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No. 66029-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Matter of:

LINDA RINALDI,

Respondent,

and

TAMAR BAILEY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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I. INTRODUCTION

There would be no question these parties were in a committed intimate relationship, and that the trial court's award was well within its discretion, had respondent commenced this action against a male partner. But appellant argues that, unlike heterosexual couples, to "prove" their commitment same-sex partners must "solemnize" their relationship before one party can seek equitable relief from the courts when the relationship ends. (App. Br. 8-10, 28) Appellant urges this court to adopt a code of conduct that, only in same-sex relationships, would disqualify a partner from seeking equitable relief if she exhibited "significant dishonesty" by maintaining a "safety fund" to provide for herself financially if the relationship ended. (App Br. 12-13, 30-31) And in a perverse misuse of homophobic federal law, appellant encourages this court to make a holding that would deprive a partner in a same-sex relationship from benefitting from the other partner's contributions to an ERISA-governed pension plan. (App. Br. 32-36)

"Equitable claims are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender

Wn.2d 103, 107, 33 P.3d 735 (2001). This court must reject appellant's demand that same-sex couples be treated differently than heterosexual couples in committed intimate relationships and both affirm the trial court's fact-bound determination that the parties were in a committed intimate relationship and its modest award to respondent, made within its broad discretion.

II. RESTATEMENT OF FACTS

A. The Parties Moved In Together Soon After Their Friendship Evolved Into A Romantic Relationship.

1. The Parties Met In 1988 In Alaska.

Respondent Linda Rinaldi, now age 64, and appellant Tamar Bailey, now age 53, met in 1988 in Alaska. (I RP 33; CP 3) Rinaldi was pursuing her Master's Degree in Public Administration at the University of Alaska and doing contract work for Fannie Mae. (I RP 28-29, 34) Bailey was a pilot, flying for Northern Air Cargo before moving on to Federal Express (FedEx) in 1989. (IV RP 133) The parties met through their therapist, as participants in a therapy group. (I RP 33-34) At the time, Bailey was in a long-term relationship with another woman. (I RP 34; IV RP 127) Bailey and Rinaldi had a platonic friendship but shared an admitted mutual

attraction, though at the time Rinaldi had not yet outwardly identified herself as a lesbian. (I RP 34, 42, 49; IV RP 127)

After obtaining her Masters Degree, Rinaldi moved from Alaska to California in 1991. (I RP 36) In July 1992, after a period of no communication, Bailey, having ended her previous relationship, obtained Rinaldi's California phone number through a mutual friend and phoned her. (I RP 37) The parties quickly resumed their friendship, but their relationship remained platonic. (I RP 37-38, 40) Although Bailey still lived in Alaska, she frequently visited Rinaldi in Idaho, where she was caring for her ailing grandmother, and in Washington, where Rinaldi moved in late 1992. (I RP 38, 39-40)

2. The Parties Became Romantic Partners In 1993 After Rinaldi Relocated To Washington State.

On February 12, 1993, the parties consummated their relationship. (I RP 43) From that date forward, they considered themselves to be a couple. (I RP 52; IV RP 163) Bailey, who was still flying out of Alaska, visited Rinaldi in Washington every two to three weeks for a few days at a time. (I RP 51)

Rinaldi and Bailey's romantic relationship was public to all their friends. (I RP 52) Bailey was "out" as a lesbian to most

friends and associates, but she was not out to her co-workers. (I RP 52, 55, 78) Rinaldi, who was raised in a strict Catholic family, resisted coming out to her parents. (I RP 50, 52-53) Rinaldi did come out to her sisters, who were supportive of Rinaldi's relationship with Bailey. (I RP 50, 52-53) Rinaldi eventually came out to her parents in 2000, who contrary to Rinaldi's initial concerns, proved supportive and immediately welcomed Bailey into their family. (I RP 78)

3. Rinaldi Quit Her Job In Washington And Moved Into Bailey's Home In Alaska. The Parties Returned To Washington And Purchased A Home Together In 1995.

