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No. 51076-6-II

**COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

IN RE MARRIAGE OF:

CHARLES M. MCBETH,

Appellant,

and

RUBY KETSCHAU,

Respondent.

OPENING BRIEF OF APPELLANT

Law Office of Charles R. Horner,
PLLC

Charles R. Horner
WSBA No. 27504
Attorney for Appellant

1001 Fourth Avenue, Ste. 3200
Seattle, Washington 98154
206-381-8454
crhornerpllc@qwestoffice.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
I. ASSIGNMENTS OF ERROR	1
A. <u>Assignments of Error.</u>	1
B. <u>Issues Pertaining to Assignments of Error.</u>	4
II. STATEMENT OF THE CASE	6
A. <u>Pertinent Events in Parties' Relationship.</u>	6
B. <u>Trial Procedure.</u>	16
C. <u>Trial Court's Disposition of the Issues.</u>	24
III. ARGUMENT	26
A. <u>Applicable Standards of Review.</u>	26
B. <u>Purpose and Elements of Committed Intimate Relationship Doctrine.</u>	27
C. <u>The Trial Court's Findings and Conclusions are Unsupported by Substantial Evidence and Legally Erroneous and This Court Should Hold No CIR Existed as a Matter of Law.</u>	32
1. The parties were not cohabitating at the time of Ketschau's purchase of the Spanaway home.	33
2. There was no reasonable inference of intent by both parties to be in a CIR at the time of the Spanaway home's purchase.	34

3.	The trial court erred as a matter of law in finding cohabitation and pooling in relation to the purchase of the Spanaway home.	35
4.	There was no substantial evidence of pooling after the parties began cohabiting to support the existence of a CIR.	37
5.	Cohabitation was not sufficiently continuous to establish a CIR.	39
B.	<u>The Trial Court’s Application of the CIR Doctrine to McBeth’s Premarital Pension Additions Was Prejudicial and Not Harmless Error.</u>	39
C.	<u>The Trial Court Failed to Consider McBeth’s Statute of Limitations Defense to CIR, Which Should Have Been Held to Bar Ketschau’s CIR Claim.</u>	42
D.	<u>A Contractual Theory that Ketschau Proffered at Trial Was Irrelevant to Support the Result.</u>	45
E.	<u>If The Court Finds a CIR Existed Before McBeth Took a Loan from His 401(k), It Should Remand for Characterization and Equitable Distribution of That Debt.</u>	46
F.	<u>The Court Should Order on Remand that Further Proceedings Be Conducted Before a Different Trial Judge.</u>	47
IV.	CONCLUSION	50

TABLE OF AUTHORITIES

	Page
I. Table of Cases	
<i>Beam v. Beam</i> , 18 Wn.App. 444, 569 P.2d 719 (1977)	30
<i>Bennett Veneer Factors, Inc. v. Brewer</i> , 73 Wn.2d 849, 441 P.2d 128 (1968)	26
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983)	27
<i>Ellis v. United States Dist. Court</i> , 356 F.3d 1198, 1211 (9th Cir. 2004)	48
<i>In re Connell v. Francisco</i> , 127 Wn.2d 339, 898 P.2d 831 (1995)	2, 27, 28, 29
<i>In re Contested Election of Schoessler</i> , 140 Wn.2d 368, 998 P.2d 818 (2000)	26
<i>In re Custody of R.</i> , 88 Wn.App. 746, 762, 947 P.2d 745 (1997)	47
<i>In re Estate of Borghi</i> , 167 Wn.2d 480, 219 P.3d 932 (2009)	43
<i>In re Kelly and Moesslang</i> , 170 Wn.App. 722, 287 P.3d 12 (2012)	42
<i>In re Marriage of Byerley and Cail</i> , 183 Wn.App. 677, 334 P.3d 108 (2014)	27-28, 29, 30, 40, 42, 43
<i>In re Marriage of Fiorito</i> , 112 Wn.App. 657, 50 P.3d 298 (2002)	41
<i>In re Marriage of Lindsey</i> , 101 Wn.2d 299, 678 P.2d 328 (1984)	28

<i>In re Marriage of Miracle</i> , 101 Wn.2d 137, 675 P.2d 1229 (1984)	31
<i>In re Marriage of Neumiller</i> , 183 Wn.App. 914, 335 P.3d 1019 (2014)	42
<i>In re Marriage of Pennington</i> , 142 Wn.2d 592, 14 P.3d 764 (2000)	27-28, 30-31, 32, 37
<i>In re Marriage of Shannon</i> , 55 Wn.App. 137, 777 P.2d 8 (1989)	40
<i>In re Marriage of Worthington</i> , 73 Wn.2d 759, 440 P.2d 478 (1968)	26
<i>In re Meretricious Relationship of Caldwell</i> , 67734-9-I, slip op. (Wn.Ct.App. July 29, 2013)	32, 38
<i>In re Meretricious Relationship of Long and Fregeau</i> , 158 Wn.App. 919, 244 P.3d 26 (2010)	35
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004)	47-48
<i>Korst v. McMahon</i> , 136 Wn.App. 202, 148 P.3d 1081 (2006)	26
<i>Lee v. Lozier</i> , 88 Wn.App. 176, 945 P.2d 214 (1997)	27
<i>Ruth v. Dight</i> , 75 Wn.2d 660, 453 P.2d 631 (1969)	45
<i>State v. Madry</i> , 8 Wn.App. 61, 504 P.2d 1156 (1972)	47
<i>Tatham v. Rogers</i> , 170 Wn.App. 76, 283 P.3d 583 (2012)	47
<i>Tyson v. Tyson</i> , 107 Wn.2d 72, 727 P.2d 226 (1986)	45

II. Statutes

RCW 4.16.080(3)	42, 46
RCW 19.36.010	46
RCW 26.09.080	3, 29, 39, 40-41, 42, 43, 50
RCW 26.16.030(4)	22

I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

The trial court erred in its findings that the parties jointly did or that one of the parties separately did the following because there was not substantial evidence to support them:

1. Were already cohabiting when respondent bought a home in December 2005.
2. Cohabited anywhere before April 2006.
3. Cohabited in a Puyallup rental home before respondent's home purchase in December 2005, or, indeed, at any time before 2008.
4. Pooled their resources and efforts in relation to respondent's purchase of the home.
5. Appellant took steps to try to purchase the home before respondent did or otherwise participated in any manner in the purchase.
6. Intended to pool their resources and efforts in connection with respondent's purchase the home in a manner akin to a married couple.

The trial court erred the following conclusions:

7. Holding that appellant's contribution of funds for living expenses, including those which respondent used to pay the mortgage on the

home, for periods when he was living there were significant for the purposes of a committed intimate relationship (CIR).

8. Concluding that appellant pooled resources with respondent in relation to work on the home to a degree sufficient for purpose of a CIR.
9. To the extent that it did so, holding that the parties had a CIR in the absence of efficient sufficient to establish all of the *Connell* factors for such, including prior and continuous cohabitation and pooling or, that all such factors need not be shown.
10. Holding that the parties resided together with sufficient continuity to establish a CIR.
11. Holding that the parties were ever in a CIR before marriage.
12. Concluding that the parties commenced a CIR before respondent purchased her home.
13. Concluding that the parties commenced a CIR as of December 2005.
14. Concluding that the parties commenced a CIR any time before April 2006, to the extent they ever had one.
15. Failing to dismiss respondent's CIR claim as time-barred.

16. Classifying appellant's retirement funds added before marriage as "community property" and not classifying it as his separate property.
17. Failing to distinguish which portion of the appellant's retirement benefits were separate property and which were community or community-like.
18. Distributing any portion of appellant's pre-marriage additions to his retirement funds to respondent based on a CIR.
19. To the extent that it might be deemed to have done so, distributing a portion of appellant's pre-marriage additions to his retirement funds to respondent in the absence of a CIR, such as on the basis of a purported contract regarding payment of the mortgage in exchange for services.
20. Failing to determine a fair and equitable distribution of appellant's retirement funds on the basis of RCW 26.09.080 only.
21. Declining to identify, to characterize, and to assign responsibility for a loan acquired on the basis of appellant's 401(k).
22. Failing to grant appellant's Motion for Reconsideration.
23. Harboring actual unjustified bias and/or giving the appearance of unjustified bias in favor of respondent and against appellant and his attorney.

