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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**

**and**

**LAURA A. DRYBREAD,**

**Respondent**

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**APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE MARY SUE WILSON**

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

In a July 1, 2019 King 5 news story, Richard Kirschner (Richard<sup>1</sup>) and Karen Kirschner represented themselves as husband and wife to the television reporter and to the world. Laura Drybread then sought and obtained an order to show cause for a hearing to terminate spousal maintenance in accordance with the terms of her divorce from Richard. At that time, Laura had been paying spousal maintenance to Richard for approximately 11 ½ years. Although Laura had known for years that Richard and Karen were cohabitating, she did not know that Richard had apparently married Karen until seeing the King 5 story.

Richard responded by denying having married Karen. But, he then provided medical records to show that, with one exception, he and Karen had held themselves out as married for

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<sup>1</sup> The parties are referred to herein by their first names for ease of reference. No disrespect is intended to anyone.

years. In one case, Richard represented to a medical provider that he and Karen had been married for 11 years.

In reply, Laura provided the court below with evidence that Richard and Karen had taken every step imaginable, short of obtaining a marriage license, to be married. She further provided evidence that Richard had avoided obtaining a marriage license solely because, in Richard's words, he wanted to "play the system" to avoid termination of maintenance.

Richard appeals the trial court's decision to terminate maintenance, basing much of his argument on the notion that (a) Laura did not prove the existence of a committed intimate relationship ("CIR") in the court below and (b) the existence of a CIR should not form the basis to terminate maintenance. Richard misunderstands Laura's position.

Laura respectfully submits that this Court should affirm the trial court's decision on any or all of three bases:

*First*, the Court need not decide whether a CIR is a basis for terminating maintenance. However, under the unique facts

of this case, the Court should affirm the trial court's decision that *this CIR* is a legitimate basis for terminating maintenance.

*Second*, to the extent that it allows Richard to "play the system" and avoid termination of maintenance by marrying Karen in every way imaginable except for obtaining a marriage license, the agreement which forms the basis for the non-modifiable maintenance provision in the decree of dissolution is unenforceable as against public policy.

*Third*, by taking the actions he did, Richard violated the duty of good faith and fair dealing implicit in every contract, thus rendering the non-modifiable maintenance agreement unenforceable.

## **II. RESTATEMENT OF ISSUES**

A. Where a spousal maintenance recipient takes every action imaginable to be married, short of obtaining a license, and does not obtain a license for the sole purpose of avoiding the termination of maintenance, should the Court consider him

“remarried” for the purpose of terminating spousal maintenance? Yes.

B. To the extent that a marital dissolution settlement agreement permits a maintenance recipient to avoid termination of maintenance by taking every action to be married, except obtaining a license, is the settlement agreement unenforceable as against public policy? Yes.

C. Where a spousal maintenance recipient takes every action imaginable, short of obtaining a license, to be married and does not obtain a license for the sole purpose of avoiding the termination of maintenance, has he violated the duty of good faith and fair dealing implicit in every contract, thus rendering the marital dissolution settlement agreement unenforceable? Yes.

D. Where a payer of spousal maintenance is aware for many years that her former spouse has been engaged in a CIR but files her request to terminate maintenance within 10 days of learning that her former spouse apparently has remarried,

should her action be time-barred by the statute of limitations or the doctrine of laches? No.

### **III. RESTATEMENT OF FACTS**

Laura and Richard were married on February 23, 1980 and separated on August 4, 2007. CP 233. Laura and Richard have an adult daughter, Sheri Dillman. CP 68. The parties resolved their marital dissolution by entering a settlement agreement which, among other things, provided that Laura would pay Richard non-modifiable spousal maintenance of \$2,200 per month and this maintenance obligation would terminate “upon [Richard’s] remarriage or death.” CP 227. The parties’ marriage was dissolved on December 28, 2007 (CP 6-9), and the decree of dissolution expressly incorporated the terms of the settlement agreement. CP 2, 3; CP 10-22.

