 42660-9-II, 2013 WL 1223622, at \*1, \*6 (Wash. Ct. App. 2013) (unpublished).

39. *Walsh v. Reynolds*, 183 Wash. App. 830, 835, 845, 335 P.3d 984, 986, 991 (2014); *In re Long & Fregeau*, 158 Wash. App. 919, 922, 926, 244 P.3d 26, 27, 29 (2010); *Gormley v. Robertson*, 120 Wash. App. 31, 33, 83 P.3d 1042, 1043 (2004). All three involved CIR relationships that existed and ended before gay marriage was legalized.

40. *Muridan v. Redl*, 3 Wash. App. 2d 44, 60–62; 413 P.3d 1072, 1080–81 (2018), *review denied*, 191 Wash. 2d 1002, 422 P.3d 912 (2018); *Long v. Fregeau*, 158 Wash. App. 919, 926, 244 P.3d 26 (2010).

41. *Muridan*, 3 Wash.App.2d at 60–62; 413 P.3d at 1080–81 *relying on* *Marriage of Pennington*, 142 Wash. 2d 592, 604, 14 P.3d 764, 764 (2000) and *Long v. Fregeau*, 158 Wash. App. 919, 926, 244 P.3d 26 (2010).

42. *Koher v. Morgan*, 93 Wash. App. 398, 400, 968 P.2d 920 (1998); *Lindemann v. Lindemann*, 92 Wash. App. 64, 68, 960 P.2d 966, 968 (1998).

from that time: “The three-year statute of limitations applies to actions ‘upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.’”<sup>43</sup> Another, applying the doctrine at the death of one of the parties to the CIR, rejected the estate’s contention that an equitable CIR claim was subject to Washington’s four month non-claims statute.<sup>44</sup> Such a claim, it held, was not a debt owed by the estate but rather more akin to a claim by a spouse or a tenant in common that property to which they were entitled should not be included in the estate inventory.<sup>45</sup> The Washington Court of Appeals determined in another case that because it takes mutual intent to establish a CIR, “when a party to a committed intimate relationship expresses the unequivocal intent to end the relationship, that relationship ends.”<sup>46</sup> Other cases simply apply community property principles to resolve CIR issues. One case held that where a CIR interest in a state pension plan could not be divided under a qualified domestic relations order (QDRO) (because the parties were not married), the court was entitled to award a sum certain to the non-employee representing his CIR share.<sup>47</sup> Another affirmed an award of 36% of the CIR

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43. *In re Kelly & Moesslang*, 170 Wash. App. 722, 735, 287 P.3d 12, 18 (2012) (applying WASH. REV. CODE § 4.16.080(3) (2012)). The Court considered and rejected the argument that the ten-year statute of limitations for recovery of real property was applicable on the grounds that CIRs do not involve vested property rights until it has been determined that a CIR actually existed. It distinguished Supreme Court decisions like *Connell* and *Olver*, which found CIR property rights to have been vested, on the ground that in those cases, the existence of a CIR was not disputed. Since the Supreme Court denied review in *Kelly & Moesslang*, we do not know whether it will find this reasoning sound. Accordingly, equity recognizes a remedy for a CIR action. Such a claim, based upon equity, is subject to a three-year statute of limitations. *In re Kelly & Moesslang*, at 737, 287 P.3d at 12. “A party must sue to establish that the relationship existed within three years of the end of the relationship.” *Id.*; accord *In re Estate of Herrin*, 32051-1-III, 2015 WL 5124758 (Wash. Ct. App. 2015) (unpublished); *Hostetter v. Hanson*, No. 76054-8-1, 2017 WL 5565662 (Wash. Ct. App. 2017) (unpublished); *Thorn v. Cromer*, 34151-8-III, 2017 WL 2294642 (Wash. Ct. App. 2017) (unpublished), all applying the three-year limitations period established in *Kelly*, the latter (*Thorn*) where it had been missed by only one day.

44. *Witt v. Young*, 168 Wash. App. 211, 212–13, 275 P.3d 1218, 1219 (2012).

45. *Id.* at 220, 275 P.3d at 1222 (“Witt’s claim is better characterized as challenging the inclusion of her property in the estate’s inventory. An interested party may challenge an estate’s inventory at any point of the probate proceedings.”).

46. *In re Parentage of G.W.-F.*, 170 Wash. App. 631, 648, 285 P.3d 208, 217 (2012). *But see In re Turner*, No. 50190-2-II, 2018 WL 1920072, at \*5 (Wash. Ct. App. 2018), review denied *sub nom.* *Turner v. Vaughn*, 191 Wash. 2d 1015, 426 P.3d 745 (2018) (the other party must understand that the party purportedly ending the CIR no longer wants to be in the relationship).

47. *In re Partnership of Rhone & Butcher*, 140 Wash. App. 600, 605, 166 P.3d 1230, 1233, 1234 (2007). *But see Owens v. Automotive Machinists Pension Tr.*, 551 F.3d 1138, 1139, 1140, 1142, 1146 (9th Cir. 2009) (discussed in text accompanying n. 75 and 76).

property to one of the partners, noting that equitable division (the standard for dissolution of a married couple as well as at the end of a CIR) does not mean equal division.<sup>48</sup> Another held that since the house at issue was acquired by binding contract before the CIR began, the house was not CIR property and the trial court erred in characterizing it as such and dividing it.<sup>49</sup> Conversely, where an ownership interest was acquired during a CIR, the fact that a buy-out agreement settling the amount of that interest was executed well after the CIR ended does not mean the interest was not CIR property.<sup>50</sup> The published decisions have also made clear that there is no statutory authority to award attorney's fees when a CIR is dissolved during the lives of both partners, whereas there is such authority when the CIR ends at the death of a partner.<sup>51</sup>

*Walsh v. Reynolds* illustrates the complexities implicit in applying the CIR doctrine to a same-sex relationship when a couple migrates to Washington from another community property state.<sup>52</sup> In California, two women started living together in 1988, and registered there as domestic partners in 2000, shortly before moving to Washington. They registered as domestic partners in Washington in 2009, but shortly thereafter, Walsh petitioned to dissolve the domestic partnership.<sup>53</sup> Interestingly, though they had registered as domestic partners in California in 2000, California did not extend community property rights to domestic partners until 2005, long after the couple had moved to Washington.<sup>54</sup> Although the Washington law under which the couple registered in 2009 extended community property rights to domestic partners,<sup>55</sup> the couple only lived

48. *In re Sutton & Widner*, 85 Wash. App. 487, 491, 492, 933 P.2d 1069, 1071, 1072 (1997). Interestingly, however, the court also affirmed the trial court's reduction of Ms. Sutton's share by the rental value of the couple's house because she had exclusive occupancy after the CIR ended, distinguishing a CIR from a marriage in this regard. *Id.*

49. *Byerley v. Cail*, 183 Wash. App. 677, 680, 687, 688, 688–89, 334 P.3d 108, 110, 113, 114 (2014).

50. "The 'property' in question is not the agreement itself, but the underlying ownership interest . . ." *Muridan v. Redl*, 3 Wash. App. 2d 44, 64, 413 P.3d 1072, 1082 (2018).

51. *Compare Helmer W. Cmty. Bank v. Helmer*, 48 Wash. App. 694, 699, 701, 740 P.2d 359, 362, 363 (1987) (denying fees at *inter vivos* dissolution for lack of statutory authority) with *In re Estate of Langeland*, 195 Wash. App. 74, 86, 87, 380 P.3d 573, 580 (2016) (awarding fees at dissolution by death under RCW 11.96A.150). But where a couple gets married (or registers as domestic partners) after a CIR and then dissolves the marriage, sweeping in the CIR property as part of the equitable division, there is, of course, statutory authority for attorneys' fees. WASH. REV. CODE § 26.09.140 (2011); *Walsh v. Reynolds*, 183 Wash. App. 830, 835, 856–58, 335 P.3d 984, 986, 996–97 (2014).

52. *See generally* *Walsh v. Reynolds*, 183 Wash. App. 830, 335 P.3d 984 (2014).

53. *Id.* at 836–837, 335 P.3d at 986–987.

54. *Id.* at 840, 335 P.3d at 988–89.

55. WASH. REV. CODE § 26.60.010 (2007).

under that regime for a short time before Walsh petitioned for dissolution. Thus, they never had occasion to accumulate community property. Confronted by this set of circumstances, the trial court held that Washington's CIR doctrine applied, but only as of 2005 when California, where the couple was no longer living, extended community property rights to domestic partners.<sup>56</sup> The court reached this decision despite suggesting that all indicia of a CIR were present as early as 1988. Apparently, the trial court believed it would violate due process to apply CIR doctrine to the couple before California conferred community property rights on domestic partners in 2005.<sup>57</sup> However, the court of appeals reversed, concluding that there were no legal obstacles to applying the equitable doctrine prior to 2005, provided that the CIR criteria were met. The Court of Appeals remanded the case for the trial court to determine whether a CIR existed prior to 2005 as the trial court had implied, and, if so, to divide the CIR property equitably.<sup>58</sup> The court did not engage in any conflict of laws analysis.<sup>59</sup>

Another important CIR case gave rise to two published court of appeals decisions and may be of particular interest to estate planners and probate attorneys.<sup>60</sup> The partners, Randall Langeland and Sharon Drown, were engaged in a CIR from 1991 until Langeland's death without a will in 2009.<sup>61</sup> "Langeland became ill in 1998. From 2003 until his death, he required daily medication and care as his medical condition became more complicated. Drown cared for him. She also maintained the home and sailboat, while continuing to work full time."<sup>62</sup> Randall's daughter, Boone, served as his personal representative and stipulated to the existence of a CIR, but that is all she agreed to.<sup>63</sup>

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56. *Walsh*, 183 Wash. App. at 835, 840, 335 P.3d at 986, 989.

57. *Id.* at 851–52, 335 P.3d at 994.

58. *Id.* at 859, 335 P.3d at 998. The court of appeals did note, however, that neither party raised a due process issue on appeal. *Id.* at 852 n.23, 335 P.3d at 994 n.23.