B. Issues Pertaining to Assignments of Error.

1. Could the parties commence a CIR commence before cohabitating?
(Assignments of Error 1-3 and 10)
2. Could pooling of resources and efforts be deemed present based on respondent's purchase of real estate where appellant neither contribute to a down payment nor obtained financing under his credit? (Assignments of Error 4-5 and 10)
3. Were the circumstance of the parties' relationship, including when the relationship began in relation to respondent's home purchase, relevant to determining their intent under the CIR doctrine?
(Assignment of Error 6)
4. Did appellant's transfers of funds to respondent for the purpose of meeting shared living expenses, including the payment of the mortgage on respondent's home, at such times as he was living there constitute pooling for CIR purposes? (Assignment of Error 7)
5. May pooling be deemed present on basis of a few hours of electrical corrections and work that appellant performed on respondent's home? (Assignment of Error 8)
6. May pooling be deemed present based on appellant's financial or labor contributions to home improvements without a showing of enhancement of the home's value? (Assignment of Error 8)

7. May pooling be deemed present on the basis of a home equity line of credit respondent obtained in her sole name? (Assignment of Error 8)
8. Did the parties continuously cohabited to a degree sufficient for CIR purposes when respondent spent a significant percentage of the time residing elsewhere before the marriage? (Assignments of Error 9-10)
9. To the extent it did so, would it be error for the trial judge error to hold that the parties were in a CIR based on a contention of an agreement of an exchange of responsibility for mortgage payments for household services? (Assignments of Error 10 and 19)
10. Were the parties in a CIR at any time and, if so, when did it start (Assignments of Error 11-14)
11. Is a claim of a committed intimate relationship preceding a contiguous marriage time-barred if not raised within three years of separation date? (Assignment of Error 15)
12. Did the trial court commit prejudicial (*i.e.*, non-harmless) error requiring a remand to reevaluate the distribution of property its previous characterization of property and its distribution were evidently made with reference to a CIR purportedly beginning in December 2005, and it is not apparent that the court would have

made the same distribution in the absence of a CIR? (Assignments of Error 16-18 and 20)

13. To the extent that there was a CIR, did the court err by failing to acknowledge, characterize, and assign responsibility for a loan taken out against appellants 401(k) while the parties were cohabiting? (Assignment of Error 21)

14. To the extent remand is required, should the case be reassigned to another judge based on actual or perceived bias of the judge who tried this case? (Assignment of Error 23)

II. STATEMENT OF THE CASE

A. Pertinent Events in Parties' Relationship.

Appellant Charles McBeth and respondent Ruby Ketschau, the parties to this committed intimate relationship (CIR) and dissolution of marriage proceeding, first met briefly before Thanksgiving Day 2005, but did not have their first date and in-depth interaction until Thanksgiving Day. RP of 6/5 at 149:22-150:11. At that time, McBeth was 53 years old and Ketschau was 41 (making them 64 and 53 as of the start of the trial, on May 31, 2017). *See* Ex. 48.

At the time of the parties first meeting, Ketschau had significantly over 10 years' experience in running child care businesses, following a 10-year military career. RP of 6/5 at 5:7-12. She had recently operated a

child care business at a home at 6720 Pacific Avenue, Tacoma. *Id.*, at 5:13-15. She earned \$48,314.98 in that work in 2004. *Id.* at 5:15-16. She sold that home in 2004, and applied proceeds toward one year's rent of an apartment in Puyallup to which she moved with her son in December 2004. RP of 6/1 at 265:19-266:9; RP of 6/5 at 6:15-18. She then studied for, and became licensed as, a real estate salesperson by the time the parties first met. RP of 6/5 at 6:9-10; Ex. 39. She testified that she had "always been an entrepreneur of some sort." *Id.*, at 6:19-20.

McBeth had been working as a union electrician for several years before the parties met and continued doing so through the time of trial. RP of 6/1 at 219:2-4. He had been acquiring service credits toward a union pension for several years before meeting Ketschau. *Id.* He also had already established a 401(k) account through his employment, to which he simply continued to add through routine deductions from his paychecks and employer contributions, with no contributions by Ketschau, during and after the end of the parties' cohabitation. *Id.* at 219:10-17, 221.

On their first date, Ketschau told McBeth that she was living in the Puyallup apartment, but was going to close on a purchase of a Spanaway home in two weeks. RP of 6/1 at 205:20-25; RP of 6/5 at 150:14-17. She also stated shortly after meeting him that she had been successful in child

care in the past and planned to establish such a business in the Spanaway home. RP of 6/1 at 268:8-15.

Ketschau closed on the purchase of a home at 126 - 156th Street East, Spanaway (hereinafter the Spanaway home) on Tuesday, December 6, 2005. The Statutory Warranty Deed conveying title to the home to her as “a single woman” bore the date of November 30, 2005, which was a Wednesday and the third business day following the parties’ first date. Ex. 35; CP 64. The first and second Deeds of Trust bore the date December 1, 2005 and referred to promissory notes for two loans to Ketschau, “a single woman,” accounting for the entire purchase price for the home. Ex. 36, at 2 ¶ (A); Ex. 37, at 1; CP 66.

Ketschau alleged at trial that the parties discussed buying a home together virtually immediately after first meeting. She did not testify, however, that the parties ever resided together in any place before she closed her purchase of the Spanaway home.

Ketschau alleged that, at unspecified points in time, McBeth had applied and been rejected for some loan in relation to the Spanaway home, she entered into a contract to purchase the home, and she had then been approved for loans in relation to the home. Her testimony on those matters was disjointed and unclear in its chronology. She did not supply dates for most of the alleged events and actions. RP of 6/5 at 15:10-19:8. She

mentioned dates only in connection with the her assertions that the parties acquired the Spanaway home together (December 5, 2005); that she received some loan (sometime in 2006); and that the parties reached an agreement concerning their respective roles (March 2006).

Ketschau did not present any testimony or documentary evidence to support her assertions regarding the McBeth's purported role in relation to her acquisition of the Spanaway home. To the contrary, she (1) admitted on cross examination that she had no knowledge of any actions by McBeth in relation to her ultimate purchase of the Spanaway home, (2) did not inquire of him about, or attempt to impeach his testimony as to his lack of, any role in her purchase, and (3) admitted that she might have entered into the purchase and sale agreement and applied for the purchase money mortgages before meeting him.

McBeth testified that he had nothing whatsoever to do with the purchase of the Spanaway home. RP of 6/1 at 245:9-19. Ketschau allowed to stand unchallenged his testimony on that point as follows:

Q. (By Ms. Ketschau) Mr. McBeth, when did Ms. Ketschau tell you she had purchased a home in Spanaway?

A. It was the week of Thanksgiving. We met again for the second time in 2005, and you told me at that time you had purchased a home, and you were going to sign in two weeks and then move in that same month, and that's -- that's what you told me.

Q. Okay.

A. I -- you know, I wasn't even involved with it.

Q. Thank you. Okay. Let me see. Mr. McBeth, what year did you buy the Ford Explorer?

RP of 6/1 at 205:18-206:3 (emphasis added).

Ketschau did not produce any documentary evidence at trial to corroborate her allegations, such as a purchase and sale agreement or loan application in McBeth's name, and she admitted she had never seen any such documents and that "I don't know what Mr. McBeth did" relative to his supposed efforts to purchase the home RP of 6/5 at 98:3-5, 101:6-11.