Sometime between 2007 and 2011,<sup>2</sup> Richard reconnected with Karen, a friend from high school. CP 35. Although it is unclear from the record when Richard and Karen began cohabitating, it appears that by Thanksgiving 2011 they were indeed living together, because at that time Richard and Karen began pressuring Sheri's children to call Karen "Grammy." CP 69. Richard and Karen have continued to cohabit through the present. CP 55.

Prior to moving in with Richard, Karen worked a full-time job. CP 77. Karen now arranges Richard's medical appointments and drives him wherever he needs to go. CP 56. For these services, she receives compensation from the State of Washington, CP 71, although Richard's financial declaration does not indicate that Karen has any current income. CP 60. Karen and Richard handle all their finances together. CP 174.

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<sup>2</sup> Richard declared that he and Karen reconnected in 2011 (CP 35), but on March 18, 2019 also represented that he and Karen had been married for 11 years. CP 176.

On July 1, 2019, King 5 news aired an interview with Richard and Karen in a story relating to inappropriate patient practices at Providence Health and Services. CP 2-3. The King 5 story identifies Richard and Karen as married no less than eight times.<sup>3</sup> CP 24-26. When Laura saw the report and heard these references, she believed that Richard and Karen must have “recently” been married. CP 2. For his part, Richard claims that the reference to Karen being his wife was a “mistake” that he did not feel he needed to correct, especially since he and Karen had represented to Providence that they were husband and wife. CP 37.

Believing that Richard had remarried, Laura then filed a motion for an order to show cause to terminate maintenance on July 10, 2020. CP 1. Richard responded by denying that he and Karen had married, claimed that Karen was simply his girlfriend, and claimed that his “friends and family know that

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<sup>3</sup> Including references to Richard and Karen as “the Kirschners,” the “couple” and “he and his wife.”

we are not legally (or spiritually) married, and we do not have intentions of taking that big step....” CP 35. In her responsive declaration, Karen also stated that she and Richard were not married, and “[didn’t] have plans to get married anytime soon.” CP 55. Richard then provided copies of some of his medical records, which showed that on at least two occasions he and Karen had represented to medical providers that they were married:

**March 18, 2019 meeting with Dr. Samantha Artherhold**

Identifies as married to Karen. CP 173 (twice), CP 174 (thrice), CP 175 (twice), CP 176 (twice), CP 182 (twice)

Claims Karen as “his wife of 11 years” (CP 176)

Indicates that Richard “enjoys going on cruises, last went to Mexico in January [2020].” CP 177.

Karen indicates that both she and Richard “keep very busy with projects at home as well as time with grandchildren.” CP 177.

**March 12, 2019 meeting with Dr. Eunice Chen**

Identifies as married to Karen. CP 195 (twice), CP 196.

In only one record—from May 19, 2020—did Richard identify Karen as anything other than his wife. CP 205. Richard admitted that he routinely claims to medical providers that Karen is his wife, because doing so “allowed Karen to be with me while hospitalized or at doctor’s appointments.” CP 36.

Although Richard claimed that Laura “has been aware of [his] current and past medical issues,” the record is devoid of any evidence that Laura knew, prior to the King 5 story, that Richard and Karen were holding themselves out as husband and wife. CP 37.

Richard filed a financial declaration in response to Laura’s motion, apparently in compliance with Thurston County Local Special Proceedings Rule (“LSPR”) 94.03B(b)(4). CP 58. However, although LSPR 94.03B(b)(4) requires it, he elected not to file his tax returns, which would have shown whether he filed as single or married.<sup>4</sup>

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<sup>4</sup> Although Richard apparently treated Laura’s motion as one to modify maintenance, Laura originally filed her motion as one to terminate

In reply to Richard's claim that he was not married to Karen, Laura provided the trial court with the following evidence<sup>5</sup> that, at a minimum, the Kirschners were holding themselves out as being married:

- Karen had taken Richard's last name. CP 75
- Richard wears a wedding ring. CP 80
- Richard and Karen wrote Richard's relatives online stating "we together are blessed to be a part of your loving family." CP 82.
- Karen refers to Richard and Laura's grandchildren as her grandchildren. CP 88.