59. Prior to *Walsh*, the court of appeals had applied the CIR doctrine to another migrating couple in *In re Marriage of McCarthy*, No. 30029-3-111, 2012 WL 3580059 (Wash. App. 2012). The trial court concluded that a couple had entered into a CIR in Louisiana in 1992 and maintained it there for almost ten years, before they moved to Washington and married in 2002. *Id.* at \*1, \*2. The court of appeals affirmed that determination by the trial court and also its equitable division of property, including CIR property acquired in Louisiana. *Id.* at \*4, \*8. As in *Walsh*, the court did not raise the conflict of laws issue.

60. *In re Estate of Langeland*, 177 Wash. App. 315, 312 P.3d 657 (2013), *cert. denied*, 180 Wash. 2d 1009, 325 P.3d 914 (2014) ("Langeland I"); *Estate of Langeland v. Drown*, 195 Wash. App. 74, 380 P.3d 573 (2016), *cert. den. sub nom.*, *Estate of Langeland*, 187 Wash. 2d 1010, 388 P.3d 488 (2017) ("Langeland II").

61. *In re Estate of Langeland*, 177 Wash. App. at 319, 327, 312 P.3d at 659, 660, 664.

62. *Drown*, 195 Wash. App. at 80, 380 P.3d at 577.

63. *In re Estate of Langeland*, 177 Wash. App. at 319, 321, 312 P.3d at 660.



The probate assets itemized in the personal representative's inventory as Langeland's property . . . include the proceeds from a software company Langeland founded in 1994, a house that he purchased with Drown in 1999, and a thirty-six-foot sailboat purchased in 1998. The [trial] court, relying on the presumption of correctness for this inventory, required Drown to prove her ownership interest. It rejected Drown's claim that the court should presume joint ownership of assets acquired while she and Langeland cohabited and applied the dead man's statute to limit Drown's testimony.

When Drown failed to meet the burden of proving that she owned any interest in the contested assets, the court awarded nearly all of the assets to Langeland's only heir, Boone. It found that Drown proved her rights to the Fidelity IRA, on which she was named as beneficiary, and 24.7 percent ownership of the couple's Bellingham home, based upon a promissory note executed by Drown and Langeland. Characterizing Drown's claims as baseless, the court awarded attorney fees to the estate for defending against Drown's claims. It denied Boone's request for fees relating to the IRA award. Drown appealed the award of property and fees to Boone; Boone cross appealed the award of the IRA to Drown and the court's denial of fees related to that claim.<sup>64</sup>

In the first appeal, *Langeland I*, the court rejected the trial court's decision that the inventory the daughter had filed should prevail. After a thoughtful analysis of conflicting presumptions, the court that "the presumption that property acquired during an intimate committed relationship is jointly owned prevails over the presumption of correctness for an estate inventory."<sup>65</sup> Moreover, Boone had failed to overcome that presumption; accordingly, the court vacated the award of fees to the daughter and remanded for an equitable division.<sup>66</sup> It did, however, reject Drown's argument that the intestacy statute should apply by analogy and give Drown 100% of the CIR property, and additionally rejected her argument that any conclusion that "contested probate assets were jointly owned [would] require that the trial court divide them equally between Drown and Boone."<sup>67</sup> Interestingly, the daughter also contested the trial court's decision to award to Drown the funds in a Fidelity IRA on which Langeland had named her the beneficiary, claiming that Drown had failed to prove that she had not exercised undue influence in getting Langeland to roll his pension plan over into the IRA and name her as beneficiary.<sup>68</sup> But the court of appeals also rejected this argument:

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64. *Id.* at 319–20, 312 P.3d at 660.

65. *Id.* at 327, 312 P.3d at 663.

66. *Id.* at 329, 331, 312 P.3d at 664, 665.

67. *Id.*

68. *Id.*

Designating a life insurance beneficiary is not an *inter vivos* gift because the designation is “merely a means of transmitting property at death” and the beneficiary has no rights before the insured’s death. Similarly, naming the beneficiary of an IRA is not an *inter vivos* gift. As a result, the cases involving an *inter vivos* gift relied upon by Boone have no application. Drown did not have the burden of proving by clear, cogent, and convincing evidence the validity of the beneficiary designation and the absence of undue influence.<sup>69</sup>

On remand, the trial court “awarded Drown half of the joint property assets. It also found that *equity required it to distribute most of the estate’s half of the joint property assets to Drown.*”<sup>70</sup> This distribution included “the other half interest in the house [total value \$235,000.00], the company bank account [\$19,250], the estate bank account [\$6,453], a 2007 Toyota [\$8,000], and household personal property [\$1,078]. The trial court awarded [the daughter] Boone the estate’s half of the proceeds from sale of the sailboat [\$75,250] and a 2002 Honda [\$4,500].”<sup>71</sup> On appeal, Boone asserted that there had been a separate property agreement between her father and Drown, but the court of appeals rejected this argument. First, it had been decided in the first appeal; second, even if it had not been decided, at most the alleged agreement pertained to management of property rather than to ownership; and third, “Drown’s testimony showed that she did not understand the terms or the purpose of the agreement Boone now asserts. Thus, substantial evidence supports the trial court’s findings that that agreement was not executed freely and voluntarily or with full candor and sincerity toward Drown.”<sup>72</sup> Additionally, Boone complained that the trial court had not divided assets that Drown had acquired during the CIR. The court of appeals agreed that such assets would have been subjected to equitable division under CIR doctrine, but rejected Boone’s argument anyway on the ground that Boone had not included an equitable share in any of these assets in her inventory of Langeland’s estate, and had not challenged the inventory until

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69. *Id.* at 330–31, 312 P.3d at 665. Interestingly, the court went on to say: “The court heard testimony from Drown about her role in assisting Langeland to create the rollover IRA; it heard testimony from Boone’s expert witness opining that Langeland’s signature on the transfer documents was a forgery; and it heard Drown’s denial of any wrongdoing. The court ultimately found the IRA beneficiary designation valid. Substantial evidence supports the court’s findings on this issue.” *Id.*

70. *In re Estate of Langeland v. Drown*, 195 Wash. App. 74, 81, 380 P.3d 573, 577 (2016), *review denied sub nom.* *Estate of Langeland*, 187 Wash. 2d 1010, 388 P.3d 488 (2017) (emphasis added).

71. *Id.* As tallied, in the “equitable division” Drown was awarded \$269,781 and Boone \$79,750.

72. *Id.* at 84, 380 P.3d at 578–79.

this second appeal.<sup>73</sup> Finally, the court of appeals ordered restitution to Drown in excess of \$70,000 in fees that had been withdrawn prior to vacating the fee award to Boone.<sup>74</sup>

In short, *Langeland* was a dramatic application of the CIR doctrine which affirmed a very generous “equitable” division in favor of a surviving partner. Although Drown had unsuccessfully argued that she should be treated like a surviving spouse under the intestacy statute, she ended up with almost all the CIR assets as a *matter of equity*. *Langeland* demonstrates how generous courts may be in protecting a surviving partner. It also illustrates the point made earlier in the discussion of *Olver*: the applicability of the CIR doctrine at death means that the estate of the first to die—even where the first to die is the wealthier partner—should be able to capture an “equitable share” of property acquired by the survivor during the CIR. *Langeland*’s estate failed to argue for such a share early enough, but the court of appeals was clear that it would have been proper had the claim been made properly.<sup>75</sup>

Finally, the court of appeals in *In re Marriage of Neumiller*<sup>76</sup> held that a CIR is not required to be pled in a *marital dissolution proceeding* for it to be considered in the division of property.<sup>77</sup> The couple had apparently been in a CIR for seven years prior to their four-year marriage. The wife had not alleged a CIR in her original petition, to which her husband responded on the day of trial. That same day, over husband’s objection, wife filed an amended petition which did allege a CIR. The trial court reserved judgment on the husband’s objection and allowed the wife to testify about the relationship, but at the time of judgment, the court concluded that the CIR had been raised “way too late in the game for the Court to consider it here.”<sup>78</sup> The court of appeals disagreed: “[W]e do not believe that [a CIR] needs to be pleaded when it is merely an evidentiary fact in a marriage dissolution proceeding. Like any evidence, or theory of a case, it typically would be disclosed in pre-trial discovery, but evidence does not need to be included in the pleadings before it is admissible at trial.”<sup>79</sup> Accordingly, the

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73. *Id.* at 86, 380 P.3d at 580.

74. *Id.* at 92, 380 P.3d at 583.

75. Of course, this still leaves open the question what an equitable share would be for the estate of the first to die, where the deceased partner is no longer around to enjoy that share and only his or her heirs and legatees will benefit.

76. *In re Marriage of Neumiller*, 183 Wash. App. 914, 335 P.3d 1019 (2014). Interestingly, the court of appeals cites *Marriage of Lindsey* but not *Connell* for the basic CIR doctrine.

77. *Id.* at 923, 335 P.3d at 1024.

78. *Id.*

79. *Id.* at 922, 335 P.3d at 1023–24.

court remanded the case for the trial court to determine whether a CIR had existed and, if so, how it would affect characterization and division of property.