The parties discussed moving in together early in their romantic relationship, and debated whether to live in Washington, where Rinaldi lived, or Alaska, where Bailey lived. (I RP 53) By July 1993, the parties decided that Rinaldi would move into Bailey's Anchorage home because Bailey's career options through FedEx were stronger in Alaska. (I RP 53-54, 56) Even though Rinaldi did not want to return to Alaska, she left her job with Thurston Regional Planning in Olympia and moved to Anchorage in September 1993. (I RP 54, 55-56)

It was undisputed that there was no real expectation that Rinaldi work in Alaska. (I RP 57, V RP 184, 197) In a letter to Rinaldi before she moved to Alaska, Bailey wrote that she had enough money to support them both, and “you shouldn’t be wasting your energy trying to pay the rent. Let’s join forces here.” (I RP 60, 61) But Rinaldi sought and obtained some contract work with the Municipality of Anchorage while living in Alaska. (I RP 57) Bailey had placed Rinaldi on her checking and savings accounts, and both parties deposited their earnings into a joint account, from which their individual and joint expenses were paid. (I RP 62, 136, 139-40, V RP 21, 131-32)

Living in Alaska was stressful for Rinaldi. (I RP 64) Bailey’s job kept her away from home, and Rinaldi had trouble readjusting to Alaska. (I RP 63-64) Eventually, the parties learned that the career prospect they thought Bailey would have if they lived in Alaska was no longer an immediate option. (I RP 64-65) In July 1994, the parties decided to move to Seattle together. (I RP 65) They rented a house before finally finding a home to purchase in West Seattle in April 1995. (I RP 66-68)

The parties put down \$29,000 on the home from their joint account, and Bailey took out a \$15,000 loan against her 401(k) to put towards the down payment, which the parties paid back with interest during the relationship from earnings. (I RP 68; V RP 58) Both Rinaldi and Bailey are obligated on the mortgage. (II RP 41) The deed for the home states that it is owned by “Tamar D. Bailey and Linda Rinaldi both single persons as joint tenants with the right of survivorship not as tenants in common.” (II RP 40; Ex. 67)

B. The Parties Lived Together In A Marriage-Like Relationship, With All Of The Attendant Ups And Downs, For 14 Years. They Pooled Their Resources, Undertook Joint Projects, And Repeatedly Expressed Their Intent To Treat Each Other As Spouses.

The parties' West Seattle home, which sits on three-quarters of an acre, needed significant work. (I RP 69) In addition to extensive landscaping, they tackled structural issues, gutting and refinishing the downstairs, replacing the kitchen, and re-wiring and repairing dry rot. (I RP 69) Because Bailey traveled frequently as a pilot for FedEx, Rinaldi oversaw the work and did a great deal of physical labor on their West Seattle home herself. (I RP 70, 96-97, III RP 13-14) Rinaldi considered the West Seattle home a joint project. (I RP 97)

In addition to making and overseeing home improvements, which continued through the parties' separation in 2008, Rinaldi started a business, consulting on community, public sector, and affordable housing planning. (I RP 74) Over the years, Rinaldi's consulting income gradually increased. (I RP 99-100) But Bailey, who continued to fly for FedEx earning as much as \$250,000 a year, was always the primary wage earner in their relationship. (V RP 160-62)

Rinaldi described the parties' relationship as "hopeful and loving" and committed, but it also had "rocky points." (I RP 70) The parties often had trouble communicating, and sought couples counseling. (I RP 70-71) Rinaldi testified that while therapy did not "fix everything" in their relationship, it was still helpful. (I RP 71)

The parties pooled their employment earnings to save for retirement, improve their home, travel, provide gifts for their family, and pay monthly expenses. (I RP 125-27, 184-86, II RP 45, V RP 141, 181) But Rinaldi was insecure because of the disparity in their incomes, and felt that she would be "vulnerable" if they broke up. (See VI RP 133-34) As a result, and because the parties often had difficulty communicating, Rinaldi started what she referred to as her

“safety fund.” (I RP 171, 175, VI RP 132-33) Rinaldi deposited some funds from her earnings into a separate account with her sister, so that she would have funds available if she had to move out of the parties’ shared home and pay expenses on her own.¹ (I RP 171, VI RP 132-33)

In total, between 2001 and 2006 Rinaldi set aside about \$25,000 from her earnings, about 8% of her adjusted gross income over those years. (I RP 171, 179; Ex. 165,166, 167, 168, 169, 170) Although Bailey claims on appeal that she only learned of this fund through “a random subpoena of financial institutions” (App. Br. 12), in fact Rinaldi disclosed this account in her answers to the first set of interrogatories propounded to her in this action. (VI RP 131)

