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Division II  
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No. 54234-0-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Marriage of

RICHARD J. KIRSCHNER,

Appellant,

v.

LAURA A. DRYBREAD,

Appellee.

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BRIEF OF APPELLANT

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## **1. INTRODUCTION**

Richard Kirschner (“Richard”), a former sheriff’s deputy, and Laura Drybread (“Laura”) were married for nearly three decades. Richard has a host of serious medical conditions, including Multiple Sclerosis. The parties amicably divorced in 2007. In the parties’ separation agreement, incorporated into the decree of dissolution, Laura expressly agreed that she would pay Richard spousal maintenance until Richard remarried or died. The maintenance would also terminate if Laura became disabled. Besides those specific conditions subsequent, the maintenance was not modifiable, nor terminable.

After the divorce, Laura soon married another, Tommy. Richard became reacquainted with a childhood friend, Karen, in around 2011, and they became close. Karen is Richard’s live-in girlfriend and caregiver. By 2013, Laura supported Richard’s relationship with Karen to the degree of being desirous of them getting married. Laura expressly understood and stated to Richard in correspondence that the maintenance provision would not terminate unless Richard got married. Laura stated on occasion that she would “go to court” and change the divorce decree so that Richard could continue to receive maintenance and marry Karen.

The parties also have an adult child named Sheri. Sheri is not unlike many children of baby boomers in the fact she and her husband have relied

on financial and other support from Laura and Richard. Richard for several years used the maintenance payments from Laura so that Sheri could have place to live with the grandchildren. The relationship between Sheri and Richard and Laura, and new significant others, is best described in a letter from Laura to Sheri in 2014. There, Laura described how Sheri's children mean everything to Laura, but Laura still must cut Sheri off financially because Laura had taken on "unfathomable debt" supporting Sheri, and because Sheri had been dishonest and treated Laura's husband, Tommy, poorly. Laura indicated that she believed Sheri would withhold visitation of the grandchildren, at least as to Tommy, when Laura cut Sheri off financially.

In May of 2019, the parties appeared to be getting along okay. However, by July of 2019, things had radically changed. Laura filed a motion to terminate the maintenance provision on the basis that Richard and Karen were legally married. Laura had mistakenly learned from King 5 news that Richard and Karen were "married." In her motion, Laura did not request the trial court to declare that Richard and Karen were in a CIR, and the trial court did not find that Richard and Karen were in a CIR, nor did it analyze any such elements of law.

The trial court commissioner found "there was no indication" that Richard and Karen were "actually legally married." Nonetheless, the

commissioner reasoned that they had done everything but have a “ceremony.” On revision, the trial court judge affirmed, reasoning that “it will be a close call” on appeal but “the maintenance obligation ends because [Richard] is essentially married based upon our State’s case law on a committed intimate relationship.”

Richard appeals the termination of his spousal support because he believes this is not a “close call” on appeal, as the trial court reasoned, nor an “issue of first impression” as Laura’s attorney argued, to the trial court.

## **2. ASSIGNMENTS OF ERROR**

- 2.1. The trial court commissioner erred by finding, and concluding, that it could modify, or terminate, a non-modifiable spousal maintenance provision by showing a substantial change in circumstances, such as the party, *i.e.*, Richard, “being in a new relationship” and “not gotten married because of the risk of the termination of maintenance.” (*e.g.*, RP August 22, 2019, at 10-11).
- 2.2. The trial court commissioner erred by finding, and concluding, that it is “against public policy to not terminate . . . [non-modifiable] maintenance [unless the party receiving maintenance gets legally married] in a situation where it appears to the court that [such party receiving the maintenance, *i.e.*, Richard,] is simply doing everything but having a legal ceremony. (RP August 22, 2019, at 12).
- 2.3. The trial court judge erred by finding, and concluding, that “the maintenance obligation ends because [Richard] is essentially married based on our State’s case law on committed intimate relationship is very close to a marriage.” (RP November 15, 2019, at 17).
- 2.4. The trial court erred by equating Richard and Karen’s

relationship as similar to a CIR, when declaratory relief of establishing that they were in a CIR was not pled nor requested, and when the trial court did not analyze the elements of a CIR, nor find a CIR existed. (RP August 22, 2019; November 15, 2019).

- 2.5. The trial court judge erred by finding, and concluding, that Richard and Karen allegedly being in a CIR but not remarrying is a “unique” situation with a “very unusual set of facts.” (RP November 15, 2019, at 17).
- 2.6. The trial court judge erred by finding, and concluding, that public policy supported her ruling. (RP November 15, 2019, at 17).
- 2.7. The trial court judge erred by finding, and concluding, that Richard and Karen’s situation “is a [legal] marriage.” (RP November 15, 2019, at 17).
- 2.8. The trial court judge erred by finding that Richard’s attorney “has not made any argument to dispute that [Richard] and [Karen] are not holding themselves out as being married.” (RP November 15, 2019, at 17).
- 2.9. The trial court judge erred by finding and concluding that Richard’s “sole reason for not getting a legal blessing is to continue to have maintenance come.” (RP November 15, 2019, at 17).
- 2.10. The trial court judge erred by finding and concluding that Richard and Karen’s relationship is “essentially a marriage for the purpose of the operation of this separation contract” and that Laura “no longer” has an “obligation” to pay maintenance. (RP November 15, 2019, at 17).

### **3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 3.1. Whether Laura’s motion to modify the maintenance provision, based on an alleged CIR between Richard and Karen, was time-barred by a three-year statute of limitations or by the doctrine of laches in equity? Yes.

- 3.2. Whether the motion to modify, based on the maintenance provision being “unfair” at the time it was executed, or based on reasons Laura did not anticipate at the time the separation agreement was executed, was barred by a six-year statute of limitations? Yes
- 3.3. Whether an (alleged) CIR relationship is equivalent to a legal marriage for purposes of maintenance provisions in separation agreements and divorce decrees, and whether the trial court properly equated or declared Richard and Karen’s relationship as a CIR when declaratory relief to determine such issue was not pled, nor requested, and when the trial court did not analyze the elements of a CIR? No.
- 3.4. Whether the plain language of RCW 26.09.170 and RCW 26.09.070 require trial courts to follow “amicable settlements of disputes” regarding maintenance provisions as agreed by the parties in separation agreements that are in turn incorporated by reference into divorce decrees? Yes.
- 3.5. Whether the plain language of the settlement agreement and divorce decree, at issue in this case, required a legal marriage before any spousal maintenance could be terminated? Yes.
- 3.6. Whether the trial court erred and abused its discretion by terminating maintenance as set forth in the separation agreement and divorce decree by ruling an alleged CIR is equivalent to a legal marriage? Yes.
- 3.7. In the alternative, arguendo, if the trial court had discretion to alter maintenance amounts due under the parties’ separation agreement and divorce decree, whether it erred and abused its discretion by terminating the maintenance provision completely without examining the parties’ financial and other circumstances, including Richard’s new relationship with Karen? Yes.

#### **4. STATEMENT OF THE CASE**

- 4.1. In 2007, after 27 years of marriage, Richard petitioned for a

dissolution marriage. (CP at 210-13). He requested maintenance. (CP at 212). At the end of 2007, the trial court approved the parties' separation agreement and incorporated it into the decree of dissolution. (CP at 215-31).