#### UNPUBLISHED CIR DECISIONS

As noted, there have been a number of unpublished Washington Court of Appeals decisions applying the CIR doctrine. Many of these simply apply the CIR standards and rules previously announced by the Washington Supreme Court.<sup>80</sup> Some of the unpublished decisions, however, have dealt with

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80. See, e.g., *In re Turner*, No. 50190-2-II, 2018 WL 1920072 (Wash. Ct. App. 2018) (unpublished), *review denied sub nom.* *Turner v. Vaughn*, 191 Wash. 2d 1015, 426 P.3d 745 (2018); *Hostetter v. Hanson*, No. 76054-8-I, 2017 WL 5565662 (Wash. Ct. App. 2017) (unpublished) (substantial evidence supported determination that relationship was a CIR, when it ended, and the division of property at its end); *In re Washburn*, No. 74977-3-I, 2017 WL 4773442 (Wash. Ct. App. 2017) (unpublished) (substantial evidence supported characterization and division of CIR property at end of a sixteen-year undisputed CIR); *Marriage of Galando*, No. 74427-5-I consolidated with No. 74428-3-I, 2017 WL 3701694 (Wash. Ct. App. 2017) (unpublished) (substantial evidence supported finding of a four-year CIR prior to a fourteen-year marriage); *Rowe v. Rosenwald*, 199 Wash. App. 1006 (2017) (unpublished) (enforcing a prenuptial agreement to live separate as to property where couple never legally married); *Morgan v. Briney*, 199 Wash. App. 1038 (2017) (unpublished) (CIR found despite fact that one of the partners moved out for 8 month; Briney failed to trace his down payment on the CIR house to separate property; Morgan failed to prove that the increase in value of Briney's separate property resulted from CIR labor); *Marriage of Morelli*, 194 Wash. App. 1022 (2016) (unpublished) (rejecting claim for good will added to a separate property business partly during a CIR because business valuation evidence allocated no part of value to good will); *Harjo v. Hanson*, 2015 WL 249782 (2015); *In re Caldwell & Hanselman*, 175 Wash. App. 1055 (2013) (unpublished) (trial court did not err in finding no CIR where the couple lacked a mutual intent to form such a relationship after the initial phase of the relationship); *In re Riley*, No. 42660-9-II, 2013 WL 1223622 (Wash. Ct. App. 2013) (unpublished) (refusing to enforce an agreement to the contrary based on mutual mistake of fact and equitably dividing retirement assets acquired during a CIR); *Hanson v. Harjo*, No. 66749-1-I, 2012 WL 4335455 (2012) (unpublished) (affirming an equitable division at end of CIR with remands to take care of a few details); *In re Houttekier*, No. 29574-5-III, 2012 WL 927097 (Wash. Ct. App. 2012) (unpublished) (court will not disturb an equitable division of CIR property which is fair on the basis of a small error); *Ketchum v. Miller*, No. 30078-1-III, 2012 WL 6085294 (Wash. Ct. App. 2012) (unpublished) (trial court should have distributed as CIR property the value of CIR improvements to one partner's separate property during a CIR); *Van Allen v. Weber*, Nos. 42169-1-II, 42569-6-II, 2012 WL 6017690 (Wash. Ct. App. 2012) (unpublished) (affirming characterization and division of CIR property); *In re Marriage of Burns*, No. 65117-0-I, 2011 WL 5112875 (Wash. Ct. App. 2011) (unpublished) (court properly applied community property principles to house purchased during an eight-year CIR, one year before marriage); *Ingram v. Riddle*, No. 40220-3-II, 2011 WL 1259534 (Wash. Ct. App. 2011) (unpublished) (property acquired after a CIR terminated not subject to equitable division); *In re Marriage of Coram & Mair*, No. 28890-1-III, 2011 WL 4918507 (Wash. Ct. App. 2011) (unpublished) (court did not err in concluding that the couple's six-year

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relationship preceding its twelve-year marriage was not a CIR, nor did it err in division of property); *Ross v. Hamilton*, No. 39887-7-II, 2011 WL 1376767 (Wash. Ct. App. 2011) (unpublished) (CIR properly found and property division was within trial court's discretion); *Davis v. Lewis*, No. 63349-0-I, 2011 WL 61845 (Wash. Ct. App. 2011) (unpublished) (pro se partner presented no evidence or authority in his challenge to the trial court's determination of a nine-year CIR and division of property, so they are affirmed); *Defoor v. Defoor*, No. 62519-5-I, 2010 WL 3220165 (Wash. Ct. App. 2010) (unpublished) (court did not err in characterizing property at end of a fourteen-year post-marital CIR, but remand necessary to clarify treatment of a debt and to count one asset only once); *Culbert v. Estate of Koehler*, No. 27775-5-III, 2010 WL 1374270 (Wash. Ct. App. 2010) (unpublished) (court found a twenty-four-year CIR but denied survivor's claim for an equitable share of estate since he failed to show any CIR property available for division); *Stanford v. Villanueva*, No. 62126-2-I, 2009 WL 2992592 (Wash. Ct. App. 2009) (unpublished) (trial court did not err in concluding that the fourteen-year relationship did not meet the factors for a CIR); *In re Marriage of Briskey*, No. 36035-7-II, 2008 WL 2503658 (Wash. Ct. App. 2008) (unpublished) (trial court did not err in determining the Pennington factors did not support the finding of a CIR); *Duncan v. Peterschick*, No. 26162-0-III, 2008 WL 1952285 (Wash. Ct. App. 2008) (unpublished) (trial court did not err in finding no CIR because couple lacked the intent to form such a relationship); *In re Marriage of Bolster*, No. 59623-3-I, 2008 WL 4069457 (2008) (unpublished) (applying CIR principles to pre-marital cohabitation at end of marriage); *In re Marriage of Ellis*, No. 58741-2-I, 2007 WL 2175035 (Wash. Ct. App. 2007) (unpublished) (affirming trial court treatment of house and business acquired during a six-year CIR before marriage as community property at dissolution of marriage); *Niemela v. Adderley*, No. 57900-2-I, 2007 WL 1181007 (Wash. Ct. App. 2007) (unpublished) (affirming determination that no CIR existed, but presupposing that such a claim was viable where the matter was tried after the death of a partner); *Cutter v. Estate of Devereaux*, No. 58124-4-I, 2007 WL 1739680 (Wash. Ct. App. 2007) (unpublished) (trial court properly held that the 15-year relationship did not meet two of the Pennington factors and so was not a CIR, thus defeating surviving partner's claim to an equitable share of estate of deceased partner who had explicitly dis-inherited him by will); *Bell v. Leppard*, No. 57840-5-I, 2006 WL 2468760 (Wash. Ct. App. 2006) (unpublished) (trial court did not err in applying factors and concluding there was no CIR); *In re Relationship of Cook, Kemp*, No. 23866-1-III, 2006 WL 2349946 (Wash. Ct. App. 2006) (unpublished) (trial did not err in concluding that the couple had a ten-year CIR); *Fenn and Lockwood*, No. 33595-6-II, 2006 WL 3629147 (Wash. Ct. App. 2006) (unpublished) (CIR properly found but item that was not CIR property should not have been divided); *In re Marriage of Bostain*, No. 30450-3-II, 2005 WL 1177586 (Wash. Ct. App. 2005) (unpublished) (affirming determination that a CIR existed for seven years prior to a three-year marriage, and affirming determination that alleged "non-marital" agreement was unenforceable); *In re Parentage of M.L.*, No. 31691-9-II, 2005 WL 3541567 (Wash. Ct. App. 2005) (unpublished) (trial court properly concluded under Pennington factors that there was no CIR); *Chen v. Shulman*, No. 55402-1-I, 2005 WL 2002154 (Wash. Ct. App. 2005) (unpublished) (trial court erred in granting summary judgment for partner denying that there was a CIR); *Armstrong v. Armstrong*, No. 53565-0-I, 2005 WL 941948 (2005) (unpublished) (court properly determined beginning of CIR prior to marriage and property division); *In re Marriage of Merritt, Focese*, No. 21461-3-III, 2004 WL 1158033 (Wash. Ct. App. 2004) (unpublished) (trial court did not err in rejecting claim that there was a three-year CIR preceding the nine-year marriage); *Vo v. Tran*, No. 30007-9-II, 2003 WL 22847074 (Wash. Ct. App. 2003) (unpublished) (Finding of

unanswered or incompletely answered questions relating to CIRs. Unpublished opinions in Washington may be cited as non-binding authority if they are filed on or after March 1, 2013.<sup>81</sup> Many of the unpublished decisions in this paper were decided prior to that date. Nonetheless, those unpublished cases are cited and described here to illustrate the variety of issues that arise, as well as demonstrate the penetration of the *Connell* doctrine into Washington's common law.

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a CIR prior to marriage was proper as was property characterization and division); *Gower v. Shinstrom*, No. 49775-8-I, 2003 WL 352880 (Wash. Ct. App. 2003) (unpublished) (Finding of a CIR proper & characterization of CIR property affirmed, based on commingling doctrine); *In re Marriage of McCarty*, No. 28939-3-II, 2003 WL 23028549 (Wash. Ct. App. 2003) (unpublished) (where trial court found the couple's three-year marriage to be invalid, but characterized substantial property as community property and divided it accordingly, it did not matter whether the couple had a CIR or only an invalid marriage); *Cunningham v. Burns*, No. 47868-1-I, 2002 WL 1609045 (Wash. Ct. App. 2002) (unpublished) (affirming property division in a CIR, including court's determination that a \$40,000 down payment on a key piece of CIR property was the separate property of one of the parties); *Rota v. Vandver*, No. 25039-0-II, 2001 WL 1521996 (Wash. Ct. App. 2001) (unpublished) (CIR property found, noting that *Connell*'s five factor test "requires the court to consider such factors as whether the parties have been faithful to each other" which would not be taken into consideration in the dissolution of a marriage); *In re Parentage of G.C.M.-N.*, No. 47185-6-II, 2001 WL 879002 (Wash. Ct. App. 2001) (unpublished) (litigant may not challenge the finding that a CIR existed for the first time on appeal); *Henry v. Henry*, No. 18128-6-III, 2000 WL 155093 (Wash. Ct. App. 2000) (unpublished) (trial court did not err in rejecting claim that there was a four-year CIR before the couple's ten-year marriage); *Marriage of Kinzer*, No. 16035-1-III, 1998 WL 151795 (Wash. Ct. App. 1998) (unpublished) (twenty-three-month pre-marital relationship was long enough to support a CIR under *Marriage of Lindsey*); *In re Estate of Anderson*, No. 14572-7-III, 1997 WL 6984 (Wash. Ct. App. 1997) (unpublished) (finding a CIR and that survivor was entitled to a share of enhanced value resulting from CIR labor, but finding an abuse of discretion in valuation of CIR right of reimbursement for value added to one partner's separate property); *Marriage of Damon-Rau*, No. 19860-6-II, 1997 WL 671997 (Wash. Ct. App. 1997) (unpublished) (trial court did not err in finding a three-year CIR preceding a four-year marriage); *Carow-Wood v. Wood*, No. 38555-1-I, 1997 WL 344816 (Wash. Ct. App. 1997) (unpublished) (court did not have long-arm jurisdiction to adjudicate a CIR part of which allegedly occurred in Washington because it ended in Oregon when claimant was residing there); *Marriage of Parfomchuk*, No. 37603-9-I, 1997 WL 177445 (Wash. Ct. App. 1997) (unpublished) (trial court did not err in characterizing property acquired during a three-year CIR that preceded a ten-year marriage based on community property presumptions); *Fletcher v. Olmstead*, No. 19319-1-II, 1996 WL 734263 (Wash. Ct. App. 1996) (unpublished) (affirming denial of a CIR and, in the process, the award to only one of the cohabitants the \$3.5 million winnings from a lottery ticket purchased during the relationship).

