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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 292100 (Consolidated With 297462)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BETTE LYN KELLY,

Plaintiff-Appellant,

v.

PETER MOESSLANG,

Defendant-Respondent.

REPLY BRIEF OF APPELLANT

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REPLY

A. For purposes of accrual and the applicable limitations period, a claim for division of quasi-community property acquired during a committed intimate relationship is more analogous to a claim for division of community property acquired during marriage than it is to claims for unjust enrichment, implied contract, or implied partnership.

Peter Moesslang and Bette Lyn Kelly agree that the accrual of a claim for division of property acquired during a committed intimate relationship and the applicable limitations period are issues of first impression. Resp. Br. at 20-21. Nonetheless, existing Washington law provides ample basis to resolve these issues.

Under existing Washington precedent, property acquired during a committed intimate relationship is deemed to be analogous to community property acquired during a marriage, and it is described in terms that incorporate this analogy, i.e., quasi-community property. *See Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984); *Connell v. Francisco,* 127 Wn.2d 339, 348-52, 898 P.2d 831 (1995). As in a marriage, each party to the committed intimate relationship has a present, undivided and fully vested interest in each and every item of community property, and is a one-half owner thereof. *See Olver v. Fowler,* 161 Wn.2d 655, 670, 168 P.3d 348 (2007) (citing *Lyon v. Lyon,* 100 Wn.2d 409, 413, 670 P.2d 272 (1983)).

Moesslang does not disagree with or otherwise address this holding from *Olver* or its implications for the statute of limitations.[1] Because, as *Olver* recognizes, parties to a committed intimate relationship have fully vested interests in quasi-community property, no further legal action is necessary to preserve their respective interests following the end of the relationship. There is no requirement for judicial distribution of such property at any time, and the parties are free to continue their joint ownership indefinitely. In this sense, there is no statute of limitations within which an action for judicial distribution must be commenced.

Continuing the analogy to community property and marriage, the parties to a committed intimate relationship are deemed to be tenants in common following the end of the relationship. The fact that spouses in a dissolved or defunct marriage take undistributed community property as cotenants is already settled as a matter of Washington law. *See Ambrose v. Moore,* 46 Wn.2d 463, 465-66, 90 Pac. 588 (1907); *Peters v. Skalman,* 27 Wn.App. 247, 253-54, 617 P.2d 448, *rev. denied,* 94 Wn.2d 1025 (1980).[2] The continuation of the analogy necessarily follows from the holding in

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[1] Moesslang merely notes that the existence of a committed intimate relationship was not disputed in *Olver*. Resp. Br. at 38. The existence of a factual dispute in this case does not change the applicable law.

[2] Moesslang does not cite *Peters*. He tries to distinguish *Ambrose* on the facts, and of course, it is distinguishable to the extent it involves a marriage rather than a committed intimate relationship. Resp. Br. at 39. However, this does not have anything to do with the proposition for which Kelly cites *Ambrose*.

Olver that the interests of the parties to a committed intimate relationship are fully vested when the property is acquired. Otherwise, it would be necessary to overrule *Olver* and hold that the interests of the parties are *not* fully vested when the property is acquired, or that they are somehow divested upon termination of the relationship.

In keeping with the analogy, the parties to a committed intimate relationship are deemed to be cotenants with each other following the end of their relationship, and a claim for division of the property does not accrue until one of the parties is "ousted" from it. *See Shull v. Shepherd,* 63 Wn.2d 503, 505, 387 P.2d 767 (1963).[3] The applicable limitations period depends on the nature of the property as realty or personalty. *See* RCW 4.16.020(1) (real property); RCW 7.28.050 (real property under color of title); RCW 4.16.080(2) (personal property).