On appeal, Bailey claims this “safety fund” is proof of Rinaldi’s lack of commitment to the relationship. (App. Br. 11, 28, 30) But the trial court found as a matter of fact that Rinaldi setting aside funds due to her “fear of separation and being unable to find a place to live if they separated” was just one factor to be considered, and that “balanced against all of the other evidence

¹ After Bailey moved out of the parties’ home in 2008, Rinaldi used this “safety fund” to pay living and household expenses, including completing needed repairs to the West Seattle home. (I RP 181)

offered at trial, the court does not find this one fact dispositive of how these women lived their lives together” – in a committed intimate relationship. (CP 161)

While the parties discussed marriage, Rinaldi resisted a formal ceremony. (I RP 94-95) Rinaldi testified that she was never opposed to the idea of a marriage or a civil union with Bailey. (I RP 95) However, Rinaldi did have concerns because she was not “out” to her parents for the first seven years of the parties’ relationship, and she could not see herself participating in a ceremony, where Bailey wanted to invite family and friends, without inviting her parents. (I RP 95) Rinaldi also did not feel comfortable with the lavish ceremony that she believed Bailey wanted. (I RP 95) Further, as a practical matter, Rinaldi did not think it was necessary to go through a ceremony that would have no legal effect in Washington. (II RP 107)

As with the safety fund, Bailey claims that Rinaldi’s resistance to formalizing their relationship somehow proves a lack of commitment to it. (App. Br. 9-10, 28) But the trial court found as a matter of fact that “Ms. Rinaldi testified about the difficulty of telling her family about her relationship with Ms. Bailey and why a

public wedding presented cultural, political, and religious challenges for her. In this circumstance and in this relationship, the court concludes that Ms. Rinaldi's refusal to marry is not evidence of the absence of her intent to be in a committed intimate relationship." (CP 159)

Regardless of the lack of ceremony, the parties repeatedly evidenced their intent to be in a committed intimate relationship. In 1996, each named the other as "attorney in fact" in Durable Powers of Attorney that included the power to make medical decisions. (I RP 86-87; Ex. 28, 29) Each listed the other as beneficiary on retirement accounts. (V RP 148-49; Ex. 43) In their mutual applications for long term health care insurance in March 2007, both answered in the affirmative the question "if you are not married are you living in a committed intimate relationship with a partner with whom you have been living together at least the past five years." (I RP 93-94) In April 2007, each executed a will that stated that she was "not married in the conventional sense; however, I share a committed relationship with [the other party], whom I wish to treat for all purposes as if she were my spouse." (I RP 91-92; Ex. 32, 33)

Despite their efforts to be together, the parties agreed to “spend some time apart” by October 2007. (I RP 108-09) They agreed that Bailey would go to Anchorage for 3 or 4 months, while Rinaldi stayed in the West Seattle home. (I RP 109) They looked to purchase a home in Alaska, since a rental would likely not accommodate Bailey’s pets. (I RP 109) Bailey purchased a duplex in Anchorage, and left for Alaska on January 19, 2008. (I RP 109) Both viewed this as a “trial separation,” and a time for them to figure out what they each wanted. (I RP 110-11) Rinaldi held out hope that the parties would reunite. (I RP 111) Unfortunately, after a few months, it was clear that their relationship was over. (I RP 111)

C. Procedural History.

On September 2, 2008, Rinaldi filed a petition to dissolve the parties’ committed intimate relationship, asking the court to equitably divide the parties’ joint assets. (CP 3) On December 9, 2008, Bailey, represented by attorney Jan Dyer, answered the petition, denying that the parties had been in a committed intimate relationship. (CP 9) Bailey also filed a counterclaim asking the court to quiet title to the West Seattle home, claiming that she had

paid 100% of the down payment and a disproportionate share of the mortgage payments and upkeep. (CP 11-12)

In May 2009, approximately 9 months before the original trial date, Bailey's attorney was involved in a serious automobile collision. (CP 170) Ms. Dyer returned to work in August 2009, five months before the discovery cut off of January 4, 2010, and over six months before trial, which was set for February 22, 2010. (CP 172-73, 214) A month before trial, on January 20, 2010, Bailey sought (and Rinaldi did not oppose), a trial continuance from February 22 to May 24, 2010, due to emergency orthopedic surgery that Ms. Dyer had in the last week of December 2009. (CP 191-92) Although the original discovery cutoff date had already passed, the parties also agreed to extend discovery to April 19, 2010, to correspond with the new trial date. (CP 189, 214)