81. "[U]npublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.." Washington Supreme Court General Rule 14.1, as amended September 1, 2016. Presumably such opinions filed before March 1, 2013, may not be cited, as was the prior rule.

- May a CIR be formed even though one of the parties remains married and legally unable to marry anyone else? In principle, this question was addressed in dictum in *Vasquez* when it stated that the CIR doctrine does not depend on the legality of the relationship, since at the time same-sex partners were not legally able to marry (or even enter into a registered domestic partnership).<sup>82</sup> And that lesson was applied in *Fleming v. Spencer*, in which the court of appeals affirmed the finding of a CIR notwithstanding that one of the parties was still married when it commenced.<sup>83</sup>
- Must a litigant claiming a CIR satisfy all five of the *Connell* factors to establish a valid CIR? The answer is yes, according to the Division One Court of Appeals in *Seven v. Stoel Rives, LLP*: The opinion states that “[a]lthough the five factors in *Connell* are not meant to be exclusive, they are each essential elements of a CIR . . . . [C]ontinuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties . . . are the minimum requirements.”<sup>84</sup> However, another panel of Division One, *Jones v. Danforth*, answered in the negative, stating: “[i]n summary, reasonable persons could find four of the five factors satisfied in this case. Because the factors are merely guidelines and are not to be rigidly applied, we conclude that reasonable minds could reach different conclusions as to whether the factors demonstrate a meretricious relationship in this case.”<sup>85</sup>
- Does the CIR doctrine apply retroactively? That seems to have been the assumption of the court in *Arroyo v. Fischer*. The couple did not dispute the existence of a CIR from 1973-1983. At the time of their separation, however, the CIR doctrine was not recognized, let alone applied to a same-sex couple. In 1983, they divided up some, but not all, of their

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82. *Vasquez v. Hawthorne*, 145 Wash. 2d 103, 107, 33 P.3d 735, 737 (2001). At least one of the partners remained married to another in each of the two cases decided in *In re Marriage of Pennington*, 142 Wash. 2d 592, 604, 14 P.3d 764, 771 (2000). However, the Washington Supreme Court did not suggest this was dispositive in either case when it found that there was insufficient evidence of a CIR in each.

83. *Fleming v. Spencer*, No. 47872-9-I, 2002 WL 171249 (Wash. App. 2002) (unpublished).

84. *Seven v. Stoel Rives, LLP*, No. 64117-4-I, 2010 WL 5477191, at \*2, \*5 (Wash. Ct. App 2010) (unpublished).

85. *Jones v. Danforth*, No. 48547-4-I, 2002 WL 80695, at \*3 (Wash. Ct. App. 2002) (unpublished).

property. In 2011, one of the ex-partners brought a suit to secure a property interest in two pieces of real estate that had been acquired during the relationship, twenty-eight years in the past. Rather than enforce an agreement that the partners had executed during their CIR, the trial court concluded that the agreement had been abandoned during the relationship and applied the CIR equitable division doctrine to divide up the properties. The court of appeals affirmed, without any consideration of any potential retroactivity or statute of limitations issue. (Additionally, the court affirmed attorney's fees awarded to one of the women because the other had apparently forged a quitclaim deed ostensibly executed by the other and had relied on it at trial).<sup>86</sup>

- How rigidly will a court insist on applying the principles developed in community property cases for “uncommingling” community property and separate property in a CIR case? As noted earlier, published CIR cases have applied community property principles to uncommingle separate property assets to which funds and labor were contributed during the relationship.<sup>87</sup> In *In re Washburn*,<sup>88</sup> the court of appeals examined a CIR with facts remarkably like *Marriage of Elam*,<sup>89</sup> one of the leading “uncommingling” community property cases. Over the objection of the separate property owner, the court of appeals affirmed a trial court decision in which the trial court had failed to explain its method for calculating an equitable share awarded to the CIR against the separate property in the way that *Marriage of Elam* indicated should be done.<sup>90</sup> The *Washburn* Court affirmed the trial court's refusal to give an offset for the seventeen years the couple had lived in the separate property house rent free, on the ground that such an offset is discretionary.<sup>91</sup>

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86. *Arroyo v. Fisher*, No. 31586-0-III, 2014 WL 5215583 (Wash. Ct. App. 2014) (unpublished).

87. *See, e.g., Koher v. Morgan*, 93 Wash. App. 398, 968 P.2d 920 (1998) (separate property business); *accord Lindemann v. Lindemann*, 92 Wash. App. 64, 960 P.2d 966 (1998).

88. *In re Washburn*, No. 74977-3-I, 2017 WL 4773442 (Wash. Ct. App. 2017) (unpublished).

89. *Elam v. Elam*, 97 Wash. 2d 811, 650 P.2d 213 (1982).

90. In *Elam*, the court indicated that “each spouse [is entitled] to the increase in value during the marriage of his or her separately owned property, except to the extent to which the other spouse can show that the increase was attributable to community contributions” and then showed what such proof might look like with a formula. *Elam v. Elam*, 97 Wash. 2d 811, 816–17, 650 P.2d 213, 216 (1982). Such an approach seems to have been lacking in *In re Washburn*. *See In re Washburn*, No. 74977-3-I, 2017 WL 4773442, at \*2 (Wash. Ct. App. 2017) (unpublished).

91. *Washburn*, 2017 WL 4773442, at \*4–5.



Neither result is easy to reconcile with Washington Supreme Court precedent.

- How will a court handle debt incurred during CIR? Washington follows a “community debt” system under which obligations are classified as either separate or community from the outset of a marriage. It appears that courts are generally applying the same rules to CIRs. In *Moseley v. Mattila*, the court noted that: “[d]ebt incurred during a relationship for community-like purposes is considered community-like debt.”<sup>92</sup> Similarly, in *Rota v. Vandver*, the court held that where property was acquired during a CIR in part with inherited property and in part with a bank loan, the part purchased with the loan proceeds would be presumed to be CIR property: “[t]he parties covered the balance of the home with a loan acquired during the relationship; we presume this is jointly owned property.”<sup>93</sup> On the other hand, in *In re Black*, Ms. Einstein purchased a farm in Washington during a CIR and made a down payment with her separate property and borrowed the rest. Mr. Black did not obligate himself on the loan. The court concluded that the farm was entirely Ms. Einstein’s separate property, even though there would have been a presumption that the loan was made to the community and made community debt had the couple been married in Washington.<sup>94</sup> The court does not discuss the community debt doctrine in reaching its determination and

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The court said that the right to an offset was discretionary, but a close reading of the authority on which it relied, *Marriage of Miracle*, reveals that the court there said the award of an equitable lien to reimburse the community was discretionary after considering offsets: “A right to reimbursement may not arise if the contributing spouse received a reciprocal benefit flowing from the use of the property . . . . The trial court must take into account all the circumstances in deciding whether a right to reimbursement has arisen.” *Miracle v. Miracle*, 101 Wash. 2d 137, 139, 675 P.2d 1229, 1230–31 (1984).

92. *Moseley v. Mattila*, No.53497-1-I, 2005 WL 1178063 (Wash. Ct. App. 2015) (unpublished). The *Moseley* court additionally applied the so-called “Hurd” presumption developed in community property cases, under which use of separate property to acquire title in the joint names of a couple would be presumed a gift of the separate property to the community. The Supreme Court has since overruled this presumption. *In re Estate of Borghi*, 167 Wash. 2d 480, 491, 219 P.3d 932, 938 (2009).

93. *Rota v. Vandver*, No. 25039-0-II, 2001 WL 1521996 (Wash. Ct. App 2001) (unpublished).

94. *In re Black*, No. 64903-5-I, 2010 WL 2994049 (Wash. Ct. App. 2010) (unpublished). Having decided that the farm was her separate property, the court went on to give the CIR a right of reimbursement in 20% of its value because his contributions of CIR labor increased the value of the farm. *Id.* at \*5.

this result is arguably inconsistent with the general Washington community property doctrine.

- Will an injury to one partner during a pre-marital CIR support a claim for loss of consortium during marriage? No, held the court in *Vance v. Farmers Ins. Co.*, declining to depart from the rule in Washington that a premarital injury will not support a loss of consortium claim during marriage unless it was latent and undiscoverable at the time of marriage.<sup>95</sup>
- If a couple has children together and co-parents them, should this be conclusive evidence of a CIR? In *Hobbs v. Bates*, Hobbs argued that the court should follow the recommendations of the ALI Principles of the Law of Family Dissolution, section 6.03, and so hold. But the court declined to do so, finding the five factor *Connell* test was sufficient within making child rearing a litmus test.<sup>96</sup> Indeed, it went on to conclude that Hobbs and Bates had not formed a CIR because they had not pooled resources or functioned as an economic unit, suggesting that this was more important than other factors: “Because the nature of the common law claim of [a committed intimate] relationship operates primarily as a property claim, pooling of economic resources and functioning as an economic unit is an important factor in determining whether the parties ever intended to create a [committed intimate] relationship whereby each party would have an interest in property acquired during the relationship.”<sup>97</sup>
- Might failure to properly advise a client on the implications of the CIR doctrine give rise to legal malpractice claims? Clearly yes, although none that has reached the court appeals seems to have been successful to date. In *Taylor v. Goddard*, shortly after *Connell* was decided, Taylor’s lawyers advised him to settle when his CIR partner sought an accounting for her share of his several companies based on her CIR labor.<sup>98</sup> On their advice, he agreed to pay her \$750,000, and to indemnify her for the taxes on \$600,000 of this. When the tax liability on top of this \$750,000 grew

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95. *Vance v. Farmers Ins. Co.*, No. 76092-1-I, 1 Wash. App. 2d 1007 (2017) (unpublished); *accord* *Roosma v. Pierce Cnty*, 3:16-cv-05499-RJB, 2018 WL 784590 (W.D. Wash. 2018) (slip copy).