Moesslang criticizes this approach on grounds that the applicable limitations period should not hinge on the nature of the property as opposed to the nature of the claim. Resp. Br. at 36. However, this criticism is unwarranted because it is exactly the same approach that is followed with respect to community property acquired during a marital relationship. *See Peters,* 27 Wn.App. at 250-51 (applying RCW 7.28.050). It tracks the

[3] Moesslang tries to distinguish *Shull* on grounds that the parties in that case made similar capital contributions to the property in question. Resp. Br. at 39. However, this distinction has nothing to do with the proposition from *Shull* on which Kelly relies.

language of the relevant statutes of limitation, which are themselves phrased in terms of the nature of the property. *See* RCW 4.16.020(1) (real property); RCW 7.28.050 (real property under color of title); RCW 4.16.080(2) (personal property). It is also consistent with the "item theory" of community property (and presumably quasi-community) property followed in Washington, which holds that an interest in community property extends to each and every item of community property rather than community property in the aggregate. *See Lyon,* 100 Wn.2d at 413.

As an alternative, Moesslang argues that a claim for distribution of quasi-community property acquired during a committed intimate relationship is more analogous to a claim for unjust enrichment, implied contract, or implied partnership than it is to a claim for distribution of community property acquired during marriage. Resp. Br. at 22. In this respect, Moesslang is asking the Court to disregard the analogy to community property that has consistently been followed by Washington courts since *Lindsey*.

Moesslang reasons that the purpose of a claim for distribution of quasi-community property is to prevent unjust enrichment, and hence the accrual and limitations period for such a claim are the same as an equitable claim for unjust enrichment. Resp. Br. at 22. This reasoning equivocates between the rationale for, and the nature of, a claim for

distribution of quasi-community property. Washington courts have consistently distinguished a claim for distribution of quasi-community property from other claims such as unjust enrichment. *See, e.g., Connell,* 127 Wn.2d at 347; *see also* App. Br. at 17 n.9 (collecting cases).[4]

B. Moesslang is improperly asking this Court to determine whether a committed intimate relationship between the parties ever existed, even though the issue presented for review is whether a claim based on such a relationship is barred by the statute of limitations; in any event, the record before the Court precludes summary judgment in favor of Moesslang that no committed intimate relationship ever existed.

Moesslang attempts to reframe this case in terms of whether a committed intimate relationship ever existed between him and Kelly, even though the superior court's summary judgment and ejectment orders were based on a different issue, his statute of limitations defense. Whether a committed intimate relationship ever existed is a separate question from

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[4] Moesslang cites cases from other jurisdictions regarding the statute of limitations for common law or implied marriage. Resp. Br. at 20-21 n.17. Of course, Washington does not recognize common law or implied marriage. Only one of the jurisdictions (Texas) is a community property state. Unlike Washington, Texas has codified the elements of "informal marriage," including a rebuttable presumption that no marriage exists two years after the parties cease living together. *See* Tex. Family Code § 2.401. The Texas case cited by Moesslang actually involves a statute of limitations that has been repealed. *See Shepherd v. Ledford,* 962 S.W.2d 28, 32 (Tex. 1998) (discussing former Tex. Family Code § 1.91(b)). The Montana case cited by Moesslang does not involve a statute of limitations for common law or implied marriage, but rather the statute of limitations for claims of "seduction." *See Taylor v. Rann,* 80 P.2d 376, 377 (Mont. 1938). The Utah and New York cases cited by Moesslang involve specific statutory statutes of limitations unlike anything in Washington. *See Marriage of Gonzalez,* 1 P.3d 1074, 1079 (Utah 2000) (discussing Utah Code Ann. § 30-1-4.5(2) regarding "marriage not solemnized"); *Brody v. Brody,* 879 N.y.S.2d 337 (N.Y. Sup. Ct., 2009 (discussing N.Y. Domestic Rel. Law § 250(1) regarding "agreements relating to marriage"); *Covington v. Walker,* 819 N.E.2d 1025 (N.Y. Ct. App. 2004) (discussing N.Y. Domestic Relations Law § 210 regarding "limitations on actions for divorce and separation").

whether a claim for division of property acquired during such a relationship was timely filed.

