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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
DEPUTY

No. 39887-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

ROBERT ROSS

Respondent

v

TONI HAMILTON

Appellant

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ON APPEAL FROM THE SUPERIOR COURT FOR WAHKIAKUM  
COUNTY

The Honorable Michael Sullivan  
Superior Court No. 07 2 00002 9

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RESPONDENT'S OPENING BRIEF

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**TABLE OF CONTENTS**

I.	RESPONSE TO ASSIGNMENTS OF ERROR .....	3
II.	STATEMENT OF THE CASE .....	5
	A. Trial Testimony .....	5
	1. Ross’s case .....	5
	2. Hamilton’s case .....	11
	B. Post-Trial Hearings .....	14
III.	ARGUMENT .....	15
	A. The trial court did not err in concluding that a meretricious relationship existed between Ross and Hamilton .....	15
	1. Procedural .....	15
	2. Purpose of meretricious relationship law .....	16
	3. Elements of meretricious relationship .....	20
	B. The trial court did not err in its characterization and distribution of property .....	26
	1. Standard of review .....	26
	2. Presumption/comingling .....	26
	3. Island View property .....	28
	4. Judgment for \$17,500 ..	31
	5. Greenwood Road property.....	31
	6. Big Lake property .....	32
	C. The trial court did not err in denying the Motion for a New Trial or for reconsideration .....	33
IV.	CONCLUSION .....	39

## TABLE OF AUTHORITIES

### Washington cases

<i>Connell v Francisco</i> , 127 Wn.2d 33, 898 P.2d 831 (1995) . . . . .	20, 21, 22, 27, 28
<i>Fred Hutchinson Cancer Research Ctr. v Holman</i> , 107 Wn.2d 693, 712, 732 P.2d 974 (1987) . . . . .	15
<i>Gormley v Robertson</i> , 120 Wn. App. 31, 83 P.3d 1042 (2004) . . . . .	15
<i>Holaday v Merceri</i> , 49 Wn. App. 321, 324, 742 P.2d 127 (1987) . . . . .	34
<i>In re Dewey's Estate</i> , 13 Wn.2d 220, 226-27, 124 P.2d 805 (1942) . . . . .	27
<i>In re Marriage of Elam</i> , 97 Wn.2d 811, 650 P.2d 213 (1982) . . . . .	27
<i>In re Marriage of Gillespie</i> , 89 Wn. App. 390, 400, 948 P.2d 1338 (1997) . . . . .	28
<i>In re Marriage of Lindsey</i> , 101 Wn.2d 299, 304, 678 P.2d 328 (1984) . . . . .	16, 20, 26, 27
<i>In re Marriage of Shannon</i> , 55 Wn. App. 137, 140, 777 P.2d 8 (1989) . . . . .	28
<i>In re Pennington</i> , 142 Wn.2d 592, 14 P.3d 764 (2000) . . . . .	20, 22, 23
<i>In re Rhone</i> , 140 Wn. App. 600, 166 P.3d 1230 (2007) . . . . .	27
<i>Kinder v Mangan</i> , 57 Wn. App. 840, 846, 790 P.2d 652, <i>review denied</i> , 115 Wn.2d 1018, 802 P.2d 127 (1990) . . . . .	15
<i>Marriage of Marzetta</i> , 129 Wn. App. 607, 120 P.3d 75 (2005) . . . . .	28
<i>Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 855 P.2d 1210 (1993) . . . . .	27
<i>Robel v Roundup Corp.</i> , 148 Wn.2d 35, 42, 59, P.3d 611 (2002) . . . . .	15
<i>Soltero v Wimer</i> , 159 Wn.2d 428, 150 P.3d 552 (2007) . . . . .	26
<i>Sutton v Widner</i> , 85 Wn. App. 487, 933 P.2d 1069 (1997) . . . . .	21
<i>Willener v Sweeting</i> , 107 Wn.2d 388, 393, 730 P.2d 45 (1986) . . . . .	15

## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The Court made no error. The Court properly found that Hamilton and Ross were in a marital-like relationship.
2. The Court properly found that Ross used a portion of his monthly paycheck to support the alleged meretricious community.
3. The Court properly found that Ross contributed \$90,000 from loans to support the alleged meretricious community.
4. The Court properly characterized property as quasi-community property at Findings of Fact 2.8.
5. The Court properly found the facts referred to and contained in paragraph 2.17 of the Findings of Fact and Conclusions of Law.
6. The Court properly reached a Conclusion of Law that a meretricious relationship existed between Robert Ross and Toni Hamilton.
7. The Court properly ordered a division of property between the parties.

8. The Court properly denied Hamilton's Motion for a directed verdict at the close of Ross's case.
9. The Court properly denied the Motion for New Trial/Reconsideration made by Hamilton.