4.2. In pertinent part, the separation agreement provided that the parties intended the agreement to be final. (CP at 219). They agreed it was fair and equitable. (CP at 220). They agreed full disclosure was made, legal counsel was obtained or could have been obtained, and that maintenance provided by Laura to Richard was nonmodifiable unless he died or got remarried. (CP at 219, 222, 227). Applicable terms at issue were as follows:

Paragraph 1.8 Full Settlement. These parties are now desirous of making a *full and final their marital and property rights and obligations*, and to settle the other issues addressed herein. . . .

Paragraph 1.9 Full Disclosure. Each party has fully disclosed to the other all properties he or she owns, and all income he or she derives from said properties. . . . Each party acknowledges that he or she understands the nature and extent of the parties' property and liabilities, that this agreement fairly describes the property and liabilities, and that *the distribution of property and liabilities in this agreement is fair and equitable*. The parties have attempted to divide their properties in such a manner that after deducting all liabilities *each will receive a fair and equitable share of property or cash*. Each party acknowledge that he or she has discussed this Settlement Agreement with his or her legal advisors. . . .

Paragraph 1.10 Incorporated into Decree. The parties agree that the terms of this agreement shall be incorporated into the Decree of Dissolution of Marriage. . . and given full force and effect thereby. *It is understood and agreed by the parties*

*that this Separation Agreement shall be final and binding upon the execution by both parties, whether or not a decree of dissolution is obtained.*

Paragraph 2.1 Release of Claims. . . *Both parties agree that neither will assert any claim or demand of any kind against the other, except as expressly recognized herein.*

Paragraph 2.3 Fairly Negotiated. The parties acknowledge that they are making this agreement of their free will and volition and that no coercion, force, pressure or undue influence whatsoever has been employed against either of them in negotiation leading to the execution of this Separation Agreement.

Paragraph 2.4 Court Approval. It is the intent of the parties that the court approve this Separation Agreement as fair and equitable at the time it was entered into and thus enforceable. . . . The parties . . . executing this Separation Agreement . . . each voluntarily consents to . . . the Superior Court of Thurston County . . . to award all such relief and ratify all rights and obligations set forth in this Separation Agreement.

Paragraph 2.5 Benefit of Counsel. Each party acknowledges that he or she has been represented in negotiations and in the preparation of this Separation Agreement by counsel of his or her own choosing, or has had the opportunity to have this Separation Agreement reviewed by independent counsel. Each party has read this Separation Agreement and fully understand it.

Paragraph 3.1 Notwithstanding that the provisions of this Separation Agreement shall be included and merged into the Decree of Dissolution, it is also the intention of the parties that this Separation Agreement retains its status independently as a Separation Agreement between the parties, [and] *each spouse [may] enforce his or her rights as they arise from this Separation Agreement by contract law. . . . It is understood and agreed by each party that this Separation Agreement shall be final and binding upon execution by both parties. . . . This Separation Agreement*

*may be terminated and modified only by a written document so reflecting, signed by the parties.*

Paragraph 3.2 Entire Separation Agreement. This Separation Agreement represents the entire agreement of the parties. . . . *No other agreements*, covenants, representations or warranties, *express or implied*, have been made by either party to the other party. . . . All prior or contemporaneous conversations, negotiations, *possible and alleged agreements* and representations . . . *with respect to the subject matter hereof are waived, merged herein and superseded hereby.*

Paragraph 3.3 Interpretation. No provision of this Separation Agreement shall be interpreted for or against any party because that party or that party's legal representative drafted this Separation Agreement.

Paragraph 8.1 The wife shall pay spousal maintenance to the husband. . . . [in] the sum of \$2,200.00 per month. . . . *Spousal maintenance shall be terminated upon the husband's remarriage or death.* Spousal maintenance may be reviewed and modified if the wife becomes disabled. "Disabled" shall be defined as that condition required by the U.S. government to qualify for social security disability benefits. Otherwise, *the wife's maintenance obligation shall be non-modifiable and shall be a continuing obligation and lien upon her estate.* The wife shall carry and designate the husband as a primary irrevocable beneficiary of the life insurance policy she currently maintains through her employment with the State of Washington, said designation being not less than 50% of the face value of said policy.

(CP at 215-31) (emphasis added).

4.3. Laura soon thereafter married someone she had known since childhood, "Tommy." (CP at 44-47). Sheri married a man named "Chad." (CP at 44-47).

4.4. In 2011, Richard reunited with Karen, a childhood friend, at a high school reunion. (CP at 35). Richard was later hit by car when walking as a pedestrian. (CP at 35). The accident complicated numerous existing medical conditions, including Multiple Sclerosis, but brought him closer together with Karen. (CP at 35).

4.5. In June of 2013, Laura sent an email to Richard and wanted to reduce the spousal maintenance she sent to Richard in half, so that half could be used for Sheri's "rent." (CP at 48-51). She offered "Tommy and I will continue to pay the remaining [half,] \$1100[,] permanently, even when you get married. . . .[a]s long as [Richard] marr[ies] Karen!!!. . . ." (CP at 48-51).

4.6. In the same email from June of 2013, Laura admitted that she understood that the maintenance provision, within the separation agreement and decree of dissolution, terminates "when [Richard] get[s] married. . . .":

*The way our order is written now, when you get married I would not longer be required to pay what the divorce agreement says.*

(CP at 48-51) (emphasis added). Richard used the maintenance payments from Laura to help Sheri, Chad, and the Sheri's children (the "grandkids" or "grandchildren" or "Sheri's children") have a place to live; Richard gave them his home to live in while Richard rented a place for himself using the maintenance payments to pay for such rental home:

There is no immediate gain in [reducing Richard's maintenance payment] for us, but in my mind, it does guarantee [Sheri, Chad, and the grandkids] the ability to make it another three years or more without financially ruining you and allow you to get the house back in a better state. . . . The gain for me comes when Chad and Sheri have their own house and become self-sufficient. . . . I think that without Sheri under the pressure of being in your house and feeling more independent you will see a change in your and her relationship. I'm think she would feel more independent.

(CP at 48-51).

4.7. In the same email from June of 2013, Laura made clear that she knew and was happy about Richard and Karen being happy together in a marital-like relationship:

. . . I will respect what you and Karen think is best. We had a really nice time tonight. We need to do this more often. Thanks for sharing all of the pics with us! Now we want to go on a cruise! I like the Tahiti idea!

(CP at 48-51).

4.8. In 2014, Laura wrote Sheri and discussed the turbulent and emotional relationships between Sheri and Chad and Laura and Tommy, as well as between Sheri and Chad and Richard and Karen. (CP at 44-47). Laura discussed how Sheri would not let Laura or Tommy see Sheri's children anymore, and Laura made clear that "there is NOTHING more important to her" than those grandkids:

Under the circumstances, with your decision to take the [grand]kids out of my life, neither my [husband] Tommy or I feel the obligation any longer to provide any financial

support. As angry and frustrated as you were, I was also. . . . To say that you have broken my heart is an understatement *because there is NOTHING more important to me than [the grandkids]*. . . . [M]y heart breaks because you have taken something important away from [them] and that is ME and Tommy. There wasn't any reason why I couldn't have a relationship with [the grandkids] without you and [your significant other] around, very much like you choose to do with [Richard] and Karen. . . .

(CP at 44-47) (emphasis added). Laura discussed that Sheri and Chad needed to financially stand on their own two feet, needed to stop “throwing” relationships “away,” needed to stop being dishonest, and inferred that financial support could continue if Sheri showed Tommy “respect.”