Moesslang's arguments about the existence of a committed intimate relationship cannot serve as alternate grounds to affirm under RAP 2.5(a) because the superior court record is not sufficiently developed to consider them. For his part, Moesslang does not address the requirements of RAP 2.5(a) for affirming on alternate grounds. Even if Moesslang's argument is properly before the Court, however, the record does not contain sufficient facts to determination, as a matter of law, that no committed intimate relationship ever existed between Moesslang and Kelly. To the contrary, the record before the Court—including the superior court's summary judgment order, Moesslang's admissions, and the undisputed evidence offered by Kelly—confirms that there are questions of fact regarding the existence of a committed intimate relationship at some point in time, even if there is disagreement about the dates when it began and ended.[5]

In its summary judgment order, the superior court found pursuant to CR 56(d) that:

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[5] As noted in Kelly's brief-in-chief, the procedural posture of this case involving review of summary judgment on the affirmative defense of the statute of limitations influences the burden of proof (it is on Moesslang) and the standard of review (Moesslang is obligated to demonstrate the absence of any genuine issues of material fact and his entitlement to judgment as a matter of law). App. Br. at 21-23.

2. The parties arguably had a meretricious relationship from 1986 to 1999.

3. If the parties did have a meretricious relationship, it ended in 1999.

4. If a meretricious relationship did exist it existed between 1986 and 1999.

CP 600 (formatting in original). These findings indicate that the superior court decided, as a matter of law, that no committed intimate relationship existed before 1986 or after 1999. The word "arguably" in finding #2 and the conditional phrasing of findings #3-4, indicate that the existence of a committed intimate relationship between 1986 and 1999 presents questions of fact that could not be resolved on summary judgment. (It should not be forgotten that most of the parties' property was acquired during that time frame.) While review of the superior court's summary judgment order is de novo, the court's findings on are at least partially consistent with the Supreme Court's admonition not to decide whether a committed intimate relationship exists on summary judgment where the facts are complicated, contested, or subject to competing inferences. *See Vasquez v. Hawthorne*, 145 Wn.2d 103, 108, 33 P.3d 735 (2001).[6]

[6] Although review of the superior court's findings on summary judgment is de novo, Kelly has assigned error to the findings in her brief in chief to the extent the superior court determined the starting and ending dates of the relationship as a matter of law. App. Br. at 2.

Moesslang's admissions, contained in his response brief, are consistent with, if not dispositive of, a committed intimate relationship during the time frame between 1983 or 1984 and "the early 1990s." Resp. Br. at 2. Moesslang admits that "at some point" after meeting Kelly "in 1983 or 1984," he and Kelly "began dating" and "engaged in a romantic relationship for the next few years." *Id.* Moesslang further admits that what he describes as "their intimate relationship" continued until "the early 1990s." *Id.* He admits that they continuously cohabited during that time (the early 1990s), and that they continued to cohabit at least until 1998. *Id.* at 2-3. Moesslang does not deny that he and Kelly acquired substantial property in late 1986 and 1987, including their home in Liberty Lake, Washington, where Kelly lived almost continuously until November 2006. App. Br. at 3-4 (including record citations).

In his declaration filed in the superior court, Moesslang never denies the existence of a committed intimate relationship with Kelly at any time. CP 62-63. Furthermore, he does not deny or acknowledge the following undisputed facts in the record that are indicative of such a committed intimate relationship extending beyond the early 1990s:

- That Moesslang and Kelly cohabited for approximately 19 of 22 years between August 1984 and November 2006. App. Br. at 8 n.6 & Appendix; CP 3-4, 369-70, 373, 376, 379 & 399.

- That Moesslang and Kelly purchased a home in Coeur d'Alene, Idaho, using a corporation they formed together. App. Br. at 4-5; CP 373.

- That Moesslang and Kelly built another home together near Livingston, Montana. App. Br. at 5-6; CP 372-73, 383-84 & 388-89.

- That Moesslang and Kelly built another home together in Spokane, Washington. App. Br. at 7; CP 376, 396-97 & 399.

- That Moesslang and Kelly worked together for approximately 25 years, from the beginning of their relationship until the summer of 2009, with Kelly working part time initially and then full time beginning in 1992. App. Br. at 8-9 & 11; CP 370-72 & 392.

- That Moesslang referred to Kelly as his "wife." App. Br. at 9; CP 379-80.