## II. STATEMENT OF THE CASE

### A. Trial Testimony

#### 1. Ross's case

Hamilton's statement of the case is incomplete. Hamilton ignores several factual issues that are important to this Court's resolution of this case. Tim Abena testified that Ross and Hamilton moved on to the 18 Island View property to live in a fifth wheel trailer. (RP I 23<sup>1</sup>). The fifth wheel trailer was owned by Ross. It was Tim Abena's impression that Ross and Hamilton were together. (RP I 24). Abena also witnessed Hamilton stating "Well, we'll just get it from Bob's retirement account" in reference to where the money would come from to repair the Island View property. (RP I 30). At a barbecue at the Island View property after Ross and Hamilton purchased it, Tim Abena and Robert Ross were discussing a volunteer project involving construction of ball fields. Ross suggested that he may come help with the project as he is an

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<sup>1</sup> The report of proceedings will be referred to as follows:  
RP I will refer to trial testimony taken on July 2, 2008.  
RP II will refer to trial testimony taken on July 7, 2008.  
RP III will refer to trial testimony taken on July 15, 2008.  
RP IV will refer to the conclusion of trial testimony on July 15, 2008 and the post-trial proceedings on May 4, 2009 and June 22, 2009.

equipment operator. Abena witnessed Hamilton when she came over and grabbed Ross by the ear and marched him away stating “You don’t have time to be doing things like that. You’ve got to be working right here.” (RP I 33).

Virgil Cothren is a long-time friend of both parties. He had contact with Ross and Hamilton almost every day between 2000 and 2005. (RP II 63). Cothren thought of them as husband and wife because Ross and Hamilton would say that they loved each other, they slept in the same bed together, they joked around and hugged each other. (RP II 72). Cothren had been in Ross and Hamilton’s bedroom and knew that Ross and Hamilton slept in the same bedroom. He saw Ross and Hamilton acting as a very happy couple together. (RP II 64-65). Cothren also knew that in 1991 Ross and Hamilton were sleeping together in the same bedroom. (RP II 65). Cothren heard Hamilton state “I got to go pick up my paycheck” with reference to picking up Ross at the airport. Cothren perceived this as additional indication that Ross and Hamilton were a happy couple together. (RP II 65-66). Cothren saw Ross and Hamilton acting together as a couple. Ross and Hamilton worked together,

cooked for each other, shared their money, went mushroom hunting, deer hunting, did yard work together and acted like a husband and wife. (RP II 66-67, RP II 73). Cothren witnessed the tremendous amount of work that Ross and Hamilton put into the Island View property. (RP II 67). Cothren spoke with Hamilton about Ross borrowing money to fix up the Island View property. (RP II 68).

Ross completed a divorce from his prior wife in 1990 or 1991. (RP I 169). Robert Ross had a lot of experience from the maintenance work that he had done on a 40-unit hunting lodge. (RP I 45-46). During the relationship between Ross and Hamilton, Ross averaged between \$65,000 and \$70,000 per year as an income. (RP I 47). Shortly after Ross and Hamilton met in 1990, they moved into Ross's apartment for a period of six or seven months. (RP I 51). At that time, Hamilton was working as an exotic dancer and was living in the club where she worked. The relationship between Ross and Hamilton involved physical work from the beginning. Hamilton stated to Ross "If you want to meet me, come over to my condo. I got some work I need to do over there. Give me a hand." From that point on, Ross and Hamilton worked together like a husband and

wife. (RP I 53). Ross and Hamilton maintained a sexual relationship from 1990 to 2005. (RP I 54, RP III 142). Ross never had relationships with other women during this time. (RP III 145). Ross and Hamilton shared in duties such as cooking, maintenance of houses, laundry, bookkeeping and paperwork. Hamilton did all of the bookkeeping and paperwork and handled the money. (RP I 55). This was consistent from 1990 through 2005. (RP I 56). Ross and Hamilton would go fishing together, go to the movies and went to restaurants. Their primary hobby, though, was building a home and trying to build a future together. (RP I 56). Ross and Hamilton had a goal of traveling around and seeing the United States in a truck and travel trailer. (RP I 57). Ross supplied Hamilton with whatever money he had available to cover the bills that they had together, along with any extra money, during the period between 1990 and 2005. (RP I 58). Ross agreed to the acquisition of property in Hamilton's name because he was concerned about a past IRS issue, even though the IRS issue was resolved. (RP I 59). Hamilton benefited from dental and health insurance coverage through Ross's employer. Ross made Hamilton the sole beneficiary on his life

insurance policy. (RP I 59-60). Ross gave Hamilton money that was deposited in bank accounts that were in Ms. Hamilton's name alone. (RP I 67-68). Ross and Hamilton also shared a bank account. (RP I 69). Hamilton withdrew money from the joint account where Ross's paychecks were deposited and placed money into accounts that were in Hamilton's name alone. (RP I 70). Water and heating bills were paid jointly by Ross and Hamilton. (RP I 71). Ross and Hamilton opened an account that both of them had access to in the name of a bed and breakfast business. Ross sent money to Hamilton in an amount averaging \$1,000 per month from approximately 2001 to 2005. (RP I 72-73).