*I will always love you, but its time Chad learns to take care of his own family and its time you learn that family is important and you can't just keep throwing people away. . . . All I require is that you respect Tommy (and I don't expect Chad to challenge him to a fight – a 68 year old man by a 36 year old – or when he challenged [Richard] – a disabled man. Can't you understand what we was [sic] going through. . . . Between the two of you so many hurtful and untruthful things were said that it will likely never be undone. And then you put such awful things on facebook where you fully know my staff and I socialize.*

(CP at 44-47) (emphasis added). Laura discussed that she and Tommy have taken on “unfathomable debt” financially supporting Sheri and Chad, and that Richard used his maintenance support from Laura to help Sheri and Chad and the grandkids:

*Tommy and I put ourselves in unfathomable debt helping the two of you . . . a whole new house set up and rent assistance you claim to have been kicked out . . . . You find me another*

*kid who has had parents who will move out of their own house for over . . . three years to allow their grandkids to have a place to live that is safe and secure while [Chad] went to school. Your dad[, Richard,] fully realizes it is the money that I pay him [in maintenance] that allows him to do that.*

(CP at 44-47) (emphasis added). Laura discussed how she was grateful for Richard using the maintenance to help Sheri and Chad and the grandkids and that she “would go back to court” and “sign papers” so that Richard could marry Karen but still “continue” receiving “maintenance payments.”

I even told him to marry Karen and I would go back to court and sign papers to continue maintenance payments under the circumstance with his health; why? Because he was my husband for 27 years and I have special kind of love in my heart for him. You seem to be worried about being left to care for your dad when you found out about the [early onset Alzheimer’s]. It took that for you to soften.

(CP at 44-47). Laura reaffirmed how she would always financially support Richard and Karen.

Well, don’t worry about your needs to care for him too much because Tommy and I will always be there to help Karen if she needs it.

(CP at 44-47). Laura made clear that Sheri disliked Karen and Tommy and that “It’s really too bad, because they are both good people” and “very good” parents:

*You don’t like Karen and you don’t like Tommy. It’s really too bad, because they are both really good people and very good to your parent and also to you.*

(CP at 44-47) (emphasis added). Laura discussed how Karen loves Richard

so much that Karen would leave Richard if Sheri's dislike for Karen caused Richard to no longer see the grandkids:

Those [grandkids] love Karen like they do me. Your dad has always had a special way with children. You were mad once when you told me [Karen] might just pack up and leave. I am gonna [sic] bet it was BECAUSE she loves your dad and know what loosing the kids would do for him.

(CP at 44-47) (emphasis in original). Laura reaffirmed that the grandkids are the most important thing to her, and that Sheri was harming them by removing family from their lives:

. . . I do hope you will stop and think about the damage you are doing to [the grandkids]. They will grow up to resent you for taking people out of their lives. . . .

(CP at 44-47). Finally, Laura stated the "purpose" of the letter was that until things changed, she would "no longer support [Sheri] and Chad":

So, back to the purpose, we can no longer help support you and chad. . . . What I don't want is continued texts and emails intended to make me feel guilty. . . . my prayers are for my beautiful grandkids. . . .

(CP at 44-47).

4.9. In the Spring of 2019, Richard was at Providence Urology Clinic. (CP at 37). Senior employees at the hospital humiliated, embarrassed, and abused Richard by using him "as a pawn" when they "initiated" a new employee. (CP at 37). The incident caused "severe flashbacks and nightmares" from decades earlier when Richard was

sexually assaulted by a doctor during grade school. (CP at 37). The incident at Providence was heard on the news. (CP at 37).

4.10. In May of 2019, Laura wrote Richard an email closing with “love ya” and expressing grave and sincere concern for what Richard was going through. (CP at 52-54). Laura acknowledged that she and Sheri had read the “news” story on King 5. (*See* CP at 52-54).

4.11. During this same month, May of 2019, Karen and Richard identified Karen as his “friend” when seeing his physician. (CP at 204-06) (“Who was seen: Patient and friend” and “As a young adult [Richard] was raped by a doctor during a physical. . . . He has only told one person, the friend with him, about that experience” and “The friend who accompanied him is his primary support and was present during the visit. She accompanies him to his medical appointments and is his confidant.”).

4.12. By July of 2019, Laura’s previously expressed views regarding Richard and Karen changed to the degree that she hired an attorney and filed a Motion for an Order to Show Cause requesting that the maintenance provision in the parties’ separation and dissolution decree be terminated. (CP at 1-31). The basis of the motion was that Laura said she saw a story on King 5 news that (mistakenly) referred to Richard and Karen being “married to each other.” (CP at 1-31). Laura did not petition the trial court for the declaratory relief of establishing Richard and Karen were in a

CIR.

4.13. Richard and Karen filed responsive declarations explaining that “Our friends and family know we’re not legally (or spiritually) married, and we do not have intentions of taking that big step in our relationship.” (CP at 35-54, 55-57). They explained that for purposes of obtaining medical records and avoiding restrictions on Karen’s access to medical information of Richard only, they had told medical personal in private, on occasion, that they were married. (CP at 35-54, 55-57). They had an experience in the past where Karen was denied access to medical information and Richard wanted to prevent that in the future. (CP at 35-54, 55-57). They further explained that King 5 news was mistaken in its reporting that they were married, and that Laura was fully aware of the status of, and fully supportive of, Richard and Karen’s close relationship for many years:

Laura has been aware of my current and past medical issues as we have had an extremely cordial and supportive relationship with [her] . . . since 2011.

\*\*\*

The claim that we are married is false. Laura is fully aware of our situation and my need for assistance. Laura has been supportive of use and helped us, wanted us to marry right up until the story on KING5 aired. . . . I am not exactly sure what fueled her filing a court hearing. . . .

(CP at 35-54). Karen explained that she was Richard’s “live-in girlfriend” and that “Richard and I don’t have plans to get married anytime soon. . . .” (CP at 55-57). Karen explained that she was Richard’s caregiver, helping

him with medical needs and activities of daily living, and that “Laura has always been supportive of [their] relationship.” (CP at 55-57).

4.14. Richard filed medical records detailing his expensive medical history, including Multiple Sclerosis, diabetes, heart disease, and surviving cancer. (CP at 164-206). He also filed a financial declaration stating that he had income of \$2,200.00 in maintenance, \$1,487.50 in social security disability payments, \$650.00 in cash on hand, \$33,000.00 in liquid financial accounts such as stocks, and \$2,958.28 in expenses each month. (CP at 58-63).

4.15. In August of 2019, Laura filed a declaration in support of the motion to terminate maintenance, as did Sheri. (CP at 68-73, 74-92). Laura stated that “*while it may be true that Richard and Karen are not legally married*, they are married in every other respect, both ‘spiritually’ and practically.” (CP at 75) (emphasis added). She explained that Karen changed her last name to match Richard’s and that Richard wears a “wedding ring.” (CP at 75). She explained they post things on Facebook expressing love and happiness for family. (CP at 75). She noted that Karen “writes to [her] granddaughter as though she were her grandmother: “Hi Sweethart! Papa is doing better. We go to the doctor tomorrow.” (CP at 75). She stated Richard and Karen hold themselves out as being married to “healthcare providers” and KING 5 news.” (CP at 75). As to Richard’s

medical condition, she stated “I do not believe that Richard’s health is relevant to my motion to terminate maintenance because Richard has remarried, or at the very least reaps all the benefits of being married and holds himself out as married.” (CP at 76). Last, Laura stated that Richard has done some home remodeling with Karen, that they have traveled, that Karen has a full-time job, and that he has \$33,000 in liquid financial assets, sufficient to “recently purchase a piano for Karen’s birthday.” (CP at 77).