- That Moesslang referred to Kelly's son by her prior marriage as his own "son." App. Br. at 9; CP 378-80, 392.

- That Moesslang, Kelly and Kelly's son took family vacations together. App. Br. at 9; CP 379.

- That Moesslang and Kelly entertained Moesslang's family and friends. App. Br. at 9; CP 370, 379-80.

- That Moesslang and Kelly executed reciprocal powers of attorney in 1994. App. Br. at 9; CP 380.

- That Moesslang executed a will in 1995, naming Kelly as his sole beneficiary if she survived him, and naming her son as his sole beneficiary if she did not. App. Br. at 9; CP 371.

- The statement by one of Moesslang's friends of 30 years that Moesslang lived with Kelly "as his wife, or spouse" through 2008. App. Br. at 9; CP 383.

- The statement by a long-term employee from the mid-1980s through the spring of 2004 that Moesslang and Kelly "always held themselves out as a married couple, living together as a family unit." App. Br. at 10; CP 391-92.

In light of these facts, it cannot be said as a matter of law that no committed intimate relationship ever existed between Moesslang and Kelly.

Against a committed intimate relationship, Moesslang relies principally on two additional facts, the apparent lack of sexual intimacy between Moesslang and Kelly after the early 1990s, and their affairs with other people, apparently beginning in the 1990s for Moesslang and the early 2000s for Kelly. These facts were discussed in Kelly's brief-in-chief, where she acknowledged that the parties "shared a bedroom from the beginning of their relationship until 1999," and that, "[w]hen they resumed living together in 2002 ... they had not been sexually intimate for an extended period of time, and they started sleeping in separate bedrooms." App. Br. at 8-9 n.6; CP 374. As both parties recognize, sexual intimacy is only one of the relevant factors, which are designed to reach *all* of the relevant evidence. *See Lindsey,* 101 Wn.2d at 305; *Vasquez,* 145 Wn.2d at 108. The presence of sexual intimacy between 1983-1984 and the early 1990s militates in favor of a committed intimate relationship during that time frame, and the absence of sexual intimacy afterwards militates

against it. The fact that a relationship ceases to include sexual activity after some point in time, does not, ipso facto, mean that it ceases to be a committed intimate relationship, nor does it mean that such a relationship never existed as a matter of law. If it did, then a party who holds title to property acquired during the relationship could simply stop engaging in sexual activity in order to take the property free and clear of any claim based on the relationship.

With respect to affairs, they have also been discussed in Kelly's brief-in-chief, when she acknowledged that she was still married, albeit separated, from her husband from the time she started living together with Moesslang in August 1984 until she obtained a divorce in December of that year. App. Br. at 11. She acknowledged Moesslang's claims that he "dated" Denise Cole in the early 1990s and then "reconnected" with her some time in 1999 or 2000 to form "a significant romantic relationship." App. Br. at 12. She also acknowledged her own relationships beginning in the early 2000s. App. Br. at 12. Again, while affairs are relevant to the existence of a committed intimate relationship, they are not dispositive. *See Long & Fregeau*, 158 Wn.App. 919, 925-27, 244 P.3d 26 (2010) (finding committed intimate relationship despite overlapping marriage and affairs with another person). As with sexual activity, the fact that parties to a relationship have affairs after some point in time, does not, ipso facto,

mean that their relationship ceases to be a committed intimate relationship, nor does it mean that such a relationship never existed as a matter of law. If it did, then a party who holds title to property acquired during the relationship could simply engage in one or more affairs in order to take the property free and clear of any claim based on the relationship.[7]

C. There is no presumption of prejudice and the absence of findings supported by evidence of prejudice is fatal to Moesslang's claim of laches.