On cross examination, despite having been a licensed real estate sales person at the time of the transaction, Ketschau purported to be confused about the entire concept of what it meant for her to be under contract to purchase a home and to close the purchase. RP of 6/5 at 96:3-103:17; Ex. 39. Her testimony did not, however, establish that she was not in contract or had not applied for the purchase money mortgages before the parties first date on Thanksgiving. She testified that she could have done both of those things before Thanksgiving:

Q. Between -- so, you are saying between the time you very first met Mr. McBeth and I believe before the first week of December 2005 was out, your testimony is that you had not yet decided to buy a house? So, between the time of meeting Mr. McBeth in late November of 2005 and December 6th, 2005 --

A. Objection, that's not my testimony.

* * *

Q. So, then, he made the initial offer on the home? Is that your testimony?

A. I did not say that. Objection, Your Honor.

* * *

Q. To your personal knowledge, did Mr. McBeth make an offer to Leticia G. Flores [seller] or did he not make an offer to Leticia G. Flores to purchase the home located at 126 156th Street East?

MS. KETSCHAU: Objection, Your Honor. I don't know what Mr. McBeth did.

* * *

Q. Did you not apply for the loans to purchase 126 156th Street East before Thanksgiving in 2005?

A. I don't believe so.

Q. So, you believe you first submitted your application after Thanksgiving 2005 to purchase the home?

A. I'm not sure.

* * *

Q. In fact, you were granted two separate loans; were you not?

A. Yes, sir.

Q. And that process took at least 30 days?

A. I cannot remember that.

RP of 6/5 at 96:23-97:4, 98:3-5, 101:6-11, 102:3-8, 104:25-105:4

(emphasis added).

The parties had not yet begun to live together during the period of Ketschau's purchase of the Spanaway home and would not do so until

April 2006, when McBeth moved there. He was residing in a rented home on Day Island at the time the parties met. RP of 6/5 at 98:8-11. He thereafter moved to an apartment in the Proctor District of Tacoma. *Id.*, at 152:2-8. While he may have visited Ketschau at the Puyallup apartment that she was on the verge of vacating, he never stayed overnight there. RP of 6/1 at 132:9-14, 131:3-12, 132:8-14; RP of 6/5 at 166:2-14.

With her lease of her Puyallup apartment ending and having purchased the Spanaway home, Ketschau and her son apparently moved to the Spanaway home in December 2005. McBeth testified without challenge or impeachment, and the trial court found, it was not until April 2006, when the parties began cohabiting there. RP of 5/31 at 68:4-6, 83:3-13; RP of 6/1 at 130:24-131:1, 272:16-17, 275:25-276:753. At that point, McBeth moved there with the aid of Ketschau's sister and her boyfriend. RP of 6/5 at 152:13-153:1; *id.* at 165:3-11.

Nor did Ketschau state at any time during the trial that the parties ever resided anywhere together except at the Spanaway home and, years later, at a Puyallup lease-option unit. *See also* CP 10 ¶ 4 (parties “held themselves out to the community as husband and wife from 2006 . . .”) (emphasis added); CP 60: 21-22 (no “domestic partnership” until 2006); CP 61:9-10 (“Cohabited before marriage 2006-2011. 1. 126 -156th Street, Tacoma, Washington”) (emphasis added). Of course, it would have been

impossible for the parties to cohabit in the Spanaway home until after Ketschau closed her purchase.

Following McBeth's commencement of residency at the Spanaway home in April 2016, he gave Ketschau funds for general living expenses. RP of 6/1 at 264:24-265:7. He did not directly pay any funds toward any mortgage encumbering the Spanaway home. *Id.* The parties never had any joint bank or other financial account. *Id.* at 265:8-15; RP of 5/31 at 40:2-10. He simply transferred funds to Ketschau, which were placed in her separate bank accounts. She thereafter controlled their application, if any, to the mortgages encumbering the home. RP of 6/1 at 222:22-223:10, 272:6-10.

McBeth did refer at trial to contributing to his "share" of the mortgage starting no earlier than April 2006, because that he considered that to be "fair." RP of 6/1 at 188:12-15; *id.* at 193:15-18. At such times when he was living in Ketschau's home, he did not, of course, have to pay to rent a place of his own. There was no testimony or evidence that he harbored any belief or intention that, by contributing funds to Ketschau, he was acquiring any sort of equity or right of reimbursement in the Spanaway home.

Ketschau adduced and did not impeach McBeth's testimony that he give Ketschau funds that she could have applied to the mortgage during

those extensive periods of time before the marriage when he was living in extended stay hotels because of problems in the parties' relationship. RP of 6/1 at 194:3-22, 198:17-18; 208:24-209:8. He identified in his testimony expenditures shown in his bank records that reflected weekly rental payments for such hotels. RP of 6/1 at 257-260; Exs. 2-9. The figures indicated that he was absent from the Spanaway home approximately one-quarter of the time just during the period of September 18, 2009, through May 17, 2011, before the parties married. *See* Ex. 83 (illustrative).

Although remodeling performed on the Spanaway home, prominently the conversion of the garage into a room that could be used in Ketschau's planned home daycare business, there was no evidence of any transfer or increased transfer of funds by McBeth to her, above his routine transfers for living expenses, for such a purpose. To the contrary, Ketschau, again in her sole name, secured a line of credit in July 2006, preceding the licensure of her care business in February 2006, for up to a maximum amount of \$61,600. Ex. 38. McBeth testified that he had no knowledge of that that loan. RP of 6/1 at 272:13-24, 274:16-18.

McBeth testified that, being an electrician, he devoted no more than a few hours to correcting some work of a contractor that Ketschau had hired and installing some electric heaters. RP of 6/5 at 154:14-156:2.

There was no evidence of any other labor by him on the home. Nor was any evidence produced to show any increase in the Spanaway home's value owing to either financial or labor contributions by McBeth.

In February 2007, Ketschau obtained a license to use the Spanaway home for such a business. Ex. 16. McBeth was not partner in, and the trial court found he did not work in, that business. RP of 6/19 at 7:10-14.

Ketschau earned \$58,694.50 from the child care business by 2011, the year of the parties' marriage and one year before McBeth left. RP of 6/5 at 76:19-21. There was no evidence of any regulatory or other circumstances that might have precluded her from continuing the business.

Separately, in 2008, the parties entered into a lease that including a purchase option related to a unit in Puyallup (hereinafter "Puyallup lease-option"). RP of 6/1 at 247:6-16, 266:24-267:2; CP 10 ¶ 7. That was not the same property as the Puyallup apartment in which Ketschau had resided until December 2005. The parties resided in the Puyallup lease-option for a time, during which Ketschau continued using the Spanaway home for child care. RP of 6/1 at 247:16. The expense of the Puyallup lease-option was prohibitive and the parties moved out of it and back to the Spanaway home before exercising the option. *Id.* at 267:24-268:, 269:13-15. They did not realize any gain upon vacating, as they had merely been leasing. *Id.* at 269:16-21.

The parties only resided together for a little more than one year after marrying on May 28, 2011. McBeth left for the final time in July 2012. RP of 5/31 at 35:14-16. Ketschau pleaded in her Response to the Petition, and McBeth, on further reflection, concurred, that the separation date was actually July 2012. CP 43; RP of 5/31 at 35:7-13. The trial court permitted Ketschau to impeach her own pleading as to the separation date, signed under penalty of perjury, to argue for a later separation date.

McBeth did not attempt to assert any claim to the Spanaway home. Title remained in Ketschau, as it had been. No evidence was presented at trial concerning the value of her equity in the home as of McBeth's departure.

Several months after McBeth's departure, Ketschau voluntarily surrendered her child care license because of "Family goals/personal issues," moved out-of-state to reside with her son, who had by then entered the Air Force, and, ultimately abandoned the Spanaway home to foreclosure, which occurred in 2014. RP of 6/5 at 68:4-13; Ex. 16; Ex. 79.