Ross and Hamilton completely renovated the Vallerian Street property. (RP I 86). Ross invested \$40,000 of his money into the Vallerian Street property and Hamilton invested \$45,000. The only testimony about the increase in value of the Vallerian Street property was by Ross where he attributed one-half of the value to his input and efforts. (RP I 87). Ross used his tax refund to pay the taxes for the Vallerian Street property. (RP II 55). Ross did a substantial amount of the repair work on the 18 Island View property including

work on the residence roof, the pool house roof, the pool boiler, pressure washing, buying tools and equipment, fixing the hot tub, cleaning and painting, maintenance of all facets of the home, repairing water leaks, landscaping, brush clearing, clean-up, plumbing and interior painting. (RP I 90-97). While at the Island View property, Ross and Hamilton slept together in the same hide-a-bed. The other bedrooms were saved for potential customers at the bed and breakfast. (RP I 98). Ross and Hamilton shared a goal of downsizing and moving to Portugal or other places they may have wanted to retire. (RP I 103). Ross provides the only testimony regarding a valuation of his contribution to the Island View property. Ross indicates that the value of his efforts amount to one-half of the value of the Island View property. Ross and Hamilton agreed to an equal division of the Island View property before they bought it. (RP I 104). Ross had discussions with Hamilton regarding their future retirement and working on the Island View and other properties as an investment for retirement. Hamilton agreed that this is what they were working toward. (RP I 105). Ross also performed work on real estate on Greenwood Road. The purchase of 69.35%

of the Greenwood Road property came through a loan from Curly Cochran. The payment of the loan to Curly Cochran came from money out of Ross's paycheck. Ross provided money to Hamilton because he didn't think that they would ever be separated. (RP I 108-109). Ross and Hamilton purchased real property at 5813 South Jay Sedor Street in Big Lake, Alaska. Hamilton borrowed some money to purchase the property and Ross gave Hamilton out of his paycheck to pay the payments. The parties planned to improve the land and make it worth more money. (RP I 116-117). Hamilton stated to Ross "Well, don't worry about it. It's all half yours anyhow." This was Hamilton's response whenever the parties talked about whose name was on title to real estate. (RP I 119).

## 2. Hamilton's case

Toni Hamilton's testimony was notable for both what she said and did not say. Ms. Hamilton flatly denies that Ross made financial contributions to property. (RP III 31). Ms. Hamilton claims that there were no sexual relations with Mr. Ross after the middle of 1990. (RP III 32-33). Ms. Hamilton denies that Ross put any dollars into the purchase price of the Vallerian property. (RP III 35).

Hamilton does not deny that Ross used his money for renovation of the Vallerian Street property and never denies that Ross used his tax returns to pay the taxes on the Vallerian Street property. Hamilton also never refutes Ross's testimony about the total renovation of the Vallerian Street property. Hamilton claims that Ross was merely a tenant based on rental agreements for the property at 1412 Vallerian Street. (RP III 37-38). Hamilton makes this claim even though she did not own the Vallerian Street property in 1990 when she claims to have rented to Ross. (RP III 122). Hamilton acknowledged that the Vallerian property was purchased on June 19, 1992, two years after the alleged rental agreement with Ross for that property. (RP III 65). Hamilton also had a 1999 rental agreement with Ross during a period in which the Vallerian property was rented out only to a couple from Chitna, Alaska. (RP III 125). Ms. Hamilton did not claim any income from the rental of the Vallerian property on her 1999 tax return. (RP III 124). Hamilton claims that she rejected three proposals of marriage in 1990. (RP III 41). Hamilton went on to live with Ross for 15 years after this point, but at trial claimed Ross wasn't marriage material. (RP III 40). Hamilton admits to

kissing and hugging Ross in the presence of others. (RP III 48).

Hamilton explained the things she had done in her marriage to William Hamilton including responsibilities and recreation. (RP III 109-110). Hamilton also maintained the same or similar responsibilities and recreation with Ross. (RP III 110-111).

Hamilton admitted that she did not maintain a relationship with tenants like she did with Mr. Hamilton or Mr. Ross. (RP III 111).

Hamilton never refuted or denied that the money from Ross's paycheck that he sent to her was comingled with funds used to make the payment on the Greenwood Road property. (RP III 50-52).

Hamilton admits that Ross did work to improve the Greenwood Road property. (RP III 55-56). Hamilton acknowledged that the proceeds from the sale of her Nickel Street<sup>2</sup> property in Alaska were kept in a separate account and were not used in the purchase of the Island View property. (RP III 58-59, 114-115). Hamilton admits that Ross contributed at least \$25,000 to the Island View property.

Hamilton admits that Ross did work on the Island View property. (RP III 81). Hamilton never denies or refutes that Ross contributed

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<sup>2</sup> The transcription refers to this property as "Nickel Street" even though the street name on documents presented at trial was "Nichols." For consistency, it will be referenced to as the "Nickel" property herein.

his tax return money to the improvement of the Island View property. Hamilton never claims a rental income on her taxes in her testimony for Island View.