Laura and Sheri had what could only be characterized as a tumultuous relationship prior to 2014. CP 45-47. By August

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maintenance due to Richard's apparent remarriage. Because of this, Laura did not believe that LSPR 94.03B(b)(4) applied. Should this Court remand for further proceedings or should this Court require additional evidence pursuant to RAP 9.11(a), Laura would provide her financial declaration as well as her tax returns.

<sup>5</sup> During the August 22, 2019 hearing before the court commissioner, Richard through counsel objected to the court's considering evidence contained in Laura's and Sheri's reply declarations. RP 8/22/19 at 4-6. This included an objection to evidence that Richard wore a wedding ring, despite the fact that Richard was standing before the court commissioner wearing a wedding ring. *Id.* at 4. The court commissioner overruled the objection. *Id.* at 6. Richard does not assign error to this ruling.

2014, Sheri had removed her children, Takeo and Kallei, from Laura's life. CP 45. When she filed her motion to terminate maintenance, Laura urged Sheri not to get involved in the dispute. CP 69. However, Sheri provided additional information to the trial court, because she "[had] a hard time not saying something when my father and Karen are being so very hypocritical while currently committing what I think is a level of fraud." CP 69.

Sheri informed the trial court:

"It was during this time [Thanksgiving 2011] that the kids talked about attending Papa and Grammy's wedding. Kai vividly recalls being dressed up in a dress and Takeo in a small Tux or suit and attended a family-filled event, minus my husband Chad and I. When I asked Dad about this, I would get talk of he and Karen having spiritually been married, that because of their religious beliefs it was important to do something before God. Yet my father would always make it perfectly clear he was not legally married. This would be about the last time I would get any kind of answer from him regarding his marital status." CP 69

"[Richard and Karen] would comment all the time about how they would get married, if they could. So many times referring to the alimony as the

reason that they would not, stating that they sometimes “had to work the system.” CP 70

Sheri, her husband Chad and their children lived with Richard and Karen for over a year and a half starting in the summer of 2014. CP 70. “[Richard and Karen] lived and breathed as a married couple. Every decision about décor to family outings to where to eat, to how to afford medication was made in the manner that married people talk! There were also the typical I love you’s, and calling each other names of endearment like ‘husband’ and ‘wife.’” CP 71.

The court commissioner found that Richard and Karen had been in an 11 year cohabitation relationship, that they had a ceremony, that they hold themselves out as husband and wife, that Richard wears a wedding ring, that Richard and Laura’s grandchildren refer to Karen as “Grammy,” and that Richard is married to Karen in every other way but “having a legal ceremony.” RP 8/22/19 at 10-12. The court commissioner further found that, by taking all these actions but not obtaining a marriage license, Richard “is simply attempting to avoid the termination of maintenance based on marriage.” Id. at 11.

Richard does not assign error to any of these factual findings.

Appellant's Brief at 3-4.

The court commissioner declined to terminate maintenance based on Richard's remarriage. *Id.* at 10. Instead, the court commissioner found that Richard's remarriage in every way save obtaining a marriage license amounted to a substantial change of circumstances justifying a modification of maintenance to zero pursuant to RCW 26.09.170(1). *Id.* at 11. When Richard's attorney pointed out that the maintenance was non-modifiable, the court commissioner found that it would be against public policy not to terminate maintenance under such circumstances. *Id.* at 12.

Richard then timely filed a motion for revision. CP 96.

On revision, the trial judge found that Richard and Karen are holding themselves out as being married, that they had been doing so for a long time, and that the sole reason Richard and Karen had not obtained a marriage license was to avoid termination of maintenance. RP 11/15/19 at 17. As with the

court commissioner's factual findings, Richard does not assign error to these findings. Appellant's Brief at 3-4.

The trial judge declined to apply the modification provisions of RCW 26.09.170(1) as the court commissioner had done. RP 11/15/19 at 16. The trial court also declined to terminate maintenance based on Laura's public policy argument. Id. at 17. Instead, based on the "very unusual set of facts" presented, the trial court found that Richard and Karen's relationship is "essentially marriage," and thus terminated maintenance based on the language in the settlement agreement and RCW 26.09.170(2) that provides for termination of maintenance upon remarriage. Id. at 17.