B. Trial Procedure.

The trial required two and one-half days and was substantially prolonged by Ketschau's failure to follow local rules regarding trial preparation, particularly in organizing and sharing exhibits. Although the transcript does not include an elapsed time readout, the undersigned can

safely represent that McBeth was comparatively prepared and economical in presenting his case in chief, having supplied the required trial notebooks. As Ketschau was *pro se*, the trial court allowed her latitude in that respect and McBeth is, of course, not complaining about that approach.

Beyond merely being lenient with Ketschau regarding compliance with local rules, however, the trial judge repeatedly expressed impatience with the pace of the trial, incorrectly stating that it had been sent to her as a one-day trial and repeatedly referring to her planned absence from the court on recess. RP of 5/31 at 114:6-12; *compare* Order Amending Case Schedule of 5/31/17 (“Estimated Trial (days): 2”) (to be included in supplemental designation of Clerk’s Papers).

Despite expressing concern with the trial’s pace, and even though trial was not held on the afternoon of May 31, the judge observed on the afternoon of June 1 that Ketschau appeared to be tired and advised her that she could ask to take the rest of the afternoon off, which meant she would also have Friday, Saturday, and Sunday off before trial resumed on Monday, June 5. RP of 6/1 at 284:10-21. The judge went on to advise Ketschau as follows:

Having said that, Ms. Ketschau, you need to be what I will call have your "A" game on which means if you have exhibits that have not been admitted or marked, you need to have them. You need to

also be clear where they are on your exhibit list or on Counsel's proposed exhibit list, so we can move forward with your testimony. Be prepared for cross-examination. You've already done that, so be prepared for that and other than that, I think you're doing just fine considering you don't have a law degree.

Id. at 285:12-22 (emphasis added).

At another point, the trial judge praised Ketschau as follows

I know you're pretty sharp; I've read your pleadings. So, you're asking very good questions, so just put on your case; I'm listening.

RP of 5/31 at 66:6-8.

McBeth and his attorney did not receive any comparable leniency, praise, or encouragement at any point during trial. Instead, the court delivered multiple negative remarks regarding McBeth's credibility in the midst of his testimony on the day of trial, citing in that connection objections his attorney raised against exhibits Ketschau offered. The following exchange occurred when McBeth testified he could not answer as to whether he had entered into a contract with an alarm company in 2008 (note: he was 64 years old at the time of trial and being asked to testify whether made a single, minor consumer transaction some nine years earlier) without refreshing his memory with the document that had just been excluded because it had been altered and contained hearsay notations by Ketschau:

Q. (By Ms. Ketschau) Mr. McBeth -- Mr. McBeth, did you have a contract with Icon Security in 2008?

A. I don't recall. I haven't seen the document.

Q. Let me show you another one then.

MR. HORNER: Objection. The document has been excluded.

THE COURT: There was no question regarding the document which is interesting that the response was what it was. Just keep in mind, I just want the witnesses in this case to understand, this is not a trial before a jury. It's before a judge, and I've been doing this quite a while, so those types of responses are not really helpful, and it's actually delaying this case; so just keep that in mind going forward. The question that was asked by Ms. Ketschau was: Mr. McBeth, did you have a contract with Icon Security in 2008? There was no reference to any document in that question.

RP of 6/1 at 183:6-22 (emphasis added).

The trial judge gave further expression to an apparent belief that raising objections cast a shadow on McBeth's credibility at end of the first morning of his testimony, going back on the record to state the following:

Actually, let's go back on the record, briefly. Okay. Briefly, back on the record, Counsel for Mr. McBeth, and, Ms. Ketschau, as I think both of you probably are not paying attention to the fact that this is a bench trial which means this Court assesses credibility of the witnesses, as well, so things that will get away with a jury doesn't really work well with a judge; so keep that in mind as you move forward because there has been delaying tactics on both sides in regards to why this case is taking so long in moving forward, but none of that is, of course, slipping by this Court; so just keep that in mind. We'll reconvene at 1:00.

RP of 6/1 at 200:22-201:8. Yet, the record establishes that many of McBeth's evidentiary objections were sustained, including his objections to 19 of 46 exhibits Ketschau offered, compared to the rejection of just one of his 28 proffered exhibits. *See Exhibit Record.*

After adjourning early on June 1, the parties had to devote all day Monday, June 5, to taking testimony in light of the judge's pending absence. Testimony was completed at 4:25 p.m. At that point, the court stated that "I will give each side three minutes for closing" following a close to two and one-half day trial. RP of 6/5 at 167:1-2 (emphasis added). The judge did not appear to perceive that limitation as a problem, stating "I've heard your testimony. I've already -- at the beginning of this case, I indicated to counsel and Ms. Ketschau the issue as I understand it to be, and nothing has changed, so three minutes." Id. at 167:6-9. Out of a desire to accommodate the court's wishes and desire to complete the trial before her absence and believing, based on her statements, that the court had been attentive to the facts and the law, the undersigned worked quickly. Good to her word, the court brought closing arguments of both parties to an end within less than six minutes combined.

It was clear from the trial judge's verbal decision delivered on June 19, 2017, that she had given full credit to Ketschau's legal argument that the Spanaway home had been acquired jointly by the parties in the context of a committed intimate relationship and, beyond simply discounting McBeth's consistent contrary testimony on every key point, had disregarded the lack of any testimony and evidence supporting Ketschau's claims and her admissions on the stand. The judge opened by pronouncing

that the parties had jointly leased and began residing together in the Puyallup lease-option in December 2005, despite the testimony of both parties that they had done so years later, in 2008:

And around December 2005, rather early in the relationship, the parties rented an apartment in Puyallup with an option to buy, and moved, according to Mr. McBeth, because the terms of the lease option were prohibitive. They then moved to the 156th Street East, Tacoma, Washington home in April of 2006, where they resided together until July 2012, when Mr. McBeth left the home. They did not rent any other place during the relationship.

RP of 6/19 a 5:8-19 (emphasis added). To make this finding, the trial judge would have had to overlook both parties' testimony that Ketschau lived with her son in a Puyallup apartment for which she paid a year's rent in advance until December 2005, when she bought and moved to the Spanaway home, and McBeth's testimony, bolstered by Ketschau's cross examination questions and testimony, that he was residing in his own homes on Day Island, followed by a rental home in the Proctor District, before he first moving to the Spanaway home in April 2006. See RP of 6/5 at 166:2-3. Nor did the judge account for (1) what was happening with the Spanaway home between December 6, 2005, and April 2006, and as to which she had given an occupancy covenant in the Deed of Trust; or (2) how the parties could have been living together anywhere in Puyallup between December 2005, and April 2006, considering that Ketschau

vacated her apartment there in December 2005, and they would not rent the Puyallup lease-option until 2008.

As for how McBeth could possibly have had any role in Ketschau's acquiring the Spanaway home, the trial judge asserted the following:

The statutory deed naming Ms. Ketschau only as a single woman was provided by Mr. McBeth, and that was not persuasive testimony [*sic*; it was a certified document] because it was clear to this Court from the testimony heard and the exhibits presented that Mr. McBeth's credit/restitution issue was the reason why that property was placed only in Ms. Ketschau's name, as she was the only one that qualified.

RP of 6/16 at 7:16-22. For that conclusion to be correct, the parties would have had to accomplish at least the following within less than three business days after their first date, considering that the Statutory Warranty Deed was prepared on November 30, 2005, three days after the long Thanksgiving weekend:

1. Reach an agreement to buy a home in order to cohabit like a married couple even though they had just met and one of them, McBeth, was married at the time;
2. Identify a property for purchase;
3. Secure a written contract for purchase (statute of frauds) even though McBeth was married and would remain so until May 30, 2006, *see* RCW 26.16.030(4);
4. Application by McBeth for (noting long holiday weekend), and receiving an answer back from the lender rejecting him for, a loan to purchase such home;
5. Arrange with seller for rescission of the contract of purchase or its amendment to remove McBeth as purchaser;

6. Application by Ketschau for and receipt of approval for two loans in her sole name for 100 percent of purchase price; and
7. Resolve all other contingencies, prerequisites, and issues entailed in purchasing the Spanaway to enable closing instruments to be readied by November 30 (deed) and December 1 (deeds of trust and promissory notes).