4.16. Sheri’s declaration provided that “[Richard] and Karen are being so very hypocritical while currently committing what I think is a level of fraud.” (CP at 68-73). She said that “By Thanksgiving 2011, [Richard] and Karen were already putting heavy pressure on my children to call Karen “Grammy.” (CP at 68-73). She proffered that Richard’s health was in good enough condition to “finish putting together about 75%” of a “play set” for the grandkids. (CP at 68-73). She offered into the record that the grandkids “talked about attending Papa and Grammy’s wedding.” (CP at 68-73). Sheri said she asked Richard about this and Richard replied with “talk of he and Karen having spiritually been married . . . because of their religious beliefs. . . . *Yet [Richard] would always make it perfectly clear he was not legally married.*” (CP at 68-73). Sheri stated that “[Richard] and Karen. . . . would comment all the time about they would get married, if they could.” (CP at 68-73). She said that Richard “had to work the system.” (CP at 68-73). She

stated that “Karen was simply using [Richard] for the free alimony.” (CP at 68-73). She said that despite his medical conditions he didn’t need 24 hour care, let alone partial care. (CP at 68-73). “He was baby sitting and going to parks and taking care of two homes!” (CP at 68-73). She stated that Karen and Richard told each other that they loved each other, discussed how to afford medications, and talked like married people. (CP at 68-73). Richard and Karen didn’t tell Sheri about all of their travel plans. (CP at 68-73). Last, she stated Richard was defrauding the State of Washington because Karen was paid caregiver under state disability regulations. (CP at 68-73).

4.17. On August 22, 2019, a commissioner at the trial court initially heard Laura’s motion. (RP August 22, 2019). Laura’s attorney represented to the trial court that this was an “issue of first impression.” (RP August 22, 2019, at 4). The issue of first impression he presented was “it’s against public policy to allow a party to do everything that is associated with marriage except obtain a marriage license and thereby escape having maintenance terminated.” (RP August 22, 2019, at 7). He argued that the “it’s against public policy to countenance” the situation of Richard living with Karen but still receiving maintenance as ordered in the separation agreement and decree of dissolution. (RP August 22, 2019, at 7). He argued that “three other states’ courts have considered similar issues.” (RP August 22, 2019, at 7). These were all common law marriage states. (RP August

22, 2019, at 7).

4.18. At the same hearing, Richard argued that the “separation agreement” is “perfectly clear” that “spousal maintenance shall be terminated upon the husband’s remarriage or death.” (RP August 22, 2019, at 8). Richard further pointed out that he “obviously is not dead” and “not married.” (RP August 22, 2019, at 8). Richard pointed out that Laura’s reply declaration “does seem to concede the fact” that Richard “has not, in fact, gotten remarried.” (RP August 22, 2019, at 8). He stated that “Washington is not a common law marriage state.” (RP August 22, 2019, at 8). He argued that “cohabitation does not equal” and “does not trigger the maintenance termination clause.” (RP August 22, 2019, at 8). This is because “either [Richard]’s married or he’s not.” (RP August 22, 2019, at 8). Since “he’s not married, then the maintenance must continue.” (RP August 22, 2019, at 8). In reply to Laura’s arguments about statements about being married on the news or in private medical records, Richard explained “his declaration goes on to explain the circumstances.” (RP August 22, 2019, at 8). He pointed out that Karen “doesn’t always” say she is his wife; she says so “for the purpose of having her being able to attend him at medical appointments” and such, and that “there was a medical record as recently as May 2<sup>nd</sup>, 2019, where she identifies as his friend, not his wife.” (RP August 22, 2019, at 8). Richard explained that he has needed “ongoing assistance from his

girlfriend.” (RP August 22, 2019, at 9).

4.19. The trial court commissioner found that “Because the parties do not have a marriage license, there's no indication that they've actually legally married.” (RP August 22, 2019, at 10). She found that Richard “is simply doing everything but having a legal ceremony” and that “he is married to [Karen] in every other way.” (RP August 22, 2019, at 10-12). The commissioner concluded that “there is a substantial change in circumstances, and [Laura] is no longer required to pay maintenance. . . .” (RP August 22, 2019, at 11). She also concluded that “it would be against public policy for the court to not terminate the maintenance where . . . [Richard] is simply doing everything but having a legal ceremony.” (RP August 22, 2019, at 12).

4.20. Richard moved to revise. He argued that the trial court commissioner erred by basing her ruling on a substantial change in circumstances and erred by modifying non-modifiable spousal maintenance. (CP at 96-118).

4.21. Laura’s attorney responded on revision, arguing that the circumstances were extraordinary, and that the general rule that non-modifiable spousal maintenance is not modifiable did not apply. (CP at 119-55). He argued caselaw allowed non-modifiable “maintenance . . . be modified by extreme financial hardship” that was “not foreseen as the time

of initial decree.” (CP at 119-55). He equated that caselaw to the present case, arguing that Laura “could not have foreseen [Richard] would marry his new wife in all respects, save for obtaining a marriage license, solely to avoid his maintenance award.” (CP at 119-55). He argued the maintenance provision had to be stricken to protect public policy. (CP at 119-55). Last, he argued that Richard and Karen had a CIR, “which is most closely analogous legal concept to common law marriage” and that because Richard was in CIR he was married for the “purpose of determining whether maintenance should be terminated. . . .” (CP at 119-55).

4.22. During the hearing on revision, Richard argued that the grounds ruled upon were not pled by Laura, that the court had no authority to modify non-modifiable spousal maintenance, and that “the law says that the argument [that the separation agreement is unfair] has to be made before the decree is entered.” (RP November 15, 2019, at 3-5). Richard argued that “this decree was entered . . . almost 12 years ago” and that Laura did not move for termination until 2019. (RP November 15, 2019, at 4).

4.23. In response, during the revision hearing, Laura’s attorney agreed with the judge, and conceded, that Laura could have foreseen, at the time of the divorce decree was executed, that “her ex-husband would live with another partner and not marry.” (RP November 15, 2019, at 12). But Laura’s attorney argued, in summation, that it was against public policy for

Richard to remain in a CIR but not get legally married when doing so avoided terminating maintenance paid to him by his former spouse. (RP November 15, 2019, at 8-14). The law Laura’s attorney purposed making was that “a committed intimate relationship . . . should amount to remarriage under the [maintenance modification] statute.” (RP November 15, 2019, at 13). Laura’s attorney described Richard as inappropriately “work[ing] the system” by not legally remarrying Karen. (RP November 15, 2019, at 10).