96. *Hobbs v. Bates*, No. 51463-6-I, 2004 WL 1465949 (Wash. Ct. App. 2004) (unpublished).

97. *Id.* at \*12.

98. *Taylor v. Goddard*, No. 49164-4-I, 2002 WL 31058539 (Wash. Ct. App. 2002) (unpublished).

to \$386,233 (including approximately \$152,000 in “tax on tax”)<sup>99</sup> he sued the lawyers for malpractice. But his malpractice claim was thrown out on summary judgment for failure to have shown breach of duty and/or proximate cause.<sup>100</sup> Similarly, in *Seven v. Stoel Rives, LLP*, Seven sued Stoel Rives for malpractice on the theory that they had failed to advise her of the CIR doctrine when her partner had died, thus depriving her of a chance to claim an equitable share of his estate. But the court again granted summary judgment to the law firm because Seven failed to show a triable issue on all the *Connell* factors.<sup>101</sup>

- May misconduct of one of the partners to a CIR be grounds for denying an equitable share? Yes, held the court in *In re Marriage of Bailey*, at least if it is financial “misconduct.”<sup>102</sup> The couple had lived together for four years before marrying and had been married for two when a guardian was appointed for the husband and filed for dissolution. The trial court determined that even if they had been in a CIR for four years before marriage, he would have denied an equitable share because of the wife’s misconduct. She argued that this ran afoul of the rule that marital misconduct may not be considered under RCW 26.09.080. But the court of appeals disagreed. “[T]he ‘marital misconduct’ which a court may not consider under RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross financial improvidence, the squandering of marital assets, or . . . the deliberate and unnecessary incurring of tax liabilities.”<sup>103</sup> Washington courts have repeatedly “held that negatively productive conduct that causes the dissipation of marital assets can be considered” in shaping a

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99. See *Meretricious Relationship of Moran v. Taylor*, No. 43242-7-I, 2000 WL 291143 (Wash. Ct. App. 2000) (unpublished) (court of appeals enforced the Taylor/Moran agreement).

100. *Taylor*, 2002 WL 31058539 at \*4–5.

101. *Seven v. Stoel Rives, LLP*, No. 64117-4-I, 2010 WL 5477191, at \*2, \*5 (Wash. Ct. App 2010) (unpublished).

102. See *In re Marriage of Bailey*, No. 69616-5-I, 2014 WL 2573978 (Wash. Ct. App. 2014) (unpublished); *But see In re Marriage of Muhammad*, 153 Wash. 2d 795, 806–07, 108 P.3d 779, 785 (2005), in which the Supreme Court required the trial court on remand to reconsider a property division, which had included a pension earned during a pre-marital CIR. The trial court had improperly taken into account “fault” in dividing up the property at the end of the marriage. There is not enough in the case to tell whether the court believed the prohibition against considering “fault” in a dissolution also applied to division of CIR property, but that is one possible reading of the case.

103. *In re Marriage of Bailey*, 2014 WL 2573978 at \*3.

fair and equitable division of the parties' assets and liabilities.<sup>104</sup> "In simple terms, the trial court determined here that Jackie, acting without good faith and against Mason's interests during the marriage, misappropriated substantial amounts of marital assets as well as Mason's separate property for her own personal financial gain.<sup>105</sup> Further, the court concluded that "[b]ased on the properly supported findings, we cannot say that the trial court abused its discretion by determining that a division of property acquired by the parties prior to the marriage would not be just and equitable under the circumstances here."<sup>106</sup>

- Where federal law has deferred to community property division at divorce, does it similarly cover equitable division of CIR property? Yes, concluded the court in *In re Marriage of Silk & Broadsword*.<sup>107</sup> The couple was in a CIR for seven years, then married for seven years; then they divorced. There, Mr. Silk "contend[ed] the court lacked authority to divide the portion of the tier II benefit he earned while living in a pre-marriage committed intimate relationship (CIR) with her," but the court of appeals disagreed.<sup>108</sup> A revised federal law, reversing a judicial determination that had held the original statute preempted operation of community property law, stated: "This section shall not operate to prohibit the characterization or treatment of [Tier II Railroad Retirement Benefits] as community property for the purposes of, or property subject to, distribution in accordance with a court decree of divorce . . . ." <sup>109</sup> At least in the context of a dissolution proceeding, where all the property of a couple is available for equitable division, the court held that this non-preemption language encompassed equitable division of CIR property. It remains unclear whether it would have extended to a division of CIR property absent an accompanying marriage. The *Owens* case, discussed below, is suggestive, but it dealt with a private pension subject to the Employee Retirement Income Security Act (ERISA), which contains different non-preemption language.

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104. *Id.*

105. *Id.*

106. *Id.*

107. *In re Marriage of Silk and Broadsword*, No. 30875-8-III, 2013 WL 6836465 (Wash. Ct. App. 2013) (unpublished).

108. *Id.* at \*1-2.

109. Railroad Retirement Solvency Act of 1983 § 419(a)(3); 45 U.S.C. § 231m(b)(2) (emphasis added).

- If a former spouse who is receiving spousal maintenance enters into a CIR with someone else, does this trigger the termination of spousal maintenance as would remarriage? No, said the court in *In re Marriage of Karon*, because the statute does not say so. But it may be a change in circumstances justifying an amendment.<sup>110</sup>
- Absent the establishment of a CIR, do other legal theories for property sharing remain viable in Washington? Presumably they are, although each must be examined and evaluated based on its distinctive elements. In *Fletcher v. Olmstead*, three years into a five-year relationship with Fletcher, Olmstead won \$3.5 million in the Washington lottery. She sought a share on theories of CIR, constructive trust, implied partnership, implied contract, and misrepresentation. Unfortunately, she failed to offer sufficient evidence to support any of her theories and she was denied any portion of the winnings.<sup>111</sup>

The federal courts sitting in Washington have recognized the CIR doctrine in several interesting contexts.

- In *Owens v. Auto. Machinists Pension Trust*<sup>112</sup>, a Washington state court had issued a QDRO requiring the Machinists Pension administrators to divide a pension equally between the parties to a thirty-year CIR.<sup>113</sup> The Pension argued that since the parties were not married, this was not a valid QDRO, but the federal district court and the ninth circuit disagreed. Since the order arose out of Washington's "domestic relations law" and was "related to marriage," it qualified. Moreover, the non-employee spouse qualified as an "alternate payee" under ERISA. The court rejected the Pension's contention that the Defense of Marriage Act (DOMA) precluded this result, noting that this was not a same-sex relationship.
- In *In re Goodale*, a state court had divided property acquired by a same-sex couple who had a CIR of almost twenty years.<sup>114</sup> In doing so, the state

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110. *In re Marriage of Karon*, No. 41944-7-I, 1999 WL 211826 (Wash. Ct. App. 1999) (unpublished).

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

112. *Owens v. Auto. Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

113. *Id.* at 1146 (the ninth circuit used the expression "quasi-marital relationship," unaware that the new expression "committed intimate relationship" had been adopted by the Supreme Court).

114. *In re Goodale*, 298 B.R. 886 (Bankr. W.D. Wash. 2003).

court had awarded them \$78,793.58 as a debt against the other, and stated: “[T]he court hereby clarifies for any bankruptcy court, that the above award is also necessary for [Mr. Foshay’s] support and care and further reflects [Mr. Foshay’s] joint interest in the 401k and pension titled in Respondent’s [Mr. Foshay’s] name, but accrued jointly under Washington law. As such, the court intends such debt to be nondischargeable in bankruptcy.”<sup>115</sup> When Goodale declared bankruptcy, notwithstanding the state court’s intent, he sought to avoid the lien in the bankruptcy. He succeeded because a lien is only exempt from the bankruptcy if it secures a debt “to a spouse, former spouse . . . for alimony to, maintenance for, or support of such spouse.”<sup>116</sup> Since the couple was not married, the exemption provision did not apply.

- In *In re Andrus*, the bankruptcy court concluded that the debtor and her partner had been in a CIR for nine years, but that did not entitle him to a share of real estate she acquired before the relationship had commenced. His theory was that during the CIR, she had executed a quit claim deed conveying the property to herself and him as a gift. But the court concluded that her partner had exercised undue influence to induce her to execute the deed, and that she had only intended to make a gift to him in the event that they married, which they never did.<sup>117</sup>
- In *In re Zimmer*, the federal district court held that a bankruptcy Judge had erred in failing to consider the equities incident to the couple’s nine-year CIR when valuing a piece of property transferred by one of them before filing for bankruptcy.<sup>118</sup>
- In *United States v. Johnson*, Mr. Johnson’s widow sought to avoid a federal income tax lien on a piece of property acquired by her husband during what she alleged was a CIR prior to their marriage. She claimed an equitable interest in the property because of the CIR which entitled her, at a minimum, to a share of any proceeds on sale. The court, however, declined to adjudicate her claim that a CIR existed because she had

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115. *Id.* at 888–89.

116. *Id.* at 889 (citing 11 U.S.C. § 522 (f)).

117. *In re Andrus*, No. 09-13123, 2010 WL 4809114 (Bankr. W.D. Wash.) (unpublished) (slip copy).