Richard now appeals.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

Laura agrees with Richard's description of the standard of review by the trial court of the court commissioner's

decision, as set forth on page 23 of his opening brief. However, she does not believe that it is relevant to this Court's decision.

Laura also agrees with Richard's statement on page 41 of his opening brief that legal conclusions and the proper interpretation of statutes are decisions that are reviewed *de novo*. *In re the Parentage of CMF*, 179 Wn.2d 411, 418, 314 P.3d 1109 (2013). However, the trial court's factual findings are reviewed under the substantial evidence standard.

*Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012). Substantial evidence is evidence sufficient to persuade a rational, fair-minded person that a finding is true. *Id.* The appellant bears the burden of showing that the record does not support the trial court's factual findings. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn.App. 335, 342, 308 P.3d 791 (2013).

**B. THE COURT SHOULD AFFIRM THE TRIAL COURT BECAUSE RICHARD AND KAREN'S RELATIONSHIP CONSTITUTES A "MARRIAGE" WITHIN THE MEANING OF THE SETTLEMENT AGREEMENT.**

### **1. Laura's Claims Are Not Time-Barred.**

Richard argues that Laura's claim for termination or modification of the maintenance award is time-barred.

Appellant's Brief at 23-25. Richard also argues that Laura had twelve years to bring forth her claims and failed to do so. *Id.* at 24. Laura respectfully disagrees.

As noted in Richard's brief, "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 (2006). Richard reasons that, whether the six-year statute of limitations of RCW 4.16.060(1) or the three-year statute of limitations for CIR's set forth in RCW 4.16.080(3) applies, Laura's claim is time-barred because Laura was aware for nearly twelve years that Richard and Karen were cohabiting. Richard fundamentally misunderstands Laura's claim.

An action accrues when the aggrieved party "discovers the salient facts underlying the elements of the cause of action." *1000 Va. Ltd. P'ship*, 158 Wn.2d at 576 (citing *Green v. A.P.C.*,

136 Wn.2d 87, 95, 960 P.2d 912 (1998)). Here, Laura does not claim that *any* cohabitation or CIR relationship forms the basis for terminating or modifying maintenance. Rather, she claims that *this* relationship, under its unique facts, forms such a basis. Laura did not know that Richard and Karen were holding themselves out to the world as husband and wife until she viewed the King 5 story on July 1, 2019. She filed to terminate maintenance nine days later. Laura did not become aware of additional facts—such as the fact that Richard and Karen held themselves out to medical providers as husband and wife or that they were “spiritually married” but were “playing the system” to avoid termination of maintenance—until further pleadings were filed in this case. Under this set of circumstances, Laura requested relief well within any statute of limitation.

For similar reasons, Laura’s claim is not barred under the doctrine of laches.

Insofar as Richard argues that Laura’s claim is not timely because RCW 26.09.070(3) requires that “challenges to a

separation agreement's alleged unfairness must be raised before the agreement is merged into the decree of dissolution,"<sup>6</sup> Laura is not making any claim as to the unfairness of the settlement agreement. Rather, she argues that the settlement agreement, to the extent that it allows Richard to avoid termination of maintenance by being married in every imaginable way except for obtaining a license, is contrary to public policy and is therefore unenforceable.<sup>7</sup> Laura also claims that Richard's performance of the settlement agreement violates the duty of good faith and fair dealing implicit in every contract and, therefore, the settlement agreement is unenforceable.<sup>8</sup>

Laura's claims are not time-barred.

## **2. Richard and Karen's Relationship Clearly Amounts to a CIR.**

Richard complains that Laura never pleaded that a CIR existed between him and Karen. This is because Laura's

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<sup>6</sup> Appellant's Brief at 24.

<sup>7</sup> See discussion *infra* at pp. 31-32.

<sup>8</sup> See discussion *infra* at pp. 32-36.

motion for relief was based on her understanding from the King  
5 story that Richard and Karen were married. However, it is  
clear that Richard and Karen were engaged in a CIR.