On May 10, 2010, the parties filed an Order on Trial Readiness confirming the trial date of May 24, 2010, and asserting that the trial would last 6-8 days. (CP 217) On May 19, 2010, less than one week before trial, and despite the Order on Trial Readiness signed by Michael Primont, Ms. Dyer's law partner, on Ms. Dyer's behalf (CP 220), Bailey filed a second motion to

continue the trial date, to July 6, 2010. (CP 195-96) This motion was based on an “emergency” surgery that Ms. Dyer had had three weeks earlier, on April 30, 2010, which purportedly caused another of her cases to be continued to the date of trial in this action. (CP 195-96) The trial court denied this second request for continuance. (CP 210)

D. After A Six-Day Trial, The Trial Court Found The Parties Had A Committed Intimate Relationship And Divided Their Jointly Acquired Assets Equally.

On May 24, 2010, the parties appeared before King County Superior Court Judge Mary Yu. Ms. Dyer and Mr. Primont appeared on behalf of Bailey. Jake D. Winfrey and Misty Willits appeared on behalf of Rinaldi. (I RP 3)

Even though Rinaldi earned significantly less income than Bailey, and was eleven years older and near retirement age, she sought only an equal division of the parties’ community-like estate, which she asserted was worth approximately \$2 million. (CP 92) Bailey continued to argue that the parties had never been in a committed intimate relationship, and denied that there should be any equitable division of assets. (CP 81) Bailey asserted that the only award to Rinaldi should be a 1994 Volvo that the parties had

purchased together, worth \$4,000, and the equivalent of 13% of the net value of the West Seattle residence, approximately \$67,000 – representing the percentage of cash Bailey claimed Rinaldi had contributed to the property. (CP 81, 83)

The trial court found that “[t]he parties, Linda Rinaldi and Tamar Bailey, were in a lesbian relationship for approximately fifteen years.” (CP 158) The trial court rejected Bailey’s claim that the parties were not in a “committed intimate relationship” because they “did not marry or register as domestic partners.” (CP 158-59) Recognizing that the factors that must be considered in determining whether a “committed intimate relationship” exists include “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties,” (CP 160) the trial court found “overwhelming evidence of a committed intimate relationship between Ms. Rinaldi and Ms. Bailey.” (CP 160)

The trial court concluded “that a 50/50 distribution of the property acquired during the relationship is a just and equitable distribution given the age of the parties, the capacity to earn a living, and the resources and services each brought to the

relationship.” (CP 161) The trial court awarded Rinaldi the West Seattle house, at a net value of \$514,056 as of trial (in a depreciating market), her “safety fund,” which by the time of trial held \$32,351², and her retirement savings of approximately \$207,000. (CP 163) Rinaldi also has a separate interest in retirement accounts of approximately \$40,000. (CP 163)

Bailey leaves the relationship with her FedEx pension of \$581,913, her FedEx 401(k) plan of \$393,910, a \$119,800 investment account, gold and silver coins worth \$25,000 at trial (in an appreciating market), and proceeds of approximately \$60,000 from the sale of a half interest in her father’s airplane. (CP 163) Bailey also has a separate interest in her retirement accounts of over \$250,000 and the Alaska duplex, valued at \$117,000. (CP 163)

In order to equalize the distribution, the trial court ordered Bailey to pay Rinaldi a judgment of \$218,806. (CP 163, 165) Bailey appeals, and has superseded the judgment.

² In addition to \$25,000 that Rinaldi deposited in her “safety fund” from her earnings, her sisters deposited approximately \$9,000 into the account to reimburse Rinaldi for payments she advanced to repair their parents’ home after their father’s death. (I RP 179) The only withdrawals from this fund prior to the parties’ separation was approximately \$4,000 that Rinaldi gave to her niece as a gift. (I RP 180)

III. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Second Motion To Continue The Trial Date.**