118. *In re Zimmer*, No. C071591RSL, 2008 WL 2180084 (W.D. Wash.) (unreported); *see also In re Selander*, No. 16-43505, 2017 WL 1157101 (Bankr. W.D. Wash.) (unreported) (giving trustee time to explore his theory that bankrupt was in a CIR at times relevant to the bankruptcy, potentially enlarging the bankruptcy estate by as much as \$200,000).

executed a quit claim deed as to any interest she might have in the property during their marriage, as part of a financing transaction. The court rejected her claim that she lacked donative intent when executing the deed.<sup>119</sup>

#### COMMON LAW MARRIAGE BY ANOTHER NAME?

Notwithstanding the court's protestations to the contrary in *Connell*, Washington's CIR Doctrine might seem like a re-introduction of common law marriage in Washington.<sup>120</sup> Appearances here are deceptive. As previously noted, in Washington, separate property is equitably divisible at divorce, but the same is not true for a CIR. But that is not the only difference. There are many legal implications of marriage in Washington that do not apply to CIRs. First, there is no right to "maintenance" following a CIR, as there would be at divorce.<sup>121</sup> Second, surviving spouses have intestate succession rights; surviving partners in a CIR do not.<sup>122</sup> Third, whereas a surviving spouse already owns half the community property, surviving committed partners have only an "equitable" claim to a share of the CIR property.<sup>123</sup> Fourth, a testamentary (or trust) provision that purports to dispose of "community property" will not encompass "CIR property" without some pretty fancy interpretive footwork by a court.<sup>124</sup> Fifth, CIR partners, including surviving CIR partners, and surviving ex-CIR partners, will not be entitled to federal social security benefits or other federal benefits that belong only to spouses.<sup>125</sup> Finally, there are, of course, also many non-property related rights (and duties) associated with marriage which are not present in a CIR.

It is also clear that the test for a CIR is quite different than that for a common law marriage: less demanding and less formalistic. A couple does not need to

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119. *United States v. Johnson*, No. 3:14-cv-05190-RJB, 2015 WL 1467049 (W.D. Wash. 2015) (unreported) (slip copy).

120. See Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 528-29 (2007).

121. *Andrews*, *supra* note 1, at 28.

122. *Id.*

123. *Id.* at 28-29.

124. See, e.g., *Matter of Estate of Mell*, 105 Wash. 2d 518, 525, 716 P.2d 836, 840 (1986) (The Supreme Court gave the words "community property" the meaning they had at the time the will was executed, a time when the testator was married, rather than their likely meaning when the testator died, having survived his wife. The extrinsic evidence made it clear that the testator must have intended to dispose of his "former community property" differently than his "separate property," but the Court refused to be swayed by that evidence. The court of appeals had found the will ambiguous under these circumstances, but the Supreme Court found no ambiguity.).

125. See *supra* note 21 and accompanying text; *Id.* at 16.

show an “agreement to marry” to make out a CIR, nor does the couple need to hold itself out as married, as would be required for a traditional common law marriage.<sup>126</sup> Indeed, this is one of the appeals of the CIR doctrine, because it accommodates the fact that many couples in this day and age have deliberately chosen not to marry. As noted earlier, whether all the *Connell* factors must be satisfied remains an open question; but even if they do, they are more flexible and nuanced than those required to establish a common-law marriage.

This is not to say that the showing required to establish the existence of a CIR is necessarily straightforward or easily met. In *Marriage of Pennington*, the Court noted that the factors required to be considered in evaluating whether a CIR has been established “are neither exclusive nor hyper technical. Rather, these factors are meant to reach all relevant evidence helpful in establishing whether a meretricious relationship exists.”<sup>127</sup> But the Court went on to reject the contention that a CIR had been established in either of the cases before it—signaling that sloppy factual determinations and questionable CIRs would not be tolerated. With heightened judicial scrutiny, frivolous cases may be weeded out; but it will also increase legal costs. Indeed, the factual determinations required by the five factor *Connell* test have induced at least one commentator to conclude that the test “creates a high degree of uncertainty for parties contemplating or currently cohabiting, for attorneys advising those parties, and for trial judges applying the concept.”<sup>128</sup> And for those couples who do not meet the test, the same commentator argues that the test may well be inequitable in result.<sup>129</sup>

#### UNANSWERED QUESTIONS

Although a lot of the questions around the CIR doctrine have been resolved, as the foregoing demonstrates, many remain. For example, “does the . . . doctrine create a present inchoate property interest in the non-title-holding partner? Does a non-title-holding [committed intimate] 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

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126. Andrews, *supra* note 1, at 29.

127. *Marriage of Pennington*, 142 Wash. 2d 592, 602, 14 P.3d 764, 770 (2000).

128. Gavin M. Parr, *What Is A “Meretricious Relationship”?: An Analysis of Cohabitant Property Rights Under Connell v. Francisco*, 74 WASH. L. REV. 1243, 1264 (1999). Professor Goldberg has also advocated for a much more “streamlined version of the Washington criteria for determining whether that committed intimate relationship exists: (1) Intimate Relationship: The length and type of relationship [and] (2) Committed Relationship: The intertwining of financial affairs.” Goldberg, *supra* note 120, at 536.

129. Parr, *supra* note 128, at 1267–68.



that was jointly-acquired?"<sup>130</sup> If the non-title holding partner has an inchoate property interest while the relationship continues, as does each spouse during a legal marriage, what might the legal consequences be? Would the non-title holding partner have standing to object to gifts of CIR property to which he or she has not consented, as a spouse would?<sup>131</sup> Would such a partner be required to consent to transactions with regard to real estate in the name of the other partner, but which might be adjudicated to be CIR property in whole or part?<sup>132</sup> What are the presumptions, for example, when a CIR couple agree to hold CIR property as joint tenants with rights of survivorship?<sup>133</sup> Or when a CIR partner uses CIR property to take out life insurance on the life of that partner and designates someone other than the other partner as the beneficiary?<sup>134</sup>

What are the creditors' rights with regard to CIR property? Under our community debt system, community property is liable for the debts and liabilities of the community.<sup>135</sup> Will the same be true for debts and liabilities incurred for a CIR purpose or benefit? As explained earlier, several unpublished court of appeals decisions have dealt with such questions, but they are in something of a disarray.<sup>136</sup> There was an important "CIR debt" issue embedded in *Olver v. Fowler*. Cung, who had been driving the CIR car, had allegedly caused the fatal crash owing to his negligence, and his estate was the defendant in a tort action following his death and that of his partner, Thuy. The tort plaintiff's concern over the inclusion of half of the CIR property in Thuy's estate was that it might put that property out of reach of any tort recovery against Cung's estate. But if the court were to follow community debt principles, as would be applied in a legal marriage, it should follow that all of the CIR property should be liable for a "CIR tort." There was no resolution of this question because on remand, the tort claim was settled. It remains open whether the court would apply community debt principles to CIRs. Other creditors' questions also remain. What happens if a

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130. John E. Wallace, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem*, 29 SEATTLE U. L. REV. 243, 244 (2005).

131. See WASH. REV. CODE § 26.16.030 92018) (rules for managing community property).

132. *Id.*

133. RCW § 64.28.040 lays down presumptions where a married couple or RDPs hold property as joint tenants, but these statutes do not apply to couples in a CIR. See WASH. REV. CODE § 64.28.040 (2018).

134. RCW § 48.18.440 lays down a presumption that a spouse is deemed to have consented to the designation of a "child, parent, brother, or sister of either of the spouses" but a partner to a CIR is not a "spouse." See WASH. REV. CODE § 48.18.440 (2018).

135. See generally WASHINGTON COMMUNITY PROPERTY DESKBOOK Ch. 6 (4th ed. 2014).

136. See footnotes 92–94 and accompanying text.

CIR partner commits a “separate tort”? In a marriage, a tort victim in such a situation would be able to reach the tortfeasor’s half of the community property if separate property were not sufficient.<sup>137</sup> This is a common law doctrine that the Court has fashioned. Will the Court extend this doctrine to a CIR?

As discussed in the context of the *Olver* case, our Court has held that CIR property rights are vested at least at death. The author has argued that certain important consequences should follow from what the court did in *Olver* (in applying the CIR doctrine to a simultaneous death) when a CIR, instead, ends with the death of only one of the partners. The estate of the first to die should contain only that decedent’s “equitable share” of the CIR property, regardless of who had legal title to the property during the relationship. The survivor should have a vested right in the rest. The court of appeals in *Langeland* did just that.<sup>138</sup> The Washington Supreme Court, however, has not dealt with such a case. Will it be prepared to reach the logical legal consequences of *Olver* in this context? If the relatively wealthy partner dies first, will the Court agree that the estate of that partner contains an equitable share of CIR property titled in the name of the relatively less wealthy survivor’s property? Conversely, will it agree that a wealthy surviving CIR partner is entitled to an equitable share of the CIR property titled in the name of a deceased relatively less wealthy partner? We do not know the answer to this question. In all likelihood, the Court will follow the logical legal consequences of the doctrine here, but will focus on what constitutes an “equitable share” under the circumstances. The estate of a relatively wealthy partner who is the first to die would seem to have a weak equitable argument, as would a relatively wealthy surviving partner.

Other questions abound. Many of them surround statutory mechanisms already in place to deal with issues that arise during or after a marriage. In Washington, for example, there is a statutory scheme for dealing with property acquired during marriage, while domiciled in another state, that would have been community property had the couple been domiciled in Washington at the time.<sup>139</sup> In essence, this is a statutory solution to a difficult conflict of laws question.<sup>140</sup> As noted earlier, at least two court of appeals decisions have applied the CIR

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137. *Clayton v. Wilson*, 168 Wash. 2d 57, 227 P.3d 278 (2010); *Haley v. Highland*, 142 Wash. 2d 135, 12 P.3d 119 (2000); *Keene v. Edie*, 131 Wash. 2d 822, 935 P.2d 588 (1997); *DeElche v. Jacobsen*, 95 Wash. 2d 237, 622 P.2d 835 (1980).

138. *In re Estate of Langeland*, 177 Wash. App. 315, 312 P.3d 657 (2013), *rev. den.*, 180 Wash. 2d 1009, 325 P.3d 914 (2014) (“*Langeland I*”); *In re Estate of Langeland v. Drown*, 195 Wash. App. 74, 380 P.3d 573 (2016), *rev. den. sub nom. Estate of Langeland*, 187 Wash. 2d 1010, 388 P.3d 488 (2017) (“*Langeland II*”).