The trial judge refused to reconsider her conclusions regarding the starting date of the parties' cohabitation and the circumstances of the purchase of the Spanaway home despite repeated invitations to do so at the June 19 hearing and, after receiving a post-trial brief from McBeth addressing the issue that featured Ketschau's own post-trial admissions under penalty of perjury, at the September 15 presentation hearing. See CP 45-101. The trial court later denied reconsideration without comment or asking Ketschau to respond. CP 122-180; CP 181.

On June 19, the trial judge stated that her conclusion was based on her determination of "credibility" based on her "meticulous notes":

THE COURT: Thank you, counsel. This Court assesses credibility, and this Court heard the testimony in this case as the trier of fact. The decision as far as credibility of the witnesses is this Court's decision. I heard the testimony. I've made my ruling. Counsel, you're entitled to get a copy of my ruling. You're also entitled to get a copy of the transcript. I keep meticulous notes. And I'm quite sure, your review of the record, you will find out that your client did in fact make certain statements, as did Ms. Ketschau. And I am the one that makes the credibility ruling, and I've done so.

MR. HORNER: All right. I just was pointing that --

THE COURT: Counsel, we're finished. Counsel, we're finished.
RP of 6/19 at 13:2-18 (emphasis added). The complete transcript,
reflecting what was actually said at trial, is of record before this Court.

C. Trial Court's Disposition of the Issues.

The trial court finally signed final orders on September 15, 2017,
over three months after testimony ended. *See* CP 102-120. They
identified McBeth's retirement funds accrued between December 2005,
and November 2012, as "community property" of the marriage, without
any differentiation of the portions accrued before the marriage, and
disbursed one-half of them to Ketschau. Findings of Fact and Conclusions
of Law (FFCL) ¶ 9.

The court established the separation date as November 2012, even
though Ketschau had pleaded without amendment, and the parties agreed,
that the separation date was July 2012, and that McBeth had never resided
with her after that. FFCL ¶ 5.

As for Ketschau's CIR claim, the trial court wrote only "[t]hat
there is an abundance of evidence that supports that there was in fact an
intimate relationship [*sic*] prior to the marriage that started December
2005 and ended May 28, 2011, the date of the marriage." FFCL ¶ 22. The
court concluded that "a just and equitable distribution of the three (3)
retirement accounts is needed for . . . the dates from December 2005

through November 2012, when the parties separated, in amount of 50% Petitioner to Respondent.” *Id.*; *see* Decree ¶ 3.

Although the court designated the 401(k) additions before the marriage as “community property,” the final orders did not reference a loan that McBeth took out against it in 2006, of which he gave a portion to Ketschau for her personal use, including a vacation with her son. *See* FFCL ¶¶ 11 and 12 (omitting any mention of such debt); RP of 5/31 at 69:11-70:23; Ex. 1. The court simply made each party responsible for debts in his and her names without further detail. Its only response to McBeth raising that issue was to state “Are you finished?” RP of 9/15 at 296.

McBeth contended both during and following trial that Ketschau’s CIR claim should be held barred by the three-year statute of limitations. RP of 5/31 at 23:18-24:3; CP 57-58. The trial court made no mention of that issue in either its verbal decision or the final orders.

With the the signing of the final orders, to which the undersigned had stated several objections, trial judge accused him of altering them without any basis. RP of 9/15 at 298:3-17.

III. ARGUMENT

A. Applicable Standards of Review.

The typical standards of review apply in this appeal. Findings of fact are evaluated to determine if they are supported by substantial evidence. "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). The evidence and all reasonable inferences based upon it are viewed in the light most favorable to the party prevailing below. *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006).

Although the appellate court defers to the trial court's determinations concerning credibility of testimony, resolutions of conflicts in the evidence, and inferences to be drawn from the evidence as long as they are reasonable ones, such deference is not merited simply because the trial court pronounces its findings to be based on "credible" evidence. That evidence must be substantial and the inferences drawn from it must be reasonable. *See In re Marriage of Worthington*, 73 Wn.2d 759, 765, 440 P.2d 478 (1968) ("The trial court's findings are determinative of the factual issues involved only when there is evidence in the record to sustain

them”); *Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 850, 441 P.2d 128 (1968).

This Court reviews a trial court’s determinations of law *de novo*, including the trial court’s legal conclusions and its judgment. *See Lee v. Lozier*, 88 Wn.App. 176, 181, 945 P.2d 214 (1997); *In re Marriage of Byerley and Cail*, 183 Wn.App. 677, 686, 334 P.3d 108 (2014), citing *In re Marriage of Pennington*, 142 Wn.2d 592, 602-603, 14 P.3d 764 (2000).

This court is entitled to reverse a trial court’s findings of fact when it determines that the evidence reasonably points only in another direction and, thereupon, to render its own conclusions of law and judgment based thereon. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 590, 675 P.2d 193 (1983).

B. Purpose and Elements of Committed Intimate Relationship Doctrine.

It is fundamental that marriage is a creature of statute in Washington and the courts have not presumed to establish common law marriage. *In re Connell v. Francisco*, 127 Wn.2d 339, 350, 898 P.2d 831 (1995). This state of affairs ultimately compelled the Supreme Court to fashion a remedy in order “to protect unmarried parties who acquire property during their relationships by preventing the unjust enrichment of one at the expense of the other when the relationship ends” in cases where

property acquired during the relationship is titled in the name of only one partner. *Byerley*, 183 Wn.App. at 686, citing *In re Marriage of Pennington*, 142 Wn.2d at 602 (emphasis added). See *In re Marriage of Lindsey*, 101 Wn.2d 299, 303, 678 P.2d 328 (1984).

Washington courts employ five nonexclusive factors to determine whether the CIR doctrine should be applied to a given state of facts in order prevent inequity. They are:

continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties

Connell, 127 Wn.2d at 346.

McBeth has not identified and does not believe there exists any Washington reported decision in which a CIR has been found in the absence of evidence supporting the existence of each of the *Connell* factors. The central purpose of the CIR doctrine, to avoid unjust enrichment of one partner to an intimate relationship at the expenses of the other, necessarily refers to property and its twin, debt, and the distribution thereof. Without in anyway being formalistic, evidence establishing all of the factors should be and has been required to ensure that the doctrine is applied appropriately, rather than overbroadly. For example, if two persons cohabit as romantic partners for a prolonged period of time, and even plan to marry in the future, but neither contributes any significant

resources or labor to the acquisition of property held in the name of the other, equity does not call for redistribution of property. Otherwise, the court would simply be creating a form of common law marriage that would automatically confer distributional powers upon the court as extensive as for a statutory marriage under RCW 26.09.080. Absent such pooling of resources, the reason for applying the doctrine falls away. It is the synergy between the prescribed factors that facilitates the identification of cases in which the doctrine should be applied to avoid inequity. Since any two persons may pool resources for joint projects for any reason, such pooling of resources would tend to give rise to an equity relationship only if coupled evidence in support of the other factors. In this way, the presence or absence of evidence for each factor casts a light on the presence or absence of evidence in support of every other factor and, by combination, indicates whether or not a CIR should be found.

Washington decisions have stated minimum thresholds that evidence must meet in order to satisfy various *Connell* factors, which makes sense considering that the courts are seeking to avoid creating what amounts to common law marriage under a broad array of circumstances, but merely to do equity when necessary.

One firm rule is that a CIR “cannot in any event commence prior to the date the parties begin living together.” *Byerley*, 183 Wn.App. at 588.

From the general law of community property comes the principal that, in the analogous situation of a purchase of real property by one person before marrying another, title is acquired by the first based on her status at the time she entered the contract for purchase. *See Beam v. Beam*, 18 Wn.App. 444, 453, 569 P.2d 719 (1977), *quoted in Byerley*, 183 Wn.App. at 688 (“ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase”) (emphasis added). The initial acquisition of the property, at least, cannot be deemed an object of pooling for the purpose of a CIR it happened before the properties began cohabiting.