In *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831  
(1995), the court set forth the five nonexclusive factors a court  
considers when evaluating whether a relationship amounts to a  
CIR:

1. Continuous cohabitation,
2. Duration of the relationship,
3. Purpose of the relationship,
4. Pooling of resources and services for joint projects,
5. Intent of the parties. *Connell*, 127 Wn.2d at 346  
(citations omitted).

Richard and Karen's relationship squarely fits within  
each of these factors. The parties continuously cohabitated for  
eleven years. CP 35, 176, RP 8/22/19 at 10-12. The purpose of  
their relationship was to be "spiritually married" and to be  
married in all respects except for obtaining a license. CP 69,

71. They handled their finances together and worked on joint projects around the house. CP 174, 177. They intended their relationship to be permanent, as they held themselves out as married and told Sheri that “This is it!” meaning that they would be together to the end. CP 70. In short, their relationship is unquestionably a CIR. However, Laura does not argue that a CIR, without any other factors, should trigger the termination of maintenance due to remarriage.

**3. The Court Should Find That *This* CIR Amounts to “Remarriage” Under the Settlement Agreement.**

Richard labels Laura’s claim that this case presents an issue of first impression as “nonsense.” Appellant’s Brief at 29. Again, Laura respectfully disagrees.

Unchallenged findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). Here, the court commissioner and trial judge made the following findings, not challenged by Richard, which are therefore verities before this Court:

Richard and Karen had been in an 11 year cohabitation relationship. RP 8/22/19 at 11.

Richard and Karen had a ceremony. Id.

Richard and Karen hold themselves out as husband and wife. Id.

Richard wears a wedding ring, even in the court room. Id.

Richard and Laura's grandchildren refer to Karen as "Grammy." Id.

Richard is married to Karen is every other way but "having a legal ceremony." Id. at 12.

Richard "is simply attempting to avoid the termination of maintenance based on marriage." Id. at 11.

The *sole* reason Richard and Karen had not obtained a marriage license was to avoid termination of maintenance. RP 11/15/19 at 17 (emphasis added).

Laura agrees with Richard's claim that our state has decades of well-established case law which defines the rights of participants in CIRs. Attorney fee awards are not available when a CIR dissolves. *Foster v. Thilges*, 61 Wn. App. 880, 812 P.2d 523 (1991). A participant in a CIR cannot be awarded

maintenance. *Lloyd v. Superior Court of King County*, 55 Wn. 347, 104 P. 771 (1909); 21 Kenneth W. Weber, Wash. Practice §57.11-12, .24 (1997). Property owned by a CIR participant acquired before the commencement of the CIR cannot be awarded to the other party. *Connell*, 127 Wn.2d at 350. Richard spends 6 ½ pages of his brief outlining the well-established case law pertaining to the rights of CIR participants. Appellant's Brief at 25-30.

What Richard fails to recognize is that this is a case of first impression because here, unlike any of the cases he cites,<sup>9</sup> the Court is being asked to determine not the relative rights of the parties to a CIR as to each other, but rather to award rights to a CIR participant against a third party that are not available to a married person. Moreover, Richard seeks such a right when he and Karen have carefully and in bad faith purposely

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<sup>9</sup> See Appendix I for a summary of how every one of the CIR cases cited by Richard deals with the rights of the CIR participants and does not limit the rights of third parties.

structured their affairs to deprive Laura of her rights. A person who enters a CIR cannot and should not expect to have the rights afforded a spouse in a lawful marriage. But, should a person who enters a CIR and is in every respect “married” except having a license have *more* rights than one who obtains a marriage license? This Court should not countenance the bad faith maneuverings of Richard and Karen, all of which were specifically designed to deprive Laura of the right not to support both Richard and his new spouse. To do so would exalt form above substance, which has long been disfavored by our State’s courts. *See, e.g., Rouse v. Peoples Leasing Co., Inc.*, 96 Wn.2d 722, 727, 638 P.2d 1245 (1982)(Dolliver, J.).