139. Wash. Rev. Code §§ 26.16.220 – .250 (2018) (quasi-community property statute).

140. Thomas Andrews, *Washington’s New Quasi-Community Property Act: Protecting the Immigrant Spouse*, 15 COMM. PROP. J. 50 (1988).

doctrine to property acquired by the couple while domiciled in another jurisdiction, without discussion of the implicit conflict of laws.<sup>141</sup> But we do not know how this problem of the “migrating” CIR couple will be resolved until the supreme court does a careful conflict of laws analysis.<sup>142</sup> Additionally, Washington has a statutory scheme in place for dealing with testamentary and other non-probate gifts made to a surviving spouse that are not changed after the couple divorces before the benefactor ex-spouse dies.<sup>143</sup> Will the Washington courts apply this statutory scheme by analogy to the wills or non-probate dispositions of former CIR partners if the CIR has been terminated before the death of a partner?

As previously explained, a CIR may arise even where one or both of the parties remains legally married to another. Will such a CIR only be recognized to have arisen when the legally married partners are adjudged to have been living “separate and apart?” There is no reason why this necessarily follows. One spouse may abandon the other and form a CIR with another where the abandoned spouse may not concede that the marriage is functionally over. In such a situation, might both community property and CIR property be accumulating simultaneously? Even if the court were to adopt some kind of bright line rule that precludes recognition of a CIR where one of the partners remains validly married to another and is not living separate and apart from the spouse, there will still be the problem of resolving a competition over some kinds of property where community property rights have not yet been adjudicated. Suppose a married couple begins living “separate and apart” with the legal result that no new community property will be accumulated. One of the spouses may form a CIR with another. During the CIR, the partners may make improvements or add CIR value to what is actually the community property of a CIR partner who is still married to another. How will a dispute between the non-CIR partner “separate and apart” spouse and the non-spouse CIR partner be resolved? In essence, this is analogous to the case of bigamy, where one legally married spouse marries another illegally. There are precious few cases involving bigamy in Washington’s jurisprudence, so there is very little to go on for guidance.<sup>144</sup>

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141. *Walsh v. Reynolds*, 183 Wash. App. 830, 335 P.3d 984 (2014); *In re Marriage of McCarthy*, No. 30029-3-III, 2012 WL 3580059 (Wash. Ct. App. 2012.).

142. For an example of a careful conflict of laws analysis in the context of conflicting marital property rights, see *Seizer v. Sessions*, 132 Wash. 2d 642, 940 P.2d 261 (1997).

143. Wash. Rev. Code §§ 11.12.051 & 11.07.010 (revoking such gifts by operation of law).

144. *Seizer v. Sessions*, 132 Wash. 2d 642, 940 P.2d 261 (1997), was such a case. However, *Seizer* dealt almost entirely with the conflict of laws issues implicit in the case and managed to avoid dealing with the potential competing claims to the lottery winnings in that case by remanding the case to determine whether the married couple was living separate and

## LAWYERING CHALLENGES

The development of the CIR doctrine, not to mention all the unanswered questions around it, raises significant challenges for lawyers who need to advise clients about navigating this important legal development. Lawyers for clients contemplating divorce may become aware that their client is contemplating, or is already involved in, what the courts might conclude to be a CIR. Lawyers who have business clients might become aware that their clients are involved in a relationship that a court might or surely would conclude is a CIR. Estate planning lawyers might also be retained by such a client. The first thing such a lawyer needs to do, of course, is to advise the client of the existence of the CIR common law and its potential implications for the client. Given the case-by-case adjudication of CIR factors, it may often be the case that a lawyer cannot give such a client a definitive answer about whether his or her relationship really is (or was) a CIR; but the client needs to be alerted to the possibility.

Not infrequently, such a client will want to know what he or she can do to avoid the legal consequences of the CIR doctrine. In short, the parties may contract around those consequences, just as parties may enter into prenuptial agreements before marriage and marital property agreements during marriage. A published court of appeals CIR decision has so held, enforcing such an agreement.<sup>145</sup> Another, an unpublished decision, has also enforced such an agreement.<sup>146</sup> Under the law of contracts, as with dancing, however, it takes two to tango. A properly advised and informed CIR partner, or prospective CIR partner, may be reluctant to enter into such a contract. Even if a contract is executed, the law of Washington, as the law of most states, imposes strict requirements before it will enforce prenuptial and marital property agreements. Under *Marriage of Matson*, the courts look first to determine if the agreement makes a “fair and reasonable provision” for the party later seeking to avoid its enforcement.<sup>147</sup> If it does not, the courts must examine:

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apart for purposes of RCW § 26.16.140 and, if not, whether the lottery winnings were acquired with separate or community property. *Seizer*, 132 Wash. 2d at 659, 940 P.2d at 269.

145. “Partners in a committed intimate relationship, like spouses, may change the status of their community-like property to separate property by entering into mutual agreements.” *In re G.W.-F.*, 170 Wash. App. 631, 638, 285 P.3d 208, 212 (2012) (enforcing an oral CIR agreement as to property).

146. See *Rowe v. Rosenwald*, No. 74659-6-I, 2017 WL 2242301 (Wash. App. 2017) (unpublished) (enforcing a prenuptial agreement to live separate as to property where couple never legally married).

147. *In re Marriage of Matson*, 107 Wash. 2d 479, 482, 730 P.2d 668, 670 (1986).

(1) whether full disclosure has been made by [the parties] of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by [both spouses of their] rights....<sup>148</sup>

We have not yet had a case where the Court has applied this test to a CIR property agreement, but there is good reason to suppose it will. As noted, the courts of appeals are assuming that result. Applying that test, the court in an unpublished decision explains the circumstances under which it was willing to enforce such an agreement:

Rowe asserts that the agreement was procedurally unfair because Rosenwald refused to negotiate the primary terms of the agreement she proposed and compromised only on minor terms. He relies on the court's statement in *In re Marriage of Foran* that "[t]he purpose of independent counsel is more than simply to explain just how unfair a given proposed contract may be; it is for the primary purpose of assisting the subservient party to negotiate an economically fair contract." But in *Foran*, the disadvantaged party did not have a lawyer, and the court described the importance of explaining to the nondrafting party the need for independent counsel. Here, Rowe had independent counsel who explained to him the legal consequences of signing the agreement and advised him not to sign it. In addition, Rowe's counsel took action on behalf of Rowe when he sent a letter to Rosenwald's counsel demanding the contract permit the parties to build community property. The agreement is not procedurally unfair simply because Rosenwald did not acquiesce to this demand or because Rowe disregarded his counsel's advice.<sup>149</sup>

It should be noticed that each of the parties in the Rosenwald case had independent counsel in negotiating the agreement. *Estate of Langeland*, discussed earlier, provides a cautionary tale on the other side. In *Langeland II*, the estate argued that the couple had entered into a separate property agreement as to a house that was a principle asset acquired during the CIR.<sup>150</sup> The court rejected that argument on a variety of grounds, but in addressing the merits of the claim it stated that:

[T]he record belies Boone's assertion that Langeland "carefully negotiated" the purported house agreement. Drown's testimony showed that

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148. *Id.* (quoting *Whitney v. Seattle-First Nat'l Bank*, 90 Wash .2d 105, 110, 579 P.2d 937 (1978)).

149. *Rowe*, 2017 WL 2242301, at \*3.

150. *Estate of Langeland v. Drown*, 195 Wash. App. 74, 380 P.3d 573 (2016).

she did not understand the terms or the purpose of the agreement Boone now asserts. Thus, substantial evidence supports the trial court's findings that that agreement was not executed freely and voluntarily or with full candor and sincerity toward Drown. Additionally, the record contains no evidence that Drown and Langeland intended to convert their jointly owned earnings into separate interests in the house.<sup>151</sup>

Lawyers that have clients who wish to enter into such an agreement need to proceed with extreme care. They should not attempt to represent both parties to such an agreement. This is simply too great a conflict of interest.<sup>152</sup> They should do their best to ensure that both parties are represented by independent counsel, that their own client makes a full disclosure of the property at issue to the non-client party, and that the non-client party is given plenty of time and opportunity to enter into the agreement knowingly and voluntarily.

If the issue is estate planning and the client has not entered into a CIR property agreement or, if they have, does not have confidence in it, the starting point is to realize that each CIR partner will have equitable property claims against the estate. Those property claims cannot be directly defeated by estate planning which leaves the property to someone else—estate planning, that is, which attempts to disinherit the CIR partner and deprive him or her of an equitable share. Estate planners might wish to consider the potential for use of a “no contest” clause as part of an estate plan, under which the CIR partner would be given some share of the decedent's estate which would be lost if the surviving partner were to contest the estate plan. But such clauses may be of limited use where the surviving partner has “probable cause” to seek an equitable share, since no contest clauses generally are not enforced against claimants with probable cause.<sup>153</sup> If, nonetheless, such a clause is used in the hope that it might succeed, the estate planner should be careful to try to protect against the equitable

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151. *Id.* at 84, 380 P.3d at 579. Three unpublished court decisions illustrate other obstacles to enforcement of such an agreement. In *Arroyo v. Fisher*, No. 31586-0-III, 2014 WL 5215583 (Wash. App. 2014) (unpublished), the court refused to enforce such an agreement where the parties had abandoned it during their relationship. In *In re Riley*, No. 42660-9-II, 2013 WL 1223622 (Wash. App. 2013) (unpublished), the court ignored an agreement reserving to each partner his/her retirement assets built up during the CIR because there had been a drastic mutual mistake of fact as to the values of the retirement assets at the time of the agreement. And in *In re Marriage of Bostain*, No. 30450-3-II, 2005 WL 1177586 (Wash. Ct. App. 2005) (unpublished), the court refused to enforce a “prenuptial agreement” that purported to cover CIR property as well as marital property not only because the proponent had failed to meet his burden under *Marriage of Matson* but also because the agreement did not represent an integrated, final agreement between the parties.