“Whether to grant or deny a continuance is a question addressed to the sound discretion of the court, and the exercise of that discretion will be set aside only for a manifest abuse thereof.” *Tucker v. Tucker*, 14 Wn. App. 454, 455, 542 P.2d 789 (1975) (citations omitted). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Here, the trial court did not abuse its discretion in denying Bailey's second motion to continue the trial date, which would have extended the trial an additional five months beyond the original date set for trial. This is especially true since this matter had been pending nearly 19 months when Bailey sought her second continuance. While the circumstances were unfortunate, her attorney's surgery had occurred more than three weeks before trial, and she provided no evidence that there in fact was an overlap of trial dates. After the surgery, Bailey's co-counsel confirmed that the trial could proceed on the date scheduled and there was no

indication at all until five days before trial that it could not. (CP 200) Rinaldi would have been prejudiced had the trial been continued at this late date, in part because of the (unrecoverable)³ fees her attorneys had incurred in preparing for trial, which at that point was less than a week away – efforts that would likely need to be duplicated if trial were moved another two months. (CP 204) Further, Rinaldi had arranged for the testimony of several out-of-state witnesses who had already purchased plane tickets based on the trial date. (CP 204)

Bailey's reliance on *In re V.R.R.*, 134 Wn. App. 573, 141 P.3d 85 (2006) (App. Br. 21) is misplaced. There, the court found that the trial court abused its discretion in denying the father's motion to continue a trial that would determine whether his parental rights would be terminated, when counsel for the father had been appointed the day before trial. This court recognized that the trial court's refusal to continue the trial date effectively deprived the father of effective assistance of counsel, to which he was entitled because his "fundamental liberty interests in the care and custody

³ Unlike in marriage dissolutions, parties to a committed intimate relationship are not entitled to an award of attorney fees under RCW 26.09.140 regardless of need. *Western Community Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.2d 359 (1987).

of [his] children” were at risk. *V.R.R.*, 134 Wn. App. at 581, 586, ¶¶ 19-20, 31. Here, no similar fundamental interests are at risk – the only thing at issue was an equitable division of the parties’ jointly acquired property. See *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995) (“Where, as here, the interest at stake is only a financial one, the right which is threatened is not considered “fundamental” in a constitutional sense”).

Further, unlike counsel in *V.R.R.*, who had been appointed just one day before trial and had been unable to obtain or review discovery, Bailey’s counsel had been representing her for at least 15 months, and had conducted extensive discovery in advance of trial. Bailey claims that her attorney’s alleged “lack of preparation” for trial warranted a continuance because she failed to “investigate, adequately, the diversion of funds by Rinaldi to secret accounts. Instead of enlisting a forensic accountant, Dyer left it largely up to Bailey to sort out 15 years of financial data.” (App. Br. 23) But by the time of Bailey’s second motion for continuance, the discovery cut off had already passed. (See CP 189, 195) Presumably if an additional expert witness was necessary, that expert would have been retained before Ms. Dyer’s April 30 surgery, since the

(extended) deadline for exchange of witness and exhibits lists was May 3. (CP 189)

In any event, the claimed basis for Bailey's second continuance was not for further investigation or discovery, but due to her attorney's surgery, and her claim that she was double-set for trial. (See CP 195-96) If Bailey's counsel failed to retain a forensic accountant, it was not related to her request for continuance, and it did not mean that the trial court abused its discretion by choosing not to deprive Rinaldi of her (second) day in court as scheduled.

Finally, Bailey complains that "no record [for the denial of the continuance] was made apart from the order denying Bailey's motion." (App. Br. 32) But Bailey set her motion without oral argument. (CP 221) Had she wanted to make a "record," Bailey should have asked the trial court to consider the matter with oral argument. Regardless, there is no requirement that formal findings of fact be entered when deciding a motion to continue the trial date. See **State v. Walker**, 16 Wn. App. 637, 639, 557 P.2d 1330 (1976), *rev. denied*, 89 Wn.2d 1004 (1977) (even in a criminal case, no findings were necessary when the record was adequate to determine the reasons for the trial court's order continuing the trial).

The trial court did not abuse its discretion in denying Bailey's second motion for continuance of the trial date. The tenable reasons for its decision are evidenced by the record and in Rinaldi's opposition to the continuance.

B. Substantial Evidence Supports The Trial Court's Finding That The Parties Were In A Committed Intimate Relationship.

A committed intimate relationship "is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). "Relevant factors establishing a [committed intimate] relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties." *Connell*, 127 Wn.2d at 346. "These factors are neither exclusive nor hypertechnical but rather a means to examine all relevant evidence. No factor is more important than another." *In re Long and Fregeau*, 158 Wn. App. 919, 926, ¶ 18, 244 P.3d 26 (2010) (citations omitted). Whether a committed intimate relationship exists is a question of fact, and subject to the deferential "substantial evidence" standard of review.