B. Post-Trial Hearings

Ross responded to Hamilton's Motion for New Trial/Reconsideration. (CP 54-57). Ross provided both explanation and documents regarding loans that he had taken from his 401(k) in the past and information from his 401(k) company. (CP 56-57).

In support of the proposed Findings and Conclusions, Ross submitted a Memorandum and attachments. (CP 78). The Court ultimately signed Ross's proposed Decree of Dissolution of Meretricious Relationship and Findings of Fact and Conclusions of Law. (CP 85-86).

### III. ARGUMENT

A. The trial court did not err in concluding that a meretricious relationship existed between Ross and Hamilton

1. Procedural

The Court in *Gormley v Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004) concisely summarizes the procedural parameters of review as follows:

We review Findings of Fact to determine whether they are supported by substantial evidence and, if so, whether the Findings support the Conclusions of Law. *Willener v Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Fred Hutchinson Cancer Research Ctr. v Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). Credibility is determined solely by the trier of fact. *Kinder v Mangan*, 57 Wn. App. 840, 846, 790 P.2d 652, *review denied*, 115 Wn.2d 1018, 802 P.2d 127 (1990).

The *Gormley* Court also indicates that unchallenged Findings of Fact are verities on appeal. *Gormley* citing *Robel v Roundup Corp.*, 148 Wn.2d 35, 42, 59, P.3d 611 (2002). In the present case, Judge Sullivan issued a Memorandum Opinion in which many of his Findings of Fact were based on his determination of credibility. (CP

40). While Hamilton assigns error to Findings of Fact 2.7 which incorporates the Court's Memorandum Opinion, there is not a specific challenge to many of the Court's Findings including the finding regarding the credibility of Ross, Abena and Cothren. To the extent that the Court's findings in its Memorandum Opinion are unchallenged, such findings should be deemed verities on this appeal. The inquiry from this point forward should be whether or not a fair-minded person would be persuaded by the evidence.

2. Purpose of meretricious relationship law

Meretricious relationship law has evolved to avoid the inequity that can result when citizens of Washington state live together and accumulate property. *In re Marriage of Lindsey*, 101 Wn.2d 299, 302, 304, 678 P.2d 328 (1984). The *Lindsey* case requires that the Court must examine the relationship of parties and the property accumulations and make a just and equitable disposition of the property. *Id.* at 304. Accordingly, the Court should review the facts of this case and determine if substantial evidence supports the trial court's Findings and Conclusions.

Hamilton asserts that there was no substantial evidence to support a finding that the relationship between Ross and Hamilton was intimate or marriage-like. However, the testimony of Abena, Cothren and Ross all support the notion that Ross and Hamilton lived together and slept together throughout the 15-year relationship. Ross denied that he had other sexual partners during his relationship with Hamilton and Hamilton admits that she had affairs or encounters. Hamilton also admits that she would hug and kiss Ross in front of others. This suggests intimacy. Intimacy should not be restricted in meretricious relationship law to include only sexual intercourse. Hamilton further asserts that the relationship may have been bigamous for a period in 1990. Mr. Ross appears to have been married for a period of less than a year at the commencement of the parties' meretricious relationship. This short period of time should not be significant in comparison to the full scope of the parties' relationship together. The trial court found that the periods of separation while Ross was working were not significant as the relationship was similar to that of a commercial fisherman who would spend time away while working for months at a time. (CP

40). It is important to note that none of Ross's absences were a result of a separation or breaking up of the parties' relationship. His absences were work related and simply part of his job. To find that Ross's absence for work purposes defeats a meretricious relationship finding would unfairly limit Washington law to benefit those with local employment. Hamilton next asserts that Ross provided insufficient proof of his financial contributions. Ross provided testimony that he obtained loans against his 401(k) account and a trailer that he owned. The trial court found that his testimony to be credible. Hamilton's Motion for Reconsideration was denied by the Court after Ross provided a procedural and substantive response. Hamilton has provided no law which requires that documents be provided to meet the substantial evidence standard. Hamilton's theory that she regarded Ross as a tenant is not well founded. The trial court agrees with this notion. (CP 40). Hamilton presented a claimed rental agreement in which Ross was a tenant at the Vallerian property in 1990. Hamilton did not own the Vallerian property until 1992. The 1990 rental agreement was an obvious act of deception by Hamilton. Both she and Ross listed the Nickel Street property as

their address for their 1990 tax returns. Hamilton also presented a 1999 rental agreement to claim that Ross was a tenant. However, on cross examination, Hamilton acknowledged that Ross did not live at the Vallerian property in 1999 and that she had other tenants who lived there during that time. Hamilton also confirmed that she claimed no rental income for the Vallerian property on her 1999 taxes. The Vallerian property was sold by Hamilton in 2000. Hamilton further acknowledged that most, if not all, of the activities she engaged in with her former husband, William Hamilton, were the same activities that she engaged in with Mr. Ross. Hamilton admitted that she did not engage in any of these activities with any other “tenants.” It appears that Hamilton was simply denying all facets of the parties’ relationship in the hope that the trial court would believe that she was a landlord and Ross was a tenant. The fact that Ross proposed three times in 1999 proves that the parties knew that they were not lawfully married. However, the fact that the parties then maintained a relationship for 15 years supports the notion that the parties ended up living together like husband and wife.