4.24. The trial court judge stated that Richard had “made a really good argument” and that “if it goes up on appeal, I think it will be close call,” but denied the revision motion. (RP November 15, 2019, at 16). She found that “certainly [Laura] could foresee that her ex-husband would live with another partner and not marry.” (RP November 15, 2019, at 12). She then rejected the commissioner’s substantial change of circumstance reasoning and basis of that previous ruling. (RP November 15, 2019, at 16). She also rejected the public policy reasoning by the commissioner because the “parties can make the contract that they have made here.” (RP November 15, 2019, at 17). Instead, the judge concluded that “the maintenance obligation ends because [Richard] is essentially married based upon our State’s caselaw on a committed intimate relationship.” (RP November 15, 2019, at 17). Last, she stated that Richard’s attorney “has not made any argument to dispute [Richard and Karen] are not holding

themselves out as married.” (RP November 15, 2019, at 17). At no point did the trial court examine or analyze the elements of, or find, that Richard and Karen were in a CIR.

4.25. Written findings or conclusions were “reserved.” (CP at 161-63).

## **5. STANDARD OF REVIEW**

“Superior court judges are authorized to review court commissioner decisions through a motion for revision.” *In re Marriage of Lyle*, 199 Wn. App. 629, 630, 398 P.3d 1225, 1227 (2017). “Although new evidence may not be considered, a judge acting on a motion for revision otherwise has plenary authority over the matter and may issue any findings or decisions that could have been entered by the commissioner.” *Id.* “Should the judge disagree with the commissioner's disposition, the judge may issue his or her own independent factual findings and legal conclusions.” *Id.* at 632-33. “Any subsequent appeal to this court is one that reviews the decision of the superior court judge, not the commissioner.” *Id.*

## **6. ARGUMENT**

### **6.1. Modification of the Maintenance Provision was Time-Barred.**

“[A] cause of action accrues when the party has the right to apply to a court for relief.” *1000 Va. Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 575, 146 P.3d 423, 428 (2006). Under RCW 4.16.060(1), claims based on written

contracts are subject to a six-year statute of limitation. Under RCW 26.09.070(3), challenges to a separation agreement's alleged unfairness must be raised before the agreement is merged into the decree of dissolution. Relief requested that is based on CIR claims are subject to a three-year statute of limitations. RCW 4.16.080(3); *In re Marriage of McBeth*, No. 51076-6-II, 2019 Wash. App. LEXIS 2401, at \*5 (Ct. App. Sep. 17, 2019) (unpublished). Equity allows parties to raise timeliness issues on appeal where justice requires it. *See McBeth*, No. 51076-6-II, 2019 Wash. App. LEXIS 2401 (majority opinion holding that the CIR action was time-barred. Dissenting opinion disagreeing because a statute of limitations defense was not pled at the trial court). The doctrine of laches bars stale claims in equity. *Carlson v. Gibraltar Sav. of Washington, F.A.*, 50 Wash. App. 424, 749 P.2d 697 (1988). "Laches is an implied waiver arising from knowledge of a given state of affairs and acquiescence in it." *Id.* at 429. It requires knowledge of a cause of action, unreasonable delay in commencing the action, and damage to the other party. *Id.*

Here, Richard argued that Laura waited twelve years to bring her motion to modify the maintenance provision in the separation agreement and decree of dissolution. (RP November 15, 2019, at 4). Any claim by Laura, or reasoning by the trial court, to terminate the maintenance provision based on alleged unfairness of the maintenance provision, or for

reasons Laura did not anticipate at the time of dissolutions decree's execution, are time-barred. *See* RCW 4.16.060(1); RCW 26.09.070(3).

Furthermore, the parties' declarations and exhibits clearly demonstrate that Laura had knowledge of an alleged CIR between Richard and Karen many years before bringing her motion to terminate maintenance. Because Laura clearly had knowledge, and notice, that Richard and Karen were plausibly living in a CIR far more than three years before her motion to terminate maintenance, her claim to terminate the maintenance provision based on an alleged CIR between Richard and Karen is time-barred. *See* RCW 4.16.080; *McBeth*, No. 51076-6-II, 2019 Wash. App. LEXIS 2401, at \*5; *see also Carlson, F.A.*, 50 Wash. App. 424.

6.2. Laura Never Requested Declaratory Relief of Establishing that Richard and Karen were in a CIR and the Trial Court Never Analyzed Such Elements or Ruled There was a CIR. Regardless, a CIR Relationship is Not Equivalent to a Legal Marriage for Purposes of Maintenance Provisions in Separation Agreements and Divorce Decrees, and this is a Settled Area of Law.

“[T]he *lex loci contractus* is controlling in adjudications involving the validity of marriage.” *Willey v. Willey*, 22 Wash. 115, 117, 60 P. 145, 146 (1900). “Common-law marriage is not recognized under Washington law.” *In re Pennington*, 142 Wn.2d 592, 600, 14 P.3d 764, 769 (2000). Rather, Washington recognizes formal legal marriages, domestic partnerships, and CIRs.

“By common definition, a spouse is a marriage partner or a wife or husband.” *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 252-53, 778 P.2d 1022, 1027 (1989). A CIR “is not a marriage.” *Id.* (holding the parties to a CIR are not married, not spouses, and not husband and wife). On the other hand, “To cohabit is defined as ‘to live together as husband and wife usually without a legal marriage having been performed.’” *In re Marriage of Tower*, 55 Wn. App. 697, 703-04, 780 P.2d 863, 867-68 (1989) (citing Webster's Third New International Dictionary 440 (1971)).

Although, courts have applied community property-like presumptions to property acquired during a CIR, these cases explicitly recognize that a CIR is not the same as a marriage for the purpose of applying the dissolution act. *See Connell v. Francisco*, 127 Wash. 2d 339, 348, 898 P.2d 831 (1995) (citing *Davis v. Department of Employment Sec.*, 108 Wash. 2d 272, 278-79, 737 P.2d 1262 (1987) (holding “the extension of property distribution rights of spouses to partners in meretricious relationships does not elevate meretricious relationships themselves to the level of marriages for any and all purposes.”); *see also Foster v. Thilges*, 61 Wash. App. 880, 887-88, 812 P.2d 523 (1991) (attorney fees under RCW 26.09.140 are not available in an action to divide property from a meretricious relationship); 21 Kenneth W. Weber, Wash. Practice sec. 57.11-.12, .24 (1997) (stating there is no common law or statutory duty

of maintenance between cohabitants). Instead, a CIR, without exception, has been held to be “marriage-like.”

The law has not changed. *Olver v. Fowler*, 161 Wn.2d 655, 666-68, 168 P.3d 348 (2007) (Supreme Court holding it “has not extended all of the rights of married spouses to unmarried partners.”). This is because “a CIR” is a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *E.g.*, *Rowe v. Rosenwald*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at \*6 (Ct. App. May 22, 2017) (unpublished opinion).

In *Rowe*, the parties began dating in 2008. A year later they became engaged. In 2009, they began cohabitating. Soon after, they began discussing a property agreement. The terms of a property agreement were negotiated and ultimately finalized. The terms included what would happen if the relationship ended. “In July 2011, the couple had a ceremony and party to celebrate their commitment.” *Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at \*4. “They referred to the ceremony as a wedding in e-mails and on social media. *Id.* The parties “acknowledge[d] that they never obtained a marriage license.” *Id.* The couple ended the relationship in 2013. Rowe filed for a “legal separation, seeking disposition of assets, spousal maintenance, and attorney fees.” *Id.* Rosenwald moved for summary judgment, claiming the property agreement precluded Rowe’s

claims. Rowe reacted by requesting the trial court declare the property agreement unenforceable and requesting “the [trial] court to find that a valid marriage existed.” *Id.* at \*4-5. Based on the claims and counter motions, the trial court found the property agreement was unenforceable, and struck the trial date on the issue of whether the parties were married or not. The trial court found no material issues of law or fact on any issue. *Id.* at \*5.