Next is the question of what sorts of other expenditures may be deemed pooling pointing to a CIR. The law is that the pooling of resources and labor must be in reference to specific projects and property acquired during cohabitation, and not the mere sharing of living expenses, including even contributing funds for mortgage payments on a home previously acquired by one of the parties and in which the parties reside. *See In Pennington*, 142 Wn.2d at 598, 604-605, and 606-607.¹ This

¹ “In July 1989, Nash and Chesterfield moved into a home purchased the previous year by Chesterfield.

“While living together, Nash and Chesterfield opened a joint checking account to which they both contributed funds. The account was opened for the purpose of funding living expenses; it was used to pay the mortgage and taxes on the house, as well as groceries,

principle makes sense considering that simply making mortgage payments is, from a practical standpoint, just as necessary to keeping a roof over one's head as paying rent to the landlord of a leased home. There mere fact that the payments for shelter are made to a lender instead of to a landlord makes no practical difference.

Analogously, in the case of an actual marriage or CIR otherwise established, the "community" would be entitled, at most, to reimbursement for its contributions and, even then, only to the extent that its contributions exceeded fair rental value it received from occupying the home. *In re*

utility bills, and other miscellaneous matters. Contributions to the account were initially equal, but over time Nash contributed more than Chesterfield. Nash testified he also paid nearly all expenses for their numerous vacations, and a disproportionate amount of their dining out expenses. Chesterfield had a profit sharing plan at Nordstrom, but refused to invest those funds in Nash's dental practice unless the two were married. Chesterfield also testified she would not invest in a house with Nash until they were married. Overall, Chesterfield's spending patterns did not change during the period of cohabitation, although she received promotions and pay increases at Nordstrom.

* * *

"Pooling of Resources: The trial court found Chesterfield and Nash had a joint checking account for living expenses, into which they both deposited money. During their period of continuous cohabitation, Nash assisted Chesterfield with some work-related travel logs. Chesterfield assisted Nash with his office emergencies, his accounts payable, his role as secretary for his study club, and his office correspondence. The court found the parties resided in Chesterfield's home and shared the mortgage payments. However, the parties maintained separate bank accounts. They also purchased no property jointly. Each maintained his or her own career and financial independence, contributing separately to their respective retirement accounts. When these facts are examined as a whole, the trial court's findings do not fully establish the parties jointly pooled their time, effort, or financial resources enough to require an equitable distribution of property, as contemplated by Connell."

Marriage of Miracle, 101 Wn.2d 137, 675 P.2d 1229 (1984). Even if it existed, a potential right of reimbursement based on contributions of funds applied to routine mortgage payments could not be deemed a “project” or asset acquired through pooling of resources so as to give rise to a CIR.

As for home improvements, absent evidence that investments of funds or labor increased value of the property, there is no sufficient evidence to establish pooling on that basis. *In re Meretricious Relationship of Caldwell*, 67734-9-I, slip op. at 7-8 (Wn.Ct.App. July 29, 2013), quoting *Pennington*, 142 Wn.2d at 605 (lack of evidence of increase in value of home from work performed by plaintiff supported trial court’s finding that she did not “substantially invest[] her time and effort into any specific asset so as to create any inequities”) (persuasive authority, *see* GR 14.1).

C. The Trial Court’s Findings and Conclusions are Unsupported by Substantial Evidence and Legally Erroneous and This Court Should Hold No CIR Existed as a Matter of Law.

While the trial court may be supreme in assessing witness credibility and resolving conflicts in the testimony, it may not rely on posited facts are unsupported by and, indeed, contrary to the evidence. That is what the trial judge in this case did, however, in concluding that

the Spanaway home could have been the object of pooling of resources in the context of a CIR.

1. The parties were not cohabitating at the time of Ketschau's purchase of the Spanaway home.

First, there was no substantial evidence to support a conclusion that the parties were cohabiting anywhere during the period leading up to December 6, 2005, when Ketschau closed her purchase of the home. Such purchase could not have been the object of pooling of resources in the context of a CIR because the parties simply were not living together, the *sine qua non* of a CIR, at the time of the purchase.

The trial judge plainly confused the evidence in finding that these fresh acquaintances almost immediately entered into a lease to rent a home before Ketschau closed her purchase of the Spanaway home and either party could move there. There was no such rental home. As described in the Statement of the Case, the judge erroneously found that the parties' rented and resided in the Puyallup lease-option in December 2005. The testimony of both parties makes it clear that was impossible because they did not rent it until 2008, after Ketschau had begun using her home for her day care business.

The trial judge also ignored the testimony that Ketschau was residing with her son in a different Puyallup apartment for which she had

paid a year's rent in advance using the proceeds of the sale of her previous home before vacating it in December 2005 and moving to the Spanaway home. Ketschau never contended that McBeth that moved into that Puyallup apartment, which she was about to vacate, or disputed his testimony that he resided at Day Island and then in the Proctor District and, at most, merely visited her at the apartment without staying overnight. Notably, Ketschau also admitted in discovery that cohabitation began in 2006, not 2005.

There is no evidence, let alone substantial evidence, to support the trial court's conclusion that the parties were cohabiting at the time Ketschau purchased the Spanaway home. The trial court's mistake is not immunized by its repeated invocation of its primacy on questions of credibility. There is no basis for legitimate dispute that they were not so cohabiting and this Court should make such a finding.

2. There was no reasonable inference of intent by both parties to be in a CIR at the time of the Spanaway home's purchase.

It was also not reasonable to infer that the parties had an intent to pool resources in the manner of a married couple at such an early stage of their relationship. The evidence is to the contrary and indicates that Ketschau was already in the process of purchasing the Spanaway home and already had a plan to use it for a child care business.

3. The trial court erred as a matter of law in finding cohabitation and pooling in relation to the purchase of the Spanaway home.

The trial court must be deemed to have erred as a matter of law to the extent it found that a CIR arose in the absence of cohabitation coupled with pooling of resources for significant projects. It is clear from the caselaw that the cohabitation must coincide with pooling and the other elements such that the pooling can be deemed to have been in reference to a CIR. *Compare In re Meretricious Relationship of Long and Fregeau*, 158 Wn.App. 919, 244 P.3d 26 (2010) (sufficient evidence of parties' cooperation in purchasing properties years after cohabitation began).

Even apart from the fact that the parties were not living together before Ketschau's closed purchase of the Spanaway home, there was not substantial evidence that McBeth had any involvement in that process, let alone extended any resources or efforts with reference to it. He did not contribute any money for a down payment nor did he contribute his credit toward its purchase. Ketschau borrowed the entire purchase price of the home in her sole name.

McBeth submits that contentions that he might have had any other involvement relative to Ketschau's purchase of the Spanaway home are irrelevant in view of the absence of contemporaneous cohabitation and pooling of resources. In any case, there was no substantial evidence to

support a conclusion that he might have tried to buy the home. There were no corroborating documents. RP of 6/5 at 101:21-102:2. Ketschau did not question or attempt to impeach McBeth on that point. As noted in the Statement of the Case, she admitted that she did not know what Mr. McBeth did and it was entirely possible that she had entered into the purchase agreement and applied for the purchase money mortgages before she her first date with him. If even the proponent of such an improbable story admitted she lacks knowledge to verify it, the trial court was not entitled to find substantial evidence to support it.

A fair-minded finder of fact would not have concluded that that there was anything close to the quantum of evidence necessary to establish the truth of Ketschau's contentions. In her telling, two grown adults who had just met, one of them married and not yet separated from his wife, immediately resolved to buy a home together in order to live like a married couple and then somehow managed undertake a complicated set of actions, in which first one and then the other pursued the purchase and loans to finance it, and all of that in less than three business days after the long holiday weekend when they had their first date. Given the lack of any evidence to verify such a course of life altering decisions and actions, Ketschau's legal contentions cannot be credited as supported by substantial evidence. They are nothing better than an evidence-free

construct calibrated to extract as much of McBeth's retirement funds from him as possible. It is troubling to observe the extent to which the trial court departed from the evidence in order to find "facts" that would conform to Ketschau's agenda. *See* subsection F, below.