### 3. Elements of meretricious relationship

Hamilton accurately sets forth the elements of a meretricious relationship under *Connell v Francisco*, 127 Wn.2d 33, 898 P.2d 831 (1995) and *Lindsey supra*. The factors are neither exclusive nor hyper-technical and are meant to reach all relevant evidence helpful in establishing whether a meretricious relationship exists. *Connell*, at 346.

#### Continuous Cohabitation

Ross and Hamilton were continuous cohabitants from 1990 through 2005. They lived in Ross's apartment, Hamilton's duplex, the Vallerian property, in Ross's travel trailer and at 18 Island View. This is supported by the addresses on the parties' tax returns and the testimony. Hamilton attempts to use the *In re Pennington*, 142 Wn.2d 592, 14 P.2d 764 (2000) case to show that periods of cohabitation were broken up by periods of time. In *Pennington*, the parties actually broke up their relationship for periods of time and lived apart from each other. It was not merely a function of the parties' work schedule that they were separated. Again, it would seem inappropriate to say that meretricious relationship law applies

only to those with local work schedules and not to those who maintain a relationship even though they work for periods away from home.

#### Length of relationship

Ross and Hamilton's relationship spanned 15 years. This is clearly long term. In fact, much of Washington state's meretricious relationship law has developed during the course of Ross and Hamilton's relationship. The length of relationship in *Connell v Francisco*, supra, was approximately seven years. The length of the relationship in *Sutton v Widner*, 85 Wn. App. 487, 933 P.2d 1069 (1997) was approximately five years. Certainly, 15 years of cohabitation and relationship qualify as long term.

#### Intent of the parties

Everything about the relationship between Ross and Hamilton suggests that they intended to maintain a marriage-like relationship. It is important to note that in *Connell*, supra, the Court refers to cohabitation "with knowledge that a lawful marriage between them does not exist." Hamilton argues that because she refused to marry Ross in 1990, this means she did not intend to be in a marriage-like

relationship. To the contrary, under *Connell*, she merely admits that she knew she was not in a marriage and chose to engage in a marriage-like relationship for the following 15 years. Hamilton attempts to draw a parallel with the *Pennington* case. In *Pennington*, the Court found the evidence presented at trial was insufficient to establish a meretricious relationship because the parties' relationship was neither exclusive nor stable. *Pennington*, 142 Wn.2d at 603-604. *Pennington* was married to someone else during much of the relationship and the parties did not make continuous financial contributions to each other, though they did have a joint checking account and the woman cared for the man when he was sick. *Pennington* at 604-605. Despite the woman's insistence on marrying, the man refused to marry her. In the present case, Ross and Hamilton maintained an exclusive and stable relationship for 15 years. Ross was not married to someone else during much of the relationship. The parties did make continuous financial contributions to each other and also had joint checking accounts. Ross was never insistent that Hamilton marry him. Ross's proposals of marriage occurred at the earliest point in the parties' 15-year

relationship. In *Pennington* there was a companion case. The parties in the companion case did not purchase significant assets together, did not pool their time and efforts and did not have an exclusive relationship. *Pennington* at 606-607. The Court in *Pennington* held that this evidence was insufficient to show a meretricious relationship. Again, Ross and Hamilton did purchase assets, pool their time and efforts and had an exclusive relationship. Note that there is no testimony or other evidence to support that either party in the present case lived in a relationship with any other person during the parties' relationship. What is required under *Pennington* is that a mutual intent to be in a meretricious relationship be demonstrated. *Pennington* at 604. The evidence in this case demonstrates the parties' intent regarding their relationship. The fact that Hamilton later denies such intent is irrelevant. Otherwise, a party to a meretricious relationship case could prevail simply by claiming that they did not intend to be in a meretricious relationship. The Court should evaluate the actions of the parties which, in this case, demonstrate an intent to be in a meretricious relationship.

### Pooling of resources

Ross essentially turned his paycheck over to Hamilton for deposit in the joint banking account held by the parties. The purpose in doing so was to make sure that the bills of the parties were paid. Ross testified that he contributed a large portion of his paycheck to the joint effort for the whole relationship of 15 years. Ross's income was approximately \$65,000 per year for 15 years. This means that Ross earned approximately \$975,000 during the parties' relationship. There is no testimony to support that Ross was a frivolous spender, nor that he did not spend his paychecks on the joint efforts of the parties, specifically monthly bills, food, recreation and real estate/improvements. Additionally, Ross obtained loans for improvement of property. Ross and Hamilton not only pooled finances, but they also pooled their physical efforts. In fact, it was a mutual work ethic and pooling of efforts that brought Ross and Hamilton together in the first place. Ross's abilities as a maintenance person and equipment operator and his construction skills were utilized for the improvement of real property. Hamilton's construction skills, bookkeeping skills and knowledge of

real estate were used for the improvement of property. Hamilton was even on Ross's dental and health insurance and used the coverage for her benefit.