Rowe appealed the grant of summary judgment in favor of Rosenwald. The Court of Appeals viewed all facts and reasonable inference in favor Rowe. In pertinent part, it held that there was no material issue of law or fact as to the issue of whether the parties were married; they were not and Rowe was not entitled to spousal maintenance because a CIR is not a legal marriage; Rowe’s argument “ignores . . . case law that governs ‘marital-like relationships’”:

Rowe does not show a question of fact exists about whether he and Rosenwald were married. He provides evidence that they held a formal ceremony that they called a wedding during which they exchanged rings and vows. In addition, they indicated on their respective Facebook pages that they were “married.” Rowe supplies several other examples of e-mails to friends and each other where the parties referred to the ceremony as a wedding or their relationship as a marriage. But Rowe admitted that they never obtained a marriage license and had no formal certificate. Thus, his claim ignores the body of case law that governs “marital-like relationship[s] where both parties cohabit with knowledge that a lawful marriage between them does not exist.” Here, the parties knew that they were not married. Their references to a “wedding” and representations on social media do not

create a question of fact about whether they were ever married.

We characterize their relationship as a CIR and apply the law accordingly. Because they were never married, Rowe is not entitled to maintenance under RCW 26.09.090 or attorney fees under RCW 26.09.140.

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No question of material fact exists, and no issues remain for a jury to resolve. The trial court properly struck the trial date.

*Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at \*11-15.

Here, the trial court did not analyze CIR elements and did not find that Richard and Karen were in a CIR. Nor did Laura petition for, or request, such declaratory relief. Regardless of Laura’s failure to request this relief, and regardless of the trial court’s legal error of inferring there was a CIR—without expressly finding so or even analyzing CIR elements—a CIR relationship is not equivalent to a legal marriage. This is well-settled law. Laura’s arguments to the trial court about this case being one of “first impression,” where an alleged CIR could somehow be equivalent to legal marriage were nonsense. The trial court’s ruling ignores decades of caselaw on CIRs, and it was directly contradictory to such precedent.

First, the Supreme Court, and courts of appeal, in Washington have time and time again ruled that a CIR is “marital-like” but not equivalent to a legal marriage. By definition the parties in a CIR know “a lawful marriage between them does not exist.” *Id.* at 12. All marital rights, including

maintenance, have never been extended to a CIR. This is because a CIR “is not a marriage.” *Bowen*, 113 Wn.2d at 252-53. Under such precedent, applied to the facts at hand, Richard and Karen were not married.

Second, this case is governed by the laws of Washington State. The common law authority, arguments, analogies, and citations provided by Laura for the trial court were irrelevant and inapplicable to this case because “[c]ommon-law marriage is not recognized under Washington law.” *Pennington*, 142 Wn.2d at 600.

Third, Richard cohabitating with Karen, and the couple being close to one another and in love, did not “[b]y common definition” magically transform Karen into Richard’s spouse because a “spouse is a marriage partner or a wife or husband.” *Bowen*, 113 Wn.2d at 252-53.

Fourth, a legal marriage, under Washington law, is a specific event in time well-known to the parties getting married. A legal marriage is not an unknown occurrence in time. It does not require a court determination as to when it began, like a CIR. In Washington State, either a person is legally married, or they are not; you cannot be a little bit or mostly married, just like you cannot be a little bit or mostly pregnant. Legal marriages require requisite formalities, such as the parties to the union actually intending to be legally married under the laws of the state. To demonstrate that intent, the parties get a marriage license.

As to Richard and Karen, the trial court commissioner found no wedding ceremony took place between Richard and Karen. (RP August 22, 2019, at 12) (Commissioner finding Richard “is simply doing everything but having a legal ceremony”). To the degree that the judge reasoned Richard’s attorney “has not made any argument to dispute [Richard and Karen] are not holding themselves out as married” (RP November 15, 2019, at 17), such reasoning is not supported by the record whatsoever. Richard, clearly provided declarations, exhibits, stating otherwise. (CP at 35-54, 55-57). His attorney argued that Richard’s “use of the term ‘wife’ [wa]s really for the purpose of having her being able to attend to him at medical appointments.” (RP August 10, 2019, at 9).

Last, *Rowe* is directly applicable. Notably, the case is unpublished because it does not hold anything new under Washington law. In that case, the parties did far more than Richard and Karen, including having a ceremony and drafting a property agreement. The court of appeals rightfully held there was not even a material issue of fact or law as to whether the parties were married; they were not. *Rowe* at \*11-15. *Rowe* demonstrates the frivolity of Laura’s claim that a CIR is equivalent to a legal marriage—even if this Court finds that the trial court somehow (in fact or properly) determined that Richard and Karen had a CIR.

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6.3. The Plain Language of RCW 26.09.170 and RCW 26.09.070 Require Trial Courts to Follow “Amicable Settlements of Disputes” Regarding Maintenance Provisions as Provided for in Separation Agreements Incorporated into Divorce Decrees.

The primary objective regarding statutory interpretation is to effectuate the legislature’s intent. *In re Estate of Garwood*, 109 Wn. App. 811, 814-815, 38 P.3d 362, 364 (2002). If the meaning of a statute is plain on its face, courts give effect to that plain meaning. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). An unambiguous statute requires no interpretation. *Bower v. Reich*, 89 Wn. App. 9, 16, 946 P.2d 1216, 1220 (1997).

Under RCW 26.09.070(1), the legislature’s plain intent is for trial courts to respect and follow “amicable settlements of disputes”:

The parties to a marriage . . . in order to promote the amicable settlement of disputes attendant upon their separation or . . . petition for dissolution of their marriage . . . may enter into a written separation contract providing for the maintenance of either of them . . . and . . . from all obligation except that expressed in the contract.

This is because a separation agreement, once approved of, is subsequently binding on the trial court:

[The] separation contract . . . shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence . . . that the separation contract was unfair at the time of its execution.

RCW 26.09.070(3); *see also* RCW 26.09.070(5). As to maintenance

provisions, the legislature provided and intended that parties may contract for such provisions in the divorce decree to be permanent or to end following certain agreed upon certain events occurring in the future:

When the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree. Terms of a separation contract pertaining to . . . terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.

RCW 26.09.070(7). Unless otherwise provided for in the divorce decree or separation agreement, it is the legislature’s plain intent that maintenance terminates upon “*the remarriage* of the party receiving maintenance” or upon “death”:

Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or *the remarriage* of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

RCW 26.09.170(2) (emphasis added). Maintenance provisions agreed to in a separation agreement subsequently incorporated into a divorce decree may be modified if there has been a change of circumstances (RCW 26.09.170(1)), but the legislature’s clear intent is that this is not so if the parties agreed to make them non-modifiable. RCW 26.09.170(1) (incorporating by reference RCW 26.09.070(7)). The moving party bears the burden to show reasons justifying the modification of maintenance

provisions in separation agreement and divorce decree. *In re Marriage of Shellenberger*, 80 Wash. App. 71, 79-80, 906 P.2d 968 (1995)

Additionally, for decades, parties have been free to agree to terminate maintenance upon events far less than marriage, such as cohabitation with a new partner; parties frequently do so. *See e.g., Tower*, 55 Wn. App. at 703-04.