4. There was no substantial evidence of pooling after the parties began cohabiting to support the existence of a CIR.

Base on the holding of *Pennington*, one romantic cohabitant's contribution of funds for the mortgage on the home of the other constitutes ordinary living expenses, akin to paying rent, and is not pooling of resources for the purpose of a CIR. That is all the evidence indicates that McBeth did in this case. He simply gave funds to Ketschau for general living expenses, which would have included his fair share of the expenses of keeping a roof over his head, considering he did not have to rent a home elsewhere at such times as he was residing with her. There was no evidence that McBeth contributed to any payment that would exceed the fair rental value the parties received from living in the home, such as to pay down the principle and, thereby, to increase equity in the home. That McBeth was not contributing funds in reference to acquiring an asset is indicated by the fact that he stopped contributing funds during the lengthy periods of time before the marriage when he was residing in extended stay hotels because of problems in the relationship. Nor, despite the luxury of

years to do so, was there ever any discussion, let alone steps taken toward, placing McBeth on title to the home.

There was no substantial evidence to support the only other pooling identified by the trial court, remodeling of the Spanaway home. There was no evidence of any significant contributions of funds or efforts by McBeth toward such work. Ketschau did not present evidence of any contributions or increased contributions by him with reference to the only remodeling project referenced at trial, the conversion of the garage into a room for Ketschau's child care business. The only evidence was that Ketschau acquired a line of credit in July 2006, again in her sole name, several months before obtaining a license from the Department of Early Childhood Learning. Such line of credit is the only notable source of funding for such work that appears in the record.

The few hours McBeth spent correcting some work performed by Ketschau's electrician and installing a few heaters was clearly too limited to rise to the level of pooling. That Ketschau hired someone else for most of the electrical work, in itself, speaks volumes considering McBeth is an electrician. Nor was there any evidence presented that such work or the remodeling of the garage increased the value of the home, as required to support a conclusion of pooling. *See In re Meretricious Relationship of Caldwell*, 67734-9-I, slip op. at 7-8 (Wn.Ct.App. July 29, 2013).

5. Cohabitation was not sufficiently continuous to establish a CIR.

The testimony and evidence at trial, including records of McBeth's account admitted into evidence, indicated that he was absent from the Spanaway home for extended period of time over the period between April 2006, and his final departure in July 2012. Such absences amount to approximately one-quarter of the overnights between and September 18, 2009, through May 17, 2011. McBeth submits that such interruptions of cohabitation over such a prolonged period of time broke the continuity required to establish a CIR.

B. The Trial Court's Application of the CIR Doctrine to McBeth's Premarital Pension Additions Was Prejudicial and Not Harmless Error.

While all property, including separate property, is before the court for potential distribution in a dissolution action under RCW 26.09.080, the trial court did not mention that statute in connection with her orders and explicitly proceeded under the CIR doctrine as to McBeth's premarital additions to his pensions. *See* Decree ¶ 22 (keying distribution to existence of CIR with start date of December 2005). Where, as in this case, it is crystal plain that the court could have characterized a separately titled as "community property" and, therefore, subject to redistribution, only with reference to a CIR, it cannot be said that its finding of a CIR did

not affect its classification or that it might not have made a different distribution had it not found a CIR. *See Byerley*, 183 Wn.App. at 690 (quoting *In re Marriage of Shannon*, 55 Wn.App. 137, 142-143, 777 P.2d 8 (1989) (remand required “where (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way”).

There is no indication in the trial court’s findings in this case that it found an even split of McBeth’s additions to his retirement starting in December 2005, to be just and equitable with reference to the duration of the marriage before separation and without regard to the CIR that it found.

It is not at all apparent that, absent its finding of a CIR starting in December 2005, the court would still have decided to divide the pension with reference to that date or despite the shortness of the marriage. The marriage’s shortness, really just 14 months before McBeth’s departure, would have been a factor that the court was bound to consider.

RCW 26.09.080(3). It notably did consider that factor in connection with Ketschau’s maintenance request, in contrast to its approach to the retirement.

It is entirely conceivable that, had it considered only RCW 26.09.080 in the absence of a CIR, the trial court would have made

an award to Ketschau only out of that portion of the McBeth's retirement that he added during the marriage pre-separation. It could have done so in consideration of the fact that there was no evidence that Ketschau, who is significantly younger than McBeth, being in only her late 40s as of 2011, lacked the ability to support herself. *See In re Marriage of Fiorito*, 112 Wn.App. 657, 669, 50 P.3d 298 (2002) (trial court did not abuse discretion in balance RCW 26.09.080 factors to award wife her separate property, much of the community property, but none of husband's separate property where the marriage lasted only three years long and did not affect wife's ability to support herself).

Ketschau had acquired many years of experience in running child care businesses and earned over \$58,000 from that work in 2011. Even were it to be considered that, for some temporary period following McBeth's departure, she might have had a reasonable need of temporary maintenance in order to make the transition to a one-income household and to continue or to enhance her ability to support herself, she did not seek such. It could be concluded, in light of that decision not to act, that her subsequent decisions to abandon her home and business should not be deemed a factor favoring an award of his separate retirement to her.

C. **The Trial Court Failed to Consider McBeth's Statute of Limitations Defense to CIR, Which Should Have Been Held to Bar Ketschau's CIR Claim.**

McBeth contended both at and following trial that Ketschau's CIR claim should be held barred by the three-year statute of limitations. A cause of action for CIR is time-barred after the third anniversary of termination of cohabitation. RCW 4.16.080(3); *In re Kelly and Moesslang*, 170 Wn.App. 722, 736-737, 287 P.3d 12 (2012), *review denied*, 176 Wn.2d 1018 (2013). A difference between the facts in *Moesslang* and the case at bar, raising what appears to be a question of first impression, is that parties in this case entered into a marriage that was putatively contiguous with the CIR, but the CIR claim was not raised until over three years after the parties stopped residing together. *Compare In re Marriage of Neumiller*, 183 Wn.App. 914, 335 P.3d 1019 (2014) (Spokane Superior Court Cause No. 11-3-01328-4) (CIR claim brought following marriage, but statute of limitations not at issue and CIR claim had been raised before third anniversary of end of cohabitation; see Superior Court docket entry of 8/6/12).

It may be observed that all property of the parties to a dissolution, community and separate is before the court, whereas only community-like property is subject to division in a CIR case. *Compare* RCW 26.09.080 and *Byerley*, 183 Wn.App. at 689. There is, however, no logical or just

reason why the statute of limitations should not apply to a CIR claim merely because the parties eventually happened marry each other for however brief a time following a CIR lasting for whatever length of time. The fact of the ultimate betrothal may cast light on the intent of purpose of the parties' prior relationship, but the reverse is not true. The marriage does not alter the preceding relationship from other than what it was or transform the property acquired during it in any way, at least absent a post-marital affirmative act to create marital property, such by quit claiming separate property to the marital community. *See Byerley*, 18 Wn.App. at 688 (citing *Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) (clear and convincing evidence required to transmute title from separate to community property and *vice versa*). Why, therefore, should a dilatory claimant be permitted to make a CIR claim in addition to a request for distribution in accordance with RCW 26.09.080? To allow such would, in essence, eradicate the distinction between CIR claims and requests for distribution under RCW 26.09.080, inappropriately extending a marriage-like privilege to a relationship that was not a marriage.

In this case, neither party placed the other in title to his or her respective property either before or after the marriage. The parties never cohabited after July 2012. Ketschau simply kept her property and child care business and then abandoned both and left the state without pursuing

a dissolution action in which she might have sought temporary spousal support in order to preserve her standard of living until she could make financial adjustments. She took no action after McBeth left. RP of 6/1 at 134:1-4.