Richard claims that he and Karen held themselves out because otherwise Karen could not attend Richard’s medical appointments. RP 8/10/19 at 9; CP 36. However, Richard could easily have arranged for Karen to attend his medical appointments by taking the far less drastic (and honest) step of granting her medical power of attorney. *See RCW 11.125.400.*

The word "remarriage" in both the settlement agreement and the statute, when viewed within the context of a CIR participant seeking to affect the rights of third parties, should be given its "ordinary, usual, and popular meaning...." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116 (2014)(citation omitted). Marriage is commonly defined as (1) "to join for life as husband and wife; to constitute as man and wife according to the laws and customs of a nation"; and (2) "to enter into the conjugal or matrimonial state"). IX Oxford English Dictionary 400-01 (2d ed. 1989). Here, Richard and Karen clearly were joined for life, (CP 70), and lived in a matrimonial state by sharing a name, wearing wedding rings, and holding themselves out as married. Further, when interpreting the settlement agreement, the Court must ascertain the mutual intent of the parties at the time they executed the agreement. *Viking Bank*, 183 Wn. App. at 712. At the time she signed the settlement agreement, Laura could not possibly have foreseen or intended to support Richard and

his new spouse solely because Richard did not obtain a marriage license but lived a married life in every way imaginable.

Even *Rowe*, upon which Richard heavily relies as “directly applicable,”<sup>10</sup> is readily distinguished. *Rowe* simply restated the well-established case law that parties to a CIR who do not choose to get married do not qualify for rights as to each other, such as the right to spousal maintenance or attorney fees. *Rowe v. Rosenwald*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221 at \*32-\*37 (2017)(Unpublished). Laura is not aware of a single case which has held that parties to a CIR, especially parties to a CIR who are married in every sense of the word other than having obtained a license, have been afforded rights as to third parties which are not given to married persons. *Cf. Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 732 P.2d 1021 (1987)(an unmarried cohabitant is not able to seek damages

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<sup>10</sup> Brief of Appellant at 31.

under the wrongful death statute); *Davis v. Dep't of Employment Sec.*, 108 Wn.2d 272, 737 P.2d 1262 (1987)(party to CIR who voluntarily quits employment not entitled to unemployment benefits which would be available to a spouse in a marriage); *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 778 P.2d 1022 (1989)(parties to a CIR are not entitled to a spouse's share of intestate succession).

As Richard points out, a CIR is "marital like" but not equivalent to a marriage in all respects. *See Connell*, 127 Wn.2d at 348. Therefore, parties to a CIR are not afforded all of the same rights as married persons. As the *Connell* court noted, "[t]he parties to such a relationship have chosen not to get married," and therefore are not entitled to all the rights afforded married persons. *Connell*, 127 Wn.2d at 349. The critical distinction here is that Laura had no choice in how Richard and Karen structured their relationship. No reported case in this state has addressed whether a party can avoid

termination of maintenance while reaping the benefits of marriage by arranging his affairs as Richard has done.

In other states, courts have held that common law marriages *do* amount to marriage. *See Cargill v. Rollins*, 843 P.2d 1335, 1339 (Colorado 1993); *Combs v. Combs*, 787 SW.2d 260 (Kentucky 1990); *Jeanes v. Jeanes*, 177 SE.2d 537, 537-40 (South Carolina 1970), *cited with approval*, *Joye v. Yon*, 547 SE.2d 888 (South Carolina 2001). A common law marriage valid in the state where contracted is recognized as a valid marriage in Washington. *In re Warren*, 40 Wn.2d 342, 344, 243 P.2d 632 (1952)(citation omitted). It would be inequitable to terminate maintenance of a person living in this State who entered a common law marriage while living in another state while at the same time requiring Laura to continue to support Richard and Karen.

“There is something distasteful in requiring one to subsidize a former spouse, in his or her subsequent cohabitation....” *Combs*, 787 SW.2d at 261. This Court should

find that, for the purposes of the settlement agreement, Richard and Karen are “married,” and, accordingly, Laura has no obligation to support Richard and his spouse.