Last, when deciding whether a separation or property agreement is enforceable, courts determine, if it was fair “at the time of its execution.” RCW 26.09.070(3). Substantively, a separation agreement is fair if “at the time of its execution” it makes reasonable provisions for the party not trying to enforce it, taking into account “economic” and other circumstances. RCW 26.09.070(3). Procedurally, a separation agreement is fair if it was freely entered into, and if full disclosure was made at the time “its execution.” *See* RCW 26.09.070(3).

Here, the plain language of, and clear legislative intent of RCW 26.09.070 and RCW 26.09.170, provide that “amicable settlement of disputes” govern maintenance provisions in decrees of dissolution. The legislature has the power to limit a trial court’s legal authority and discretion. *See e.g., Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142, 1145 (2007) (holding “It is a fundamental principle of our system of government that the legislature has plenary

power to enact laws, except as limited by our state and federal constitutions.”). The legislature has done so with the current versions RCW 26.09.070 and RCW 26.09.170.

The effect of the plain language of these RCW’s is that non-modifiable maintenance provisions are not modifiable unless the decree of dissolution allows them to be modified. Not that caselaw was needed to interpret these unambiguous provisions of law, but it has already properly done so in favor of Richard. *E.g., Marriage of Glass*, 67 Wn. App. 378, 390, 835 P.2d 1054, 1059 (1992); *In re Marriage of Hulscher*, 143 Wn. App. 708, 714-17, 180 P.3d 199, 202-04 (2008). Laura’s arguments to the trial court, otherwise, either relied on outdated caselaw based on prior versions of these statutes<sup>1</sup> or relied on erroneous, and overzealous, arguments inviting the trial court to not follow the law as written.

For example, at the hearing before the commissioner regarding the motion to terminate, Laura argued that the agreement was a violation of public policy and that a change in substantial circumstances allowed modification. The problem for Laura is that she was required to have made such fairness arguments *before* the trial court merged the separation agreement into the dissolution decree. Parties may not add nor “delete . . .

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<sup>1</sup> Prior versions of these statutes gave the trial court more discretion to modify maintenance provisions based on changes in circumstances after the decree was entered. The current versions, however, expressly limit the authority and discretion of the trial court.

words from . . . statute[s] to suit the meaning” they wish “to convey. . . .” and Laura cannot change the statute to suit her needs now. *See HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 454-55, 210 P.3d 297, 302 (2009). Thus, there was no violation of public policy and no unfairness to the separation agreement. Indeed, the trial court judge recognized this reality by quashing the commissioner’s (prior) public policy reasoning on the basis that “parties can make the contract that they have made here.” (RP November 15, 2019, at 17). As to the substantial change in circumstances reasoning provided by the commissioner, the trial court judge correctly rejected that too, on the basis that caselaw there only contemplated extreme financial changes not anticipated when the decree was executed. (RP November 15, 2019, at 9-11). Accordingly, the plain language of these statutes is dispositive, in Richard’s favor, to the outcome of this case.

6.4. The Plain Language of the Settlement Agreement and Divorce Decree Required a Legal Marriage Before for Any Maintenance Could Be Terminated.

A contract is construed to give controlling weight to the parties’ intent, as expressed in the contract’s plain language. *W. Plaza, LLC v. Tison*, 180 Wn. App. 17, 22, 322 P.3d 1 (2014) *review granted*, 336 P.3d 1165 (2014). Courts “give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App.

706, 712, 334 P.3d 116, 120 (2014) (quoting *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005)).

In the context of dissolution proceedings, “contracts, where they have been examined and approved by a trial court, are very generally upheld.” *Kinne v. Kinne*, 82 Wn.2d 360, 364, 510 P.2d 814, 817 (1973). Where the parties’ “expression of intent” is that they will not “seek reduction or termination of the payments unless the eventualities mentioned in the agreement should occur,” they are “bound under the decree and the contract.” *Id.* at 818. On appeal, contractual provisions are reviewed de novo. *Viking Bank*, 183 Wn. App. at 712.

Here, the separation agreement was well-drafted and clear, and nothing was out of the ordinary. The provisions plainly explained the parties’ “intent” of making their “fair and equitable” agreement “full and final” and not “termina[ble]” or “modifi[able]” without “written” and “signed” consent thereafter. The parties expressly “waived” all other “express” or “implied” claims, interpretations, representations, or understandings of its substance.

As to the maintenance provision, it was expressly agreed upon and deemed fair by the trial court when entered with court. There is no issue, or ambiguity, regarding it because a CIR is not a marriage. (*See* Section 6.2). Stated simply, “the fact that the [maintenance] payments are terminable

upon certain named events (the petitioner's remarriage . . .) [does not] create an ambiguity” because Richard has not remarried. *See e.g., Kinne*, 82 Wn.2d at 366. In fact, in 2013, Laura expressly conceded the point to Richard, “The way the order is written now, when you get married I would no longer be required to pay. . . .” (CP at 48-51). Thus, the law requires that the plain language be followed, as Laura interpreted it years ago.

However, Laura argued otherwise to the trial court. The main thrust of her argument was that she could not have anticipated, or foreseen, that Richard would get a girlfriend, but not remarry, after their divorce. This argument is absurd to the degree that Laura’s counsel conceded the point—of Laura being able to foresee that Richard could get a girlfriend but not remarry—at oral argument on revision. (RP November 15, 2019, at 11-12). Regardless, the body of caselaw in this state regarding CIRs demonstrates that thousands of people in this state cohabit, form CIRs, and do not marry. Consequently, what Laura was really arguing to the trial court was that—twelve years after the fact—she regretted not putting a cohabitation condition subsequent in the separation agreement regarding maintenance.

The case is interesting because Laura only recently changed her previously admitted tune of desiring Richard and Karen to actually marry while allowing him to keep the maintenance payments from her. (CP at 48-51). A review of the record, and particularly Laura’s letter to the parties’

daughter, Sheri, strongly suggests that Sheri, as she has done in the past<sup>2</sup>, is conditioning Laura and Tommy seeing the grandkids (the most “important” thing in the world to Laura) on Laura providing financial support to Sheri and Chad. That money had to come from somewhere, as Laura admits that she and “Tommy . . . put [them]selves in unfathomable debt helping” Sheri and Chad. (CP at 44-47). Laura moved to terminate the maintenance. She was forced to choose between trying to terminate the maintenance provision to come up with money to help Sheri or not seeing her grandkids. But Laura regretting not putting a cohabitation condition subsequent provision in the separation agreement regarding maintenance, at the time of its execution twelve years ago, is not a legal basis for terminating maintenance now. *See Kinne*, 82 Wn.2d at 366; *In re Marriage of Allen*, 78 Wn. App. 672, 678, 898 P.2d 1390, 1393 (1995) (holding courts should favor “clarity and certainty” over “emotions of the moment . . ., afterthoughts, changing circumstances . . . and the intervention of third party interests” when deciding whether to modify divorce decrees).

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<sup>2</sup> When comparing the letter to Sheri from her mother, Laura (written well-before any thought of this litigation), to Sheri’s declaration in the trial court, it is fairly easy to determine who is actually the hypocrite in this family and “who is working” this family’s relationships; it is clearly not Richard nor Karen. Rather, it is an adult child, Sheri, unable to stand on her own two feet, ungrateful for past help, and who is apparently conditioning grandparents’ time with grandchildren to get what she wants, all the while destroying family relationships in the process. Equity does not tolerate terminating maintenance provisions on such basis.