152. See WASHINGTON RULES OF PROF. CONDUCT 1.7.

153. *In re Chappell's Estate*, 127 Wash. 638, 646, 221 P. 336, 338 (1923). See generally WASHINGTON LAW OF WILLS & INTESATE SUCCESSION Ch. 7.B(2)(C) (2d ed. 2006).

claims at issue and not assume that an equitable claim would be considered a will “contest.”<sup>154</sup>

#### INFLUENCE OF WASHINGTON’S CIR DOCTRINE ACROSS THE COUNTRY

In writing this article, the author has not conducted exhaustive research into the influence of Washington’s CIR doctrine around the country. However, with the exception of only a few states, it seems that Washington’s “status-based” approach has attracted few followers among the states.<sup>155</sup> The author has found no community property states that have adopted the doctrine.<sup>156</sup> Interestingly, however, the American Law Institute (ALI) has noticed the development of the CIR doctrine in Washington, and seems to have been heavily influenced by it in formulating its recommendations for dealing with property division at the end of a non-marital “domestic partnership.”<sup>157</sup> In the Reporter’s notes to section 6.03 of the ALI Principles of the Law of Family Dissolution (“ALI Family Dissolution Principles”) it reads:

A few American jurisdictions take a status approach similar to that adopted in this section. Washington, which has the most developed law, applies its community-property law at the termination of stable non-marital relationships. See *Connell v. Francisco*, 898 P.2d 831 (Wash.

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154. *Id.*

155. See, e.g., *Wilbur v. DeLapp*, 119 Or. App. 348, 850 P.2d 1151 (Or. Ct. App. 1993) (affirming the equitable division of property acquired during an eighteen-year cohabitation: “[We] may distribute property owned by the parties in a non-marital domestic relationship. The primary consideration in distributing such property is the intent of the parties. However, in distributing the property of a domestic relationship, we are not precluded from exercising our equitable powers to reach a fair result based on the circumstances of each case.”); see also *Shuraleff v. Donnelly*, 108 Or. App. 707, 817 P.2d 764 (Or. Ct. App. 1991) (affirming trial court’s decision to equitably divide property acquired during a fifteen-year cohabitation); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986) (homemaker has equitable claim to property accumulated during long-term cohabiting relationship, without regard to contract inquiry); *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989) (relying upon constructive-trust doctrine to award woman one-half interest in home in which partners lived during cohabitation, but which was titled solely in man’s name); *Evans v. Wall*, 542 So. 2d 1055 (Fla. Dist. Ct. App. 1989).

156. See, e.g., *Gunderson v. Golden*, 159 Idaho 344, 346, 360 P.3d 353, 355 (Idaho Ct. App. 2015) (“Regardless of whether we find Golden’s arguments persuasive regarding the need for laws to govern the division of property acquired by co-habiting parties, the relief he seeks from this Court is simply not something this Court can provide.”); *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) (recognizing contract based, but not status-based theories).

157. AM. L. INST., ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

1995) (holding that at the dissolution of “meretricious” relationships, the court should rely on the community-property laws to divide between the partners all property that would have been community property had they been married).<sup>158</sup>

The section to which this note is appended is the one which defines when a “domestic partnership” has been established. It adopts, like *Connell*, a multi-factor test. But more pertinent, for our purposes is section 6.04, which states:

Except as provided in . . . this section, property is domestic-partnership property if it would be marital property under Chapter 4, had the domestic partners been married to one another during the domestic-partnership period.<sup>159</sup>

Section 6.04 goes on to state that although in a formal marriage separate property acquired during a long term may be recharacterized at the end of the marriage as marital property, this should not be done for a domestic partnership.<sup>160</sup> Further, “domestic partnership property” is to be divided at the end of the relationship.<sup>161</sup> It would appear, therefore, that the ALI has simply adopted the *Connell* rule for characterizing CIR property verbatim. Finally, the ALI recommends that “marital” (and therefore “domestic partnership property”) be divided *equally absent* the presence of certain factors such as improper gifts, intentional misconduct, or negligence by one partner or spouse.<sup>162</sup> In this respect, the ALI has departed from the Washington (and the *Connell*) “equitable division” mandate. But only in this respect.

In contrast to the ALI Family Dissolution Principles, in 2011 the ALI adopted its revised Restatement of Restitution and Unjust Enrichment (RRUE), which contains a special provision for unmarried cohabitants:

If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitu-

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158. *Id.* at § 6.03, reporter’s notes cmt b.

159. *Id.* at § 6.04.

160. *Id.* at §§ 6.04(3), 4.12.

161. *Id.*

162. *Id.* at §§ 6.05, 4.09–.10.



tion against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.<sup>163</sup>

While the RRUE radically alters the earlier Restatement on Restitution by allowing such claims by unmarried cohabitants, it nonetheless makes clear that it sets out a much more limited theory than that which has been adopted in the Family Dissolution Principles and in Washington's CIR doctrine. The comments to the RRUE are quite instructive in making the distinction and explaining the implications of Washington's doctrine:

The obligations that this section identifies as part of the law of restitution and unjust enrichment are addressed in different and more comprehensive terms by Principles of the Law of Family Dissolution: Analysis and Recommendations, Chapter 6. The Principles create status-based financial consequences for unmarried cohabitants found to be "domestic partners" (§ 6.03), while allowing couples to opt out of such consequences by contract. In jurisdictions following the Principles, separate analysis of the restitution claims described in § 28 is unnecessary and indeed superfluous, because the status-based obligations recognized by the Principles supersede the analysis in terms of unjust enrichment on which the rule of § 28 depends. It is an unstated assumption of each of the following Illustrations that the jurisdiction in question has not adopted the Principles as they relate to this category of cases.<sup>164</sup>

It should be emphasized that the claim in restitution described by § 28 is independent of the policy recommendations of the Principles and of any formal legal regime that grants status-based property rights to former domestic partners (employing that name or any other). Such a regime, to a greater or lesser extent, assimilates the economic obligations of unmarried cohabitants to those imposed by law as incidents of marriage; so that on dissolution of the relationship, the law may enforce a division of assets, an obligation of support, or other remedies, in favor of the cohabitant who would otherwise be injured by dissolution. The fact that a particular jurisdiction may not recognize such status-based obligations

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163. Restatement (Third) of Restitution and Unjust Enrichment § 28 (AM. LAW INST. 2011).

164. *Id.* at § 28, cmt. a. Interestingly, the Reporter's Notes to this section make clear that the approach taken by the section is "the current law of most U.S. jurisdictions," while only a small minority of states follow a status based approach: "In a minority of jurisdictions . . . former cohabitants may be entitled to an equitable division of property acquired during the relationship, based on principles avowedly analogous to those governing the disposition of marital property." *Id.* at § 28, cmt. a (citing *Wilbur v. DeLapp*, 119 Or. App. 348, 850 P.2d 1151 (1993); *Connell v. Francisco*, 127 Wash. 2d 339, 898 P.2d 831 (1995)) (Reporter's Notes).

does not obstruct the enrichment-based claim described in this section. It is sufficient to accept, as nearly all jurisdictions do, that the parties' status as former unmarried cohabitants does not bar a claim based on the unjust enrichment of one at the expense of the other.

#### CONCLUSION

The CIR doctrine as recognized in *Connell v. Francisco* in 1995, and before then in *Marriage of Lindsey* in 1984, has laid deep roots in Washington's common law. At least ninety-one intermediate appellate decisions have applied the doctrine since 1984. One must suppose there have been well over one hundred—perhaps hundreds—of trial court decisions applying the doctrine over this time period, many of them unappealed. There remains a number of important unanswered questions about the doctrine, but there is every reason to suggest that these questions will be answered through the further development of the common law in Washington. The doctrine, and all the unanswered questions that continue to surround it, raise serious questions for lawyers who have clients contemplating entering into a CIR or, more likely, clients who inadvertently have exposed themselves to the CIR doctrine by entering into a long term intimate relationship. In principle, parties to a CIR may contract around the CIR doctrine, but such contracts will be examined with a careful view to their fairness.

Since the legislature could, if it chose, abolish this judge-made doctrine, it bears asking whether it should. The legislature should not. The traditional doctrines available to unmarried intimate partners—contract, partnership, trusts (express, constructive and resulting), cotenancy, restitution and unjust enrichment—have not really shown themselves to be up to the task of doing justice for many modern intimate partners. Here, it is conceded that “justice” may be in the eye of the beholder. Reasonable people may take the position that partners who want to share property rights have the option of either marrying, contracting in such a way as to clarify their intention and eliminate the need for the expenditure of scarce judicial resources in fighting over the nature of the relationship, or making enforceable gifts *inter vivos*, in trust, or by will or other will substitutes. Moreover, traditional property doctrines provide for the deliberate acquisition of property jointly. But it is questionable whether any of these responses is adequate to deal with the social and psychological reality of many committed intimate relationships today.

The core insight of the community property system, as the author sees it, is that the marital relationship carries with it the inherent right to share labor and earnings without regard to which partner is in the labor force at any particular time. Labor in support of the relationship comes in many different forms: only some of it carries with it compensation in the marketplace. There is an oppor-

tunity cost when one partner stays home to raise children, does the shopping, cooks meals, cleans the house and adds value to property by repair or improvements. This kind of labor can be purchased in the market and the partner who does it could, instead, be holding down a job to pay for this kind of service. But the community property system recognizes that doing this kind of uncompensated labor may contribute as much, if not more, to the economic and psychological health of the marital partnership as does holding down a job outside the home and bringing home a wage which must then be expended, at least in part, for such services. The community property system also recognizes that there are frequently power imbalances in marital partnerships that, absent the economic sharing principle embedded in community property rights, will lead to economic (and psychological) victimization of one partner by the other.

Very little of the foregoing economic, social, and psychological reality vanishes just because a couple is not married in the eyes of the law. It is the nature of the committed relationship that gives rise to the need for recognition of this kind of shared economic enterprise, not the label "married." Indeed, sometimes the power imbalances are more severe in an unmarried committed relationship. One partner may lead the other on with promises of marriage or promises of formal property sharing, never fulfilled. One can look at this reality and say that the victimized partner has only himself or herself to blame. But life is more complicated than that. Blame is often a two-edged sword. For every victim who is to blame, there may be another who has taken advantage of the victim who is also blameworthy. In failing to protect the victims, we are protecting their oppressors.