Moesslang does not contest the requirement to prove prejudice in order to affirm the superior court's summary judgment order on grounds of laches. Resp. Br. at 41-43. However, Moesslang does not point to any evidence of prejudice, nor does he point to any finding of prejudice by the superior court. He cites nothing more than oral comments of the superior court judge, CP 612 & 1160-62, which state the length of time from what the court believed was the end of the parties' relationship in 1999 until suit was filed in 2009. This is insufficient to affirm the superior court's summary judgment order on grounds of laches because prejudice cannot be presumed from the fact or length of delay, even if such delay is

[7] Moesslang repeats the false claim made in the superior court that Kelly was engaged to be married to someone else in 2001 or 2002. Resp. Br. at 6 (referring to "Kelly's relationship with her fiancé ..."). None of the citations to the record support this claim. Resp. Br. at 5-6. Instead, a personal email from June 15, 2001, reveals nothing more than the fact that a man said "the M word" to her. CP 39. The significance of this unsupported claim is that the superior court based its award of attorney fees and costs on Kelly's supposed "engagement to another man." CP 1407 & n.5; App. Br. at 39-40; *see also infra* § D.

considered inexcusable. *See Clark County PUD v. Wilkinson,* 139 Wn.2d 840, 849, 991 P.2d 1161 (2000).

D. There is still no evidence that Kelly was engaged to another man, as required to support the superior court's fee and cost award.

In her brief-in-chief, Kelly pointed out that the superior court's fee and cost award appeared to be based on a false claim, that she was engaged to another man during the time she claims to have had a meretricious relationship with Moesslang. App. Br. at 40 (citing CP 1407 & n.5); *see also supra* n.7. While this allegation appears repeatedly in Moesslang's briefs in the trial court, it is alluded to only indirectly in his brief in this Court. Resp. Br. at 6 (referring to "fiancé"). In any event, Moesslang produces no competent evidence of such a claim to support the superior court's fee and cost award. Resp. Br. at 46-49. The absence of such evidence requires reversal of the fee and cost award because even discretionary orders must be based on findings supported by substantial evidence. *See Bay v. Jensen,* 147 Wn.App. 641, 659, 196 P.3d 753 (2008).[8]

[8] Moesslang argues for fees and costs incurred on appeal as well in the superior court, but such fees are not available in the absence of intransigence before this Court. *See Buchanan v. Buchanan,* 150 Wn.App. 730, 740, 207 P.3d 478 (2009).

E. The doctrine of unclean hands does not support the superior court's summary judgment orders.

Moesslang recognizes that the superior court did not base its summary judgment orders on the doctrine of unclean hands. Resp. Br. at 44. Nonetheless, Moesslang seeks dismissal of Kelly's claim for division of property acquired during their relationship based on the doctrine. The legal basis for Moesslang's argument is *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 113 P.2d 845 (1941), which demonstrates both the limited circumstances in which the doctrine applies and the fact that it is not susceptible to summary disposition. The factual basis for his argument consists of alleged inconsistencies between the allegations of Kelly's complaint, CP 3-7, and the statements in her declaration, CP 366-421, as compared to emails she wrote in 2001 and afterward. The characterization of these documents is drawn from the same fee and cost award that falsely portrays Kelly as being engaged to be married to someone else. Resp. Br. at 44 (citing CP 1047). A comparison of the documents, rather than the characterizations, reveals that the doctrine of unclean hands is inapplicable.

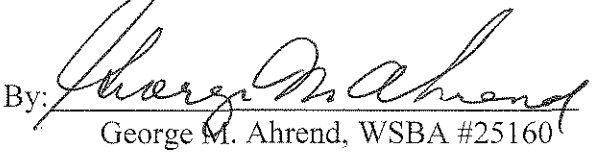
CONCLUSION

Based on the foregoing, appellant Bette Lyn Kelly respectfully asks the Court to:

1. Reverse the superior court;
2. Vacate the summary judgment orders and judgments against Kelly (CP 600-02, 800-05, 825-30, 1044-49);
3. Remand this case for trial on the merits;
4. Deny Moesslang's request for fees and costs; and
5. Grant any further relief that is warranted under the circumstances.

Respectfully submitted this 8th day of March, 2012.

AHREND LAW FIRM PLLC

By: 

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 8, 2012, I served the document to which this is annexed as follows:

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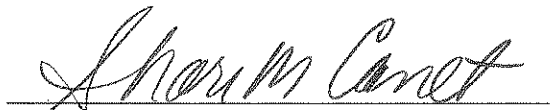

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