Furthermore, Laura has no equitable basis to terminate maintenance, and disregard the decree of dissolution, because she negligently failed to negotiate a cohabitation clause. *See Spokane Co.-operative Mining Co. v. Pearson*, 28 Wash. 118, 124, 68 P. 165, 167 (1902) (holding even an inequitable judgment will not be set aside when it was the result of negligence by the party complaining). This is doubly true in the circumstance where Laura admits that Richard for a long while used “the money that [Laura] pa[id] him” in maintenance “to allow their grandkids to have a place to live that is safe and secure. . . .” (CP at 44-47).

Accordingly, the plain language of the parties’ separation agreement and decree of dissolution was unambiguous, and an actual legal marriage was required before it could be terminated. Equity is of no help to Laura.

6.5. The Trial Court Erred and Abused Its Discretion by Terminating Maintenance as Set Forth in the Separation Agreement and Divorce Decree.

“A separation contract which precludes or limits the court's power to modify an agreed maintenance award, once approved by the court and embodied into a decree, is to be enforced in accord with its terms.” *Glass*, 67 Wn. App. at 390; *Hulscher*, 143 Wn. App. at 714-17. “Except in cases where the contract was unfair at the time of its execution, such provisions are to be enforced by our courts.” *Glass*, 67 Wn. App. at 390; *Hulscher*, 143 Wn. App. at 714-17.

Legal conclusions, including the proper interpretations of statutes, are reviewed de novo. *In re Parentage of C.M.F.*, 179 Wn.2d 411, 418, 314 P.3d 1109, 1112 (2013); *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 430, 275 P.3d 1119, 1122 (2012); *State v. Morales*, 173 Wn.2d 560, 567 n.3, 269 P.3d 263 (2012). An erroneous view of the law constitutes an abuse of discretion. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350, 359 (2005); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075-76 (1993).

Here, First, Laura's motion to terminate maintenance twelve years after the decree was entered, and years after she was on notice of a CIR claim regarding Richard and Karen, was time-barred. (*See* Section 6.1). Second, a CIR is not a marriage. Laura did not request declaratory relief regarding establishing a CIR and the trial court did not find a CIR existed, nor did it analyze such elements of law. (*See* Section 6.2). Third, the plain language of RCW 26.09.170 and RCW 26.09.070 limits the trial court's authority to respect and follow non-modifiable separation agreement incorporated into dissolution decrees. (*See* Section 6.3). Fourth, there was no basis in law or equity to terminate the maintenance provision, without the written consent of the parties. (*See* Section 6.4). Fifth, the plain language of the parties' maintenance provision was not ambiguous under the law. (*See* Section 6.2, Section 6.3, Section 6.4). Richard and Karen are not

married under decades of settled caselaw. (*See* Section 6.2, Section 6.3, Section 6.4).

Consequently, the trial court's ruling that "this is a marriage" (RP November 15, 2019, at 17), regarding Richard and Karen's relationship, was an erroneous view of the law. It was an abuse of discretion. Washington State has no common law marriage. The trial court had no authority to contradict decades of settled law on such issue. Furthermore, the trial court's granting of Laura's motion to terminate her maintenance obligation because she found that Richard and Karen are "essentially married based upon our State's case law on a committed intimate relationship[s]" was an equally erroneous view of the law, which would upend decades of well-reasoned law regarding CIRs. It was an abuse of discretion.

Last, to the degree this Court considers public policy arguments presented by Laura to the trial court, neither the maintenance provision nor Richard and Karen's relationship was a violation of public policy; the maintenance provision was substantively and procedurally fair, as determined twelve years ago, and Richard and Karen choosing not to get married is a perfectly acceptable choice in their lives. It was foreseeable to the parties at the time the separation agreement and dissolution decree were executed. The parties chose not to provide any cohabitation clause.

6.6. In the Alternative, Arguendo, If the Trial Court Had Discretion to Alter Maintenance Amounts Due Under the Parties' Separation Agreement and Divorce Decree, It Abused Its Discretion by Terminating the Maintenance Provision Completely Without Examining the Parties' Financial and Other Circumstances.

Even in cases where “cohabitation” with a new partner, such as in a CIR, is written into a divorce decree as condition subsequent that terminates maintenance, the trial court “must evaluate new relationship to determine whether equity justifies termination or modification of maintenance on basis of cohabitation.” *Tower*, 55 Wn. App. at 702. This is because “in a case where long-term maintenance has been appropriately awarded, cohabitation should not automatically trigger termination. *Id.* at 703.

Here, arguendo, if the parties’ maintenance provision was subject to modification for reasons articulated by the trial court, the trial court still erred and abused its discretion by not making “factual determination whether a substantial change in circumstances has occurred which entitles the paying spouse to ask for a reduction or elimination of maintenance.” *Id.* This is especially true given Laura’s superior financial circumstances, and especially true given Richard’s age, years of reliance on the maintenance payments, medical conditions, limited income, and monthly expenses that would far exceed his income if maintenance terminated.

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## 7. ATTORNEY FEES AND COSTS ON APPEAL

Pursuant to RAP 18.1, this Court may award costs and attorney fees if applicable law grants a party the right to recover fees and cost on appeal.

Here, RCW 26.09.140, after considering the financial resources of both parties, allows this Court to award fees and costs to Richard. He is clearly the party with far fewer financial resources. The same statute also grants discretion to award fees and costs on “any appeal” arising from a domestic dissolution. Although the trial court ruled in favor of Laura, just a cursory review of the law in this state reveals that Laura’s arguments were devoid of merit. *See e.g., Rowe*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221, at \*5. Instead of providing citation from applicable Washington State cases on point, as Richard did, Laura provided misleading and inapplicable law from other states regarding common law marriages that was utterly irrelevant. She provided arguments that were not sound. She erroneously claimed the issue presented to the trial court was one “of first impression.”

These were factors in the trial court erring. Laura caused this appeal. Richard deserves attorney fees and costs be paid for by her; had Laura simply followed the plain language of the applicable statutes and followed the plain language of the settlement agreement and decree of dissolution, this appeal would have never occurred. *See e.g., In re Parentage of Jannot*, 149 Wn.2d 123, 126-27, 65 P.3d 664, 666 (2003) (holding families’

emotional and financial interests are best served by finality and not best served with appeals).

## **8. CONCLUSION**

Richard respectfully requests this Court reverse the trial court's order, reinstate maintenance payments from the time they ceased, and award him attorney fees and costs on appeal. The Court had no authority to terminate the maintenance provision under settled caselaw and very clear statutes directly on point.

In the alternative, if this Court holds that the trial court had authority to modify the maintenance provision, Richard respectfully requests this Court remand the matter to the trial court. Upon remand, the trial court should be required to review and make findings regarding the parties' present financial circumstances. It should be required to make findings regarding whether Richard's relationship with Karen justifies reducing or terminating spousal maintenance payments from Laura.

Respectfully submitted this 18<sup>th</sup> day of May, 2020,



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Drew Mazzeo WSBA No. 46506  
Attorney for Appellant

## CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on May 18, 2020, I caused to be served:

1. Brief of Appellant

On:

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Dated May 18, 2020, at Olympia, Washington.

  
\_\_\_\_\_  
Stacia Smith

# LIFETIME LEGAL, PLLC

May 18, 2020 - 11:47 AM

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