In re Sutton and Widner, 85 Wn. App. 487, 490-91, 933 P.2d 1069, *rev. denied*, 133 Wn.2d 1006 (1997).

Here, there was substantial evidence to support the trial court's finding that the parties were in a committed intimate relationship based on the **Connell** factors:

Continuous cohabitation and duration of the relationship: There is no dispute that the parties cohabited continuously for 14 years before separating in early 2008. The fact that Bailey was away "about half the time" (App. Br. 26) during months that she worked, does not change the fact that the parties both called the West Seattle property they owned together their home, and that Bailey always returned there when she was not working. As the trial court found, "notwithstanding [Bailey]'s flight schedule, the court finds that [the parties] continuously cohabited until their separation in 2008." (CP 160)

A cohabitant cannot evade the financial consequences of a committed intimate relationship because her work schedule finds her away from home some evenings. While Bailey claims that "duration alone does not tell us the nature of [the parties]' relationship," (App. Br. 27), substantial evidence supports the trial

court's determination that it was "marital-like" up until near the very end. As early as 1994, Rinaldi named Bailey as her primary beneficiary on her retirement accounts. (Ex. 43) Thirteen years later, each party reaffirmed her intent to be in a "committed relationship with the [other party], whom I wish to treat for all purposes as if she were spouse," in the Wills that they mutually executed in April 2007. (Ex. 32, 33)

Purpose of the relationship and intent of the parties: The trial court found that "Ms. Bailey and Ms. Rinaldi held themselves out as a couple, sharing a bedroom, caring for one another's family, traveling together, and for all purposes living as life partners." (CP 161) Employing an oddly subjective (and wholly unsupportable) "test" based on the supposed emotional quality of their committed intimate relationship, Bailey claims that the parties did not have the same "purpose," that she was "unhappy," and that she believed that

the relationship in its later years was no longer fulfilling some need for “love and sexual intimacy.” (App. Br. 29)⁴

But as the trial court recognized, “not unlike other dissolutions, trial about a relationship after it has ended tends to focus on the negative aspects of the relationship, the disagreements the parties may have between them, and the weaknesses of the other.” (CP 161) In truth, lack of love, happiness, and sexual intimacy is why couples (married or not) separate.⁵ It is usually the only reason a court becomes involved in the relationship in the first (or last) place. It does not change the partners’ intended purpose when the relationship began, nor the manner in which it was maintained for 15 years.

⁴ This “test” apparently arises from the testimony of Bailey’s “expert” Pepper Schwartz, Ph.D., who was called to offer her opinion as an expert on same-sex committed intimate relationships. Dr. Schwartz testified that, in addition to the *Connell* factors, such a relationship between two women would require “honesty, trust, emotional safety which I call comfort and [] sharing, sharing feelings, experience life together,” and “sharing the same reality, that you’re both exactly what you are.” (IV RP 71)

⁵ On appeal, Bailey complains in particular that Rinaldi’s recollection of their relationship history was “hazy,” asserting that “she struggled to remember when they discussed their mutual attraction or when they first kissed or the details of their dating relationship.” (App. Br. 7) Some would argue that were this a litmus test for the right to an equitable division of property, many men would leave their marriages penniless.

Bailey also claims that the parties did not have the same “intent” because Rinaldi declined to “formalize” their relationship. (App. Br. 8-9, 28) But the trial court recognized that there were other reasons why Rinaldi did not want to engage in a public ceremony, and that her resistance was “not evidence of the absence of her intent to be in a committed intimate relationship with Ms. Bailey.” (CP 159) That both parties intended to be in a committed intimate relationship, regardless whether one of them was not enthusiastic about having a lavish ceremony, is evidenced by their mutual execution of wills in 2007, affirming that they shared a “committed relationship . . . and they wished to treat the other for all purposes as if they are spouses.” (Ex. 32, 33)