Purpose of the relationship

Ross and Hamilton had a purpose in their relationship of accumulating wealth for retirement. Ross and Hamilton wanted to have a house that was their own. Ross and Hamilton each recognized that the other had skills that contributed to the relationship. Ross and Hamilton wanted to travel across the United States in a travel trailer together. Hamilton attempts to claim a landlord-tenant relationship as the purpose, but the wealth of evidence suggests that Ross and Hamilton were working together like a husband and wife. All of the things that Hamilton did with her former husband, William Hamilton, she also did with Robert Ross.

Ultimately, there was sufficient evidence in this case to persuade a fair-minded person of the above factors.

B. The trial court did not err in its characterization and distribution of property

1. Standard of review

A property distribution after a meretricious relationship is reviewed for abuse of discretion. Discretion is abused when exercised on untenable grounds. Conclusions of Law are reviewed de novo and Findings of Fact merely need to be supported by substantial evidence. *Soltero v Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007). In the present case, the trial court's Memorandum Opinion presents a logical and well thought out explanation of not only why the Court concluded the parties were in a meretricious relationship, but why the Court awarded Ross an interest in certain properties. The trial court certainly did not exercise discretion on untenable grounds.

2. Presumption/comingling

The presumption that property held in the name of a party to a meretricious relationship is separate property was overturned. *Lindsey* supra. The *Lindsey* Court referred to this presumption as "unpredictable and at times onerous." *Lindsey* at 304. One purpose

of the *Lindsey* Court's decision was to streamline the analysis of property acquired during a meretricious relationship and place the burden of proving the separate nature of any property on the parties. *Lindsey* at 305-306. A Court should seek to avoid the unjust enrichment of one of the parties. *Connell* supra at 349. Ultimately, all property acquired during a meretricious relationship is presumed to be owned by both parties. *In re Rhone*, 140 Wn. App. 600, 166 P.3d 1230 (2007).

Hamilton must prove by clear and satisfactory evidence that she has maintained or possessed property with a separate character. *In re Dewey's Estate*, 13 Wn.2d 220, 226-27, 124 P.2d 805 (1942). Hamilton must clearly trace separate property through all of its changes and transitions. *Id.* at 226. When separate property and community property are comingled and cannot be distinguished or apportioned, such property becomes community property. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 866-867, 855 P.2d 1210 (1993). When separate and community property is comingled, the community is entitled to the increased value of the property. *In re Marriage of Elam*, 97 Wn.2d 811, 817, 650 P.2d 213 (1982). If

there is any uncertainty in tracing an asset to a separate property source, the law resolves uncertainty in favor of a finding of community character. *In re Marriage of Gillespie*, 89 Wn. App. 390, 400, 948 P.2d 1338 (1997). *Citing Connell supra* at 351. Additionally, a trial court's mischaracterization of property does not require setting aside the property distribution if it is otherwise fair and equitable. *In re Marriage of Marzetta*, 129 Wn. App. 607, 622, 120 P.2d 75 (2005). Remand may be required if the trial court was significantly influenced by its characterization of property or if it is not clear that the Court would have divided property the same way if the property was properly characterized. *In re Marriage of Shannon*, 55 Wn. App. 137, 142, 77 P.2d 8 (1989). The above rules ultimately place the burden of precise tracing of separate property on the party asserting it.

### 3. Island View property

The characterization of the Island View property requires a review of the conduct of the parties all the way back to the beginning of their relationship. The proceeds of the Vallerian Street property from Alaska paid a majority of the purchase price of the Island View

property. The Vallerian Street property was purchased in 1992, two years after the commencement of the parties' meretricious relationship. Hamilton contributed \$45,000 to the purchase. Ross contributed \$40,000 to the renovation of the Vallerian property. Ross's testimony is unrefuted where he indicates that the Vallerian property was redesigned, a garage was added and the house was completely renovated. It is also unrefuted that Ross used his tax return to pay the taxes on the Vallerian property. Ross also used his monthly paycheck to pay for improvements on the Vallerian property. Hamilton has provided no direct tracing of the source of her contribution to the Vallerian property, nor has she provided any tracing of the value or increase in value of any separate contribution. The only testimony about the resulting value of the Vallerian property is from Ross where he indicates that his contribution resulted in half of the value of the Vallerian property, suggesting equal ownership interest by both of the parties. The money from the Vallerian Street property was used to purchase the Island View property. Hamilton was clear that the proceeds from her Nickel Street duplex were placed in a separate account in the amount of

\$104,000. Those funds were kept separate and used by Hamilton. To the extent that any of the money from the Nickel Street duplex was comingled and used on the Island View property, there has been no accounting or tracing to maintain any separate character. The Island View property also involved a loan for part of the purchase price. This loan was paid back out of funds which were comingled between Hamilton's money, Ross's paychecks and money from the bed and breakfast business venture. Again, it is unrefuted that Ross paid the taxes on the Island View property out of his tax return and that he claimed the deductions for the real property ownership on the Island View property on his tax return. Ross and Hamilton both worked very hard to improve the Island View property from a purchase price of \$230,000 to a sales price of \$735,000. (CP 48). The trial court was very clear that it found the mutual efforts of the parties over 15 years were significant in determining the characterization of the Island View property. The Motion for Reconsideration gave the trial court the opportunity to rethink any issues regarding the characterization of the Island View property as community. The Court denied the Motion for Reconsideration and,

accordingly, it is clear that the Court would have reached the same conclusion regarding the Island View property even if it had been mischaracterized to some extent.