**4. The Court Should Modify Maintenance to Zero Because Richard’s Relationship with Karen Amounts to a Substantial Change of Circumstances Not Foreseen at the Time of the Decree.**

RCW 26.09.170(1) authorizes the Court to modify maintenance, including modifying it to zero, if there is a “substantial change of circumstances.” In order to modify maintenance under this statute, the Court must also find that the substantial change of circumstances was not within the contemplation of the parties at the time the decree was entered. *Lambert v. Lambert*, 66 Wn.2d 503, 509-10, 403 P.2d 664 (1965). Richard argues that it was entirely foreseeable that he would “get a girlfriend, but not remarry, after their divorce.” Appellant’s Brief at 38. He further argues that “Richard and Karen choosing not to get married is a perfectly acceptable choice in their lives.” *Id.* at 42. These statements are only half-

truths, because they do not reflect the full facts of this case, including Richard's and Karen's deception. As the trial court's uncontested findings state, Richard is married to Karen in every other way but "having a legal ceremony," RP 8/22/19 at 11, and the *sole* reason Richard and Karen did not obtain a marriage license was to avoid termination of maintenance. RP 11/15/19 at 17. Laura could not possibly have foreseen such bad faith maneuverings when the decree was entered in 2007.

Richard also rightly points out that the maintenance award in the decree was, by agreement, non-modifiable. Appellant's Brief at 35. Under normal circumstances, maintenance which is non-modifiable by agreement is exactly that: non-modifiable. *In re Marriage of Hulscher*, 143 Wn. App. 708, 180 P.3d 199 (2008); *In re Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992). However, these are not normal circumstances.

The *Hulscher* court left open the possibility that non-modifiable maintenance could still be modified when it stated

that “*generally* our courts may not modify [non-modifiable] spousal maintenance unless it was unfair when entered.” *Hulscher*, 143 Wn. App. at 710 (emphasis added). In *Glass*, the court carved out an exception for extreme financial hardship “where such changed circumstances were not foreseen at the time of the initial decree....” *Glass*, 67 Wn. App. at 390-91. Neither the *Hulscher* nor the *Glass* exceptions directly apply to this case, but those exceptions are not exclusive.

As argued below, the non-modifiable maintenance provision in the settlement agreement is unenforceable as against public policy<sup>11</sup> and, moreover, is unenforceable because Richard has violated the duty of good faith and fair dealing implicit in every contract.<sup>12</sup> Under these circumstances, and given that Laura could not possibly have foreseen the depths to which Richard has descended to force Laura to support him and his new spouse, this court should follow the reasoning of the

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<sup>11</sup> See discussion *infra* at pp. 31-32.

<sup>12</sup> See discussion *infra* at pp. 32-36.

*Hulscher* and *Glass* courts and hold that Laura's maintenance obligation is indeed modifiable, just as the court commissioner reasoned below.

**C. THE COURT SHOULD AFFIRM THE TRIAL COURT BECAUSE THE SETTLEMENT AGREEMENT, AS PERFORMED BY RICHARD, IS AGAINST PUBLIC POLICY.**

As argued below, it is a fundamental concept of contract law that “[c]ontract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against the enforcement of such terms.” *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2001) (*citing* Restatement (Second) of Contracts §178 (1981); *see also Keystone Masonry, Inc. v. Garco Const., Inc.*, 136 Wn. App. 927, 933, 147 P.3d 610 (2006). This principle has been applied by this Court within the context of family law. This court has declined to enforce contracts to provide for child support inconsistent with the child support statute. *In re Marriage of Hammack*, 114 Wn. App. 805, 60 P.3d 663

(2003)(agreement not to pay child support in exchange for disproportionate award of property unenforceable); *In re Marriage of Goodell*, 130 Wn. App. 381, 390-91, 122 P.3d 929

(2005)(agreement to prospectively terminate child support obligation unenforceable).

Here, the court commissioner found that Richard's attempt to avoid a modification or termination of spousal maintenance by enjoying all the benefits of marriage and observing all the requirements of marriage, except only for obtaining a marriage license, was against public policy. RP 8/22/19 at 12. This Court should make the same finding: that "playing the system" by observing all the requirements for a marriage, except obtaining a marriage license, for the sole purpose of avoiding a termination of maintenance, is against public policy and therefore is unenforceable.