McBeth petitioned for dissolution of the marriage over three years later, in October 2015. Even if the parties' separation date were accepted as being on or about November 30, 2012, which does not accord with their actual cohabitation, Ketschau did not first mention a possible CIR except in the form of a denial in her Response to Petition that was filed on or about February 25, 2016, well over three years after the date of separation.

There is no just or logical reason why Ketschau should have been permitted to raise a CIR issue at the late date she did. She failed to do anything to seek a division of property acquired pre-marriage until over three years after McBeth moved out of her home for the last time. In the meantime, memories continued to fade and access to other evidence relevant to the CIR, such as contentions about how the home was purchased, inevitably became less available or was lost altogether. These circumstances invoke the reasons for having statutes of limitation, which is to establish a time limit appropriate to the claim (one example being a longer limit for contracts evidenced in writing than for unwritten quasi-contracts) while requiring that the complainant act with due diligence in

order to avoid undue prejudice to the defendant from attrition of evidence relevant to stale claims and exposure to claims that may become more, rather than less spurious and exaggerated over time. *See Tyson v. Tyson*, 107 Wn.2d 72, 75-76, 727 P.2d 226 (1986), citing *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969).²

McBeth respectfully submits that Ketschau should have been barred from seeking a division of property pursuant to a the CIR doctrine because of passage of time. She may be justly relegated to a distribution pursuant to RCW 26.08.080.

D. A Contractual Theory that Ketschau Proffered at Trial Was Irrelevant to Support the Result.

Ketschau indicated during her testimony, although she did not mention it during the extremely short closing statements the trial court allowed, that she was pursuing a theretofore unpleaded contractual referring to purported promises by McBeth to pay the mortgage on the

² *Ruth*, 75 Wn.2d at 665, lists the following reasons for statutes of limitation:

Stale claims, from their very nature, are more apt to be spurious than fresh; old evidence is more likely to be untrustworthy than new. Time dissipates and erodes the memory of witnesses and their abilities to accurately describe the material events. In time witnesses die or disappear, and the longer the time the more likely this will happen. With the passing of time, minor grievances may fade away, but they may grow to outlandish proportions, too. Finally, and not to be ignored, is the basic philosophy underlying the idea that society itself benefits, except in capital cases, when there comes a time to everyone, be it long or short, that one is freed from the fears and burdens of threatened litigation.

Spanaway in exchange for being a homemaker. *See* RP of 6/5 at 15:15-16:2. The trial court did not mention such theory in its oral ruling, referring only to the CIR theory. To the extent that Ketschau's contractual argument might be deemed to have any bearing on the outcome, it is both barred by the statute of frauds and irrelevant. *See* RCW 19.36.010 ("any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith[:] . . . every special promise to answer for the debt of another person"). Such contention was also irrelevant because this is a case about characterization and distribution of property existing at the time of trial, not one about breach of an alleged agreement to pay a mortgage. Any such contract claim was also long barred by the three-year statute of limitations for oral contracts.

RCW 4.16.080(3).

E. If The Court Finds a CIR Existed Before McBeth Took a Loan from His 401(k), It Should Remand for Characterization and Equitable Distribution of That Debt.

Evidence was presented at trial that McBeth took out a \$6100 loan against the 401(k) and gave about half of it to Ketschau for use for personal expenses. The trial court entirely omitted to list and to characterize that debt as a community-like debt, if it was. *See* FFLC ¶ 11. That omission is error. This Court should order that the trial court list,

characterize, and to assign responsibility for that debt to the extent it concludes it was incurred during a CIR.

F. The Court Should Order on Remand that Further Proceedings Be Conducted Before a Different Trial Judge.

McBeth posits judicial error, not bias at trial, as the basis for reversal, but requests that, in the event this court reverses and deems a remand on any issue to be necessary, that it direct that the case be assigned to a different trial judge. A reviewing court must reassign on remand in the event there is evidence of actual bias and should remand to a different judge in the case of potential or perceived bias, also known as lack of appearance of fairness. *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972); *see also In re Custody of R.*, 88 Wn.App. 746, 762, 947 P.2d 745 (1997). Appearance of fairness is lacking where a reasonable person who possesses knowledge of all relevant facts would question the impartiality of the judge. *Tatham v. Rogers*, 170 Wn.App. 76, 96, 283 P.3d 583 (2012). Appearance of fairness is also wanting where a reasonable person would question the judge's ability to set aside previously expressed views. *See R.*, 88 Wn.App. at 754-55, 762-763. While the thrust of trial judge's findings and conclusions, in themselves, would rarely be sufficient to establish bias, viewing them in combination with comments and actions during a trial can demonstrate actual or potential bias. *In re Personal*

Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). Where, however, remanding to another judge would entail a waste of resources out of proportion to the gain in appearance of fairness, reassignment may not be appropriate. *Ellis v. United States Dist. Court*, 356 F.3d 1198, 1211 (9th Cir. 2004).

Viewing the substance of the findings and conclusions of the trial judge during the course of the proceedings together with her comments and manifest attitudes toward the parties, McBeth submits that the trial proceed out of actual unjustified bias against him and his attorney or, at the very least, violated the appearance of fairness to a degree that was striking. While the trial court's tolerance of disorganization of Ketschau's presentation and solicitous remarks to might otherwise have been attributed to her being *pro se*, see CJC 2.2, comment 4, its comments toward respondent were, by contrast, markedly negative in tone starting at an early stage of the trial and continuing through the presentation hearing of September 15 at which the undersigned was falsely accused of altering her orders.

The court explicitly indicated during McBeth's opening testimony that his, or more accurately, his attorney's proper and largely sustained evidentiary objections were somehow casting in doubt the credibility of his testimony. The judge appeared already to be making up her mind

about his credibility, just as the trial was in its early stages and after having heard Ketschau's opening argument, but none of her testimony.

The judge's conduct of the end phases of the trial also indicated that her mind was already made up even before receiving closing statements. She permitted mere minutes for closing statements following nearly two and one-half days of trial.

When she delivered her verbal ruling later in June 2017, and at the presentation of order on September 15, 2017, the trial judge manifested a complete refusal to consider McBeth's evidentiarily supported contentions that the evidence simply did not fit with her conclusion that the parties were already cohabiting at the time of Ketschau's purchase of her Spanaway home, including the obvious confusion of the timing of the Puyallup lease-option. McBeth was struck by the cruciality of that basic error in chronology in the judge's prepared remarks on June 19 and focused at length on that point. RP of 6/19 at 11:24-12:25. The judge did not even feign interest in the question, retreating to a proclamation that she was the ultimate judge of credibility and the accuracy of her notes and recollection of the evidence were not subject to question. *Id.* at 13. She similarly ignored his post-testimony briefing and Motion for Reconsideration. CP 45-101; CP 122-180. To the extent such conduct does indicate prejudice in the premises, a reasonable person could

certainly question as to whether she could or would set aside her views on remand.

Ordering reassignment of this case on any remand would not entail a disproportionate waste of resources. The most that is should be required is a reconsideration of the distribution of McBeth's retirement in light of this Court's determination of whether and when any CIR existed.

IV. CONCLUSION

Appellant requests that the Court grant him the following relief:

- (1) Reversal of the trial court's holding that there was a CIR as a matter of law;
- (2) An order that respondent's CIR claim was time-barred;
- (3) Remand to a different judge to reweigh the evidence and enter a new distribution of property pursuant to RCW 26.09.080 only;
- (4) If the Court finds there was a CIR at any point, remand to a different judge of the Superior Court reweigh the distribution of property and debt, including as to the loan taken out against the 401(k); and
- (5) An award of his costs of appeal.

RESPECTFULLY SUBMITTED this 17th day of May 2018.



Charles R. Horner, WSBA No. 27504
Attorney for Appellant

LAW OFFICES OF CHARLES R HORNER PLLC

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