4. Judgment for \$17,500

The trial court's decision to award a Judgment of \$17,500 to Ross was part of the trial court's overall balancing of what is fair and equitable in this case. Hamilton can only claim that this appears to be double-dipping, but cannot provide ample explanation of why. The Court was simply trying to balance out a contribution to the Island View property made by Ross and awarded a Judgment for the amount of \$17,500.

5. Greenwood Road property

Hamilton claims that she had a loan for the purchase of the interest in the Greenwood Road property. Hamilton did not trace how that loan was repaid. Again, considering the fact that Ross earned \$65,000 to \$70,000 per year for a total over a 15-year relationship of \$975,000, it is reasonable to conclude and supported by testimony that Ross contributed part of his income to the purchase of the Greenwood Road property. Ross also provided

physical work for the improvement of the Greenwood Road property. Hamilton admits that Ross worked to improve the Greenwood Road property which was acquired during the parties' relationship and was paid for and improved by the efforts of both parties. The only testimony as to the resulting value or interest of a party's value was presented by Ross. Ross believed he was entitled to one-half of the 69.35% acquired during the relationship. The Court obviously assessed this issue and considered the evidence and reduced the amount to 30% awarded to Ross. Hamilton attempts to claim the acquisition of this property was separate because she obtained a loan for it on which she was the sole obligee. Hamilton also points out that if Ross were "bank rolling" the purchase, then Hamilton would not have needed a loan. It is not dispositive that Hamilton obtained the loan in her name alone. Ross's testimony was clear that he believed he contributed to the payments on the loan for the Greenwood Road property.

6. Big Lake property

The Big Lake property was acquired during the parties' relationship and, thus, is presumed to be community in nature.

Hamilton makes the same arguments regarding this property as were made regarding the Greenwood Road property. It does not matter that the loan for the property was in Hamilton's name alone. Ross provided money to Hamilton for the payment of the loan. Hamilton failed to provide any evidence, let alone clear and satisfactory evidence, that she could trace the payment of the loan to a separate source. In the context of a meretricious relationship, unless accurate tracing is provided, the Court should not base a decision on the characterization of property on a dollar for dollar accounting of where money came from. The purpose of a just and equitable distribution is to assess the contributions of each party as a whole. This avoids the difficulty and injustice of accounting for specific acts of the parties. This is the reason for the community presumption.

C. The trial court did not err in denying the Motion for a New Trial or for reconsideration

Motions for Reconsideration are addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of that discretion. An abuse of discretion exists only

if no reasonable person would have taken the view adopted by the trial court. *Holaday v Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987). The evidence before the trial court regarding the Motion for Reconsideration in favor of Ross was substantial. (CP 54-57). The Court found Ross to be more credible and believed his testimony regarding the loans that he had taken out for the improvement of properties. It is reasonable for a person to conclude that Ross remembered loans from approximately 15 years prior to his testimony and could have been mistaken as to the source of the loan. The trial court accepted this explanation and believed Ross. This was in the trial court's discretion and was not a clear or manifest abuse of discretion.

The relevant portions of CR 59 are sections (a) (2) (9) and (4). CR 59(a)(2) refers to misconduct of a prevailing party that would materially affect the rights of a party. Accordingly, Hamilton must prove that misconduct occurred and that there was a material affect on the rights of a party. Misconduct involves some wrongful act. Hamilton's assertion is that Robert Ross lied under oath. It is clear from the trial and the Court's Memorandum Opinion that Mr.

Ross was not intentionally deceiving the Court. This Motion for Reconsideration was based on a hope that the Court would conclude that Robert Ross's mistaken memory about the source of a loan from 16 years ago is somehow perjured testimony. It seems clear from Mr. Ross' presentation at trial and based on his supporting witnesses that he was doing the best that he could with the health circumstances that he was suffering from. Hamilton has not shown that Mr. Ross has intentionally attempted to deceive anyone. Hamilton has merely found an inconsistency between Mr. Ross's testimony and the documents from his 401(k) provider. Since Mr. Ross was testifying to things that he believed he had done 16 years prior to his testimony, it is understandable that he was mistaken. This is not misconduct. If the Court were to conclude that Mr. Ross is guilty of some misconduct, the misconduct would have to have a material affect on the rights of a party. Just because Ross was mistaken about the source of the \$25,000 loan, it does not necessarily follow that there was no loan. Mr. Ross borrowed money to improve the Vallerian property. His memory is that there was a \$25,000 and a \$15,000. It makes sense that a person would

remember the amount of a loan, but not necessarily where the loan came from. All of the above suggest that the Court's ruling should not be altered or swayed by proof that Ross remembered the wrong source for a loan that he obtained to improve the Vallerian property. Accordingly, the rights of Hamilton are not materially altered by the allegations of misconduct.