**D. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S TERMINATION OF MAINTENANCE BECAUSE RICHARD VIOLATED THE IMPLICIT DUTY OF GOOD FAITH AND FAIR DEALING.**

There is in every contract an implied duty of good faith and fair dealing. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). The duty of good faith and fair dealing implicit in a contractual relationship "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Id.* "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1979). But this duty cannot add to or change the terms of the contract. *Badgett*, 116 Wn.2d at 569. That duty "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.* "The purpose of implying the obligation of good faith and fair dealing is to preserve the mutuality of obligations in a contract by assuring that the party who retains authority to specify the manner of a certain performance cannot thereby render a promise illusory." *Rekhter v. Dept. of Social and Health Services*, 180 Wn.2d 102, 132, 323 P.3d 1036 (2014)(Stephens, J., dissenting).

Accordingly, the implied duty of good faith and fair dealing arises where a term in the contract affords one party discretion in the manner of its performance. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997); 23 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 63:22, at 513-16 (4th ed. 2002). In order to find a violation of the implied duty of good faith and fair dealing, it is not necessary for Richard to have violated the settlement agreement. *Rekhter*, 180 Wn.2d at 111 (majority opinion, citing *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 1784 (2011)).

Here, Richard inappropriately exercised his discretion when he chose to, in his words, “play the system” by taking every conceivable action to marry Karen short of obtaining a marriage license, for the sole purpose of depriving Laura of her contractual and statutory right to terminate maintenance. Richard has enjoyed many of the benefits of being married to

Karen—such as having her present for medical appointments—  
but seeks to have his cake and eat it, too, by requiring Laura to  
support him and his new wife. Accordingly, Richard violated  
his duty of good faith and fair dealing and this Court should  
affirm the trial court on that basis.

## V. CONCLUSION

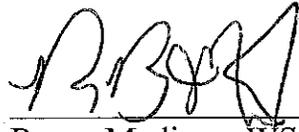
Form should not be exalted over substance. Richard and  
Karen have been “married” in every sense of the term, except  
for having a license, for eleven years and have been receiving  
the benefits of having been married. The Court should find that  
*this* CIR amounts to “remarriage” under the settlement  
agreement and affirm the trial court on that basis. The Court  
should also affirm the trial court because the settlement  
agreement, as carried out by Richard, is against public policy,

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and because Richard has violated the duty of good faith and fair dealing implicit in every contract.

Respectfully submitted this 29~~th~~ day of June, 2020

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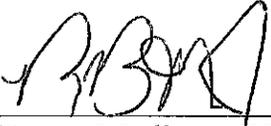
The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on June 29, 2020, I arranged for service of the foregoing Brief of Respondent, to the Court and counsel for the parties to this action as follows:

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950 Broadway, Suite 300  
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Mr. Drew Mazzeo, Attorney for Appellant  
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Via email and U.S. mail

Dated at Tumwater, Washington this 29<sup>th</sup> day of June, 2020.

  
\_\_\_\_\_  
Roger Madison, WSBA 15338

**APPENDIX I**  
**SUMMARY OF CIR CASES CITED BY APPELLANT**

*Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831  
(1995)(establishing that only quasi-community property, not separate property, may be divided upon dissolution of a CIR)

*Davis v. Dep't of Employment Sec.*, 108 Wn.2d 272, 737 P.2d 1262 (1987)(party to CIR who voluntarily quits employment not entitled to unemployment benefits which would be available to a spouse in a marriage)

*Foster v. Thilges*, 61 Wn. App. 880, 812 P.2d 523  
(1991)(attorney fee awards are not available when a CIR dissolves)

*In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764  
(2000)(parties did not establish the existence of a CIR)

*Peffley-Warner v. Bowen*, 113 Wn.2d 243, 778 P.2d 1022  
(1989)(parties to a CIR are not entitled to a spouse's share of intestate succession)

*Rowe v. Rosenwald*, No. 74659-6-I, 2017 Wash. App. LEXIS 1221 (2017)(Unpublished)(parties to a CIR who do not have a marriage license are not entitled to the rights of married persons)

**MADISON LAW FIRM, PLLC**

**June 29, 2020 - 10:16 AM**

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