Hamilton has also referenced CR 59 (a) (9) which is the catchall portion of the rule regarding substantial justice. The same analysis applies to this section as is referenced above.

CR 59 (a) (4) relates to newly discovered evidence as a basis for reconsideration or a new trial. Hamilton wanted the Court to conclude that there was some misconduct. However, this is a thin disguise for the real reason for the Motion for Reconsideration. Hamilton discovered the 401(k) information after the trial and wants to present the information to the Court for reconsideration. CR 59 (a) (4) only allows newly discovered evidence to be presented when such evidence could not, with reasonable diligence, have been discovered and produced at the trial. Hamilton was able to obtain the 401(k) information by simply sending a Subpoena Duces Tecum

to Merrill Lynch. Clearly, this information could have been obtained prior to the trial with the same effort. Additionally, Hamilton could have taken the deposition of Robert Ross in order to find out where he believed the loan money came from for the renovation of the Vallerian property. Since Hamilton did not take these actions prior to the trial, Hamilton tried to circumvent CR 59 (a) (4) by claiming misconduct.

If Hamilton's Motion for New Trial or for Reconsideration was proper under CR 59, there would have to be some impact on the Court's ultimate resolution of the case for the issues presented in the Motion for Reconsideration to matter. Clearly, the trial court did not change its mind regarding credibility determinations. The trial court's Memorandum Opinion does not rely solely on a loan of \$25,000 from Ross's 401(k) as the basis for Ross's interest in either the Vallerian Street property or the Island View property. There is more than sufficient evidence to support the Court's conclusion regarding the Island View property and the Vallerian Street property without a loan of \$25,000 from Ross's 401(k). Notwithstanding the above, Ross testified that he had taken out loans for the

improvement of the Vallerian Street property. Ross clarifies his memory of the circumstances surrounding the loan for the improvement of the Vallerian Street property in his Declaration of January 8, 2009. (CP 57). Hamilton claims that Ross's testimony about loans from his 401(k) affected the trial court's findings and distribution of property. Hamilton cannot point to any example of this. As such, this assertion by Hamilton is merely conjecture.

As no argument has been made regarding assignment of error number 8 regarding the Motion for a Directed Verdict, this issue appears to have been abandoned. Ross meet his burden in his case in chief regarding the issues of this case.

#### IV. CONCLUSION

The trial court correctly concluded that Ross and Hamilton maintained a long-term, marital-like relationship while cohabitating and with the knowledge that they were not married. The evidence of this relationship spans 15 years. Ross and his witnesses were deemed more credible than Hamilton. Hamilton's assertion that this was a landlord/tenant relationship was not supported by evidence. Ross and Hamilton combined their efforts for the common purpose of building a retirement and improving their lifestyle together. It should not be the state of the law that a party to a meretricious relationship action can simply say that they did not intend to be in a meretricious relationship to defeat the claim. The evidence of the parties' intent is what should be considered. The weight of evidence in this case supports Hamilton's intent to work with Ross toward common goals, financially, to support each other and enjoy the affection and care of each other. It should also not be the state of the law that a meretricious relationship can only be had between people with local employment. Ross and Hamilton did not end their relationship over a period of 15 years. They remained in the

relationship, even though Mr. Ross worked away from home for extended periods of time.

The characterization and distribution of property came as a result of a thoughtful and methodical Memorandum Opinion from the trial court. The comingling of funds and efforts by the parties, along with the acquisition of property during the relationship, resulted in substantial “quasi community property.” Clear and satisfactory evidence was not presented regarding the tracing of any alleged separate funds that were contributed to the property acquired during the relationship. Clear and satisfactory evidence was also not provided that would assist in determining what, if any, value was retained regarding any separate contributions to assets obtained during the relationship. Because of this, the community presumption prevails. The trial court was correct in concluding that Ross was entitled to an interest in the properties that were acquired and/or improved during the parties’ relationship.

The Motion for Reconsideration made by Hamilton was properly denied.

This Court should affirm the Judgment of the trial court.

Dated this 1st day of April, 2010.



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STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

**CERTIFICATE OF SERVICE**

RE: Robert Ross v Toni Hamilton, No. 39887-7-II

BARBARA REYNOLDS, upon oath, deposes and says:

1. I am Barbara Reynolds, legal assistant to Craig M. McReary. I am competent to make this Declaration and make it on my own personal knowledge.

2. I hereby certify that I personally served a copy of the respondent Robert Ross's Opening Brief in the above-referenced case on Mark Muenster, attorney at law, 1010 Esther Street, Vancouver, WA 98660 on the 1st day of April, 2010 by means of overnight Federal Express.

Signed at Longview, Washington on April 1, 2010.

  
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