Bailey’s arguments, and her claim that Rinaldi’s “loyalties lay elsewhere (i.e. her sister and her friends)” (App. Br. 28), are similar to those recently rejected by Division III in *Long/Fregeau*, 158 Wn. App. 919, where appellant challenged a finding that he and the man with whom he lived for 10 years were in a committed intimate relationship because each had other sexual partners. Division III rightly gave this argument short shrift: “Given the no-fault principles applied to marriage dissolutions and noting infidelities can occur

during a marriage, Dr. Fregeau's reliance on Mr. Long's infidelities to argue against a shared purpose is unpersuasive. The court acknowledged that Mr. Long did not enter into a registered domestic partnership, that Dr. Fregeau was reticent toward the idea of children, and that the relationship was marked by infidelity. Given all in this record showing permanency planning, shared love and intimacy, extended family relationships, caring for one another when sick, and holding themselves out as a couple, the court did not err in determining the parties held a shared purpose in their relationship.” *Long/Fregeau*, 158 Wn. App. at 927, ¶ 21. In this case, in any event, infidelity was rightfully not an issue, and never rose above Bailey’s unsupported speculation during trial. (VI RP 76)

“[E]quitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties.” *Vasquez v. Hawthorne*, 145 Wn.2d at 107. Regardless of the parties’ emotional struggles in their relationship, and that it was never formalized in a lavish ceremony, there is substantial evidence to support the trial court’s

finding that the parties were in a committed intimate relationship based on their intent and the purpose of their relationship.

Pooling of resources and services for joint projects:

The trial court found that “during the relationship, multiple bank accounts and credit cards were opened listing both individuals as joint owners. They established each other as beneficiary on retirement accounts and insurance policies. Earnings were pooled to pay common debts and household expenses.” (CP 160) The parties jointly purchased the West Seattle house as joint tenants with rights of survivorship – not as tenants in common, as Bailey wrongly asserts on appeal. (*Compare* App. Br. 31 *with* Ex. 67) The parties jointly worked to improve their West Seattle home, as well as Bailey’s separate properties in Alaska. (I RP 70, 96-97, 111 RP 13-14, V RP 167-68) The parties used joint funds to assist each other’s families and to pay their joint and separate obligations. (I RP 125-27, 184-86, II RP 45, V RP 141, 181)

Taken together, these are more than the actions of mere “cohabitants,” as Bailey claims. (App. Br. 30) The parties here behaved like the couples in many cases where the courts have found committed intimate relationships. In *Long/Fregeau*, 158 Wn.

App. 919, as here, the parties jointly purchased and mortgaged real property together, jointly worked on each other's and their family's properties, and shared household expenses. In ***Gormley v. Robertson***, 120 Wn. App. 31, 83 P.3d 1042 (2004), as here, the parties had a joint bank account from which they paid joint and separate obligations, borrowed money together, bought a home together, and jointly paid the mortgage and improved, decorated, and furnished their home.

This case is very different from that of the two couples described in ***Marriage of Pennington***, 142 Wn.2d 592, 14 P.3d 764 (2000) (App. Br. 29-30). In the *Pennington* matter, the claimant could not show adequate pooling of resources to prove a committed intimate relationship in part because there were several "gaps" in the relationship when they did not pool resources. The woman asserting a claim to the man's property also had no "evidence to suggest she made constant or continuous payments jointly or substantially invested her times and effort into any specific asset so as to create any inequities." ***Pennington***, 142 Wn.2d at 605. Here, however, there were no such "gaps," and the parties

continuously and jointly paid expenses over their entire 14 (plus) - year relationship.

In the *Chesterfield* matter, the parties also had not pooled resources. They always maintained separate bank accounts, purchased no property together, and maintained their financial independence. *Pennington*, 142 Wn.2d at 606-07. Here, in contrast, the parties held joint accounts, acquired property jointly, and were financially dependent on each other. While Bailey earned more, Rinaldi's contributions were not unsubstantial, and Bailey relied on Rinaldi to manage the household, including paying the parties' joint obligations from their joint account. The parties also each made the other the beneficiary of their individual retirement accounts. (V RP 148-49; Ex. 43)

Bailey makes much of the fact that Rinaldi kept a separate "safety fund" with her sister that held over \$25,000, deposited from her earnings over six years. (App. Br. 30-31) But the trial court rightly found that this was not "dispositive" to the question whether Rinaldi was "committed" to the relationship. (CP 161) The trial court found that when weighed with all of the other evidence, it was clear that Rinaldi remained committed to the parties' relationship

despite her financial insecurities. (CP 161) Rinaldi was in fact wise to be insecure, because Bailey, by far the economically superior partner, has spent tens of thousands of dollars challenging the very nature of their relationship in her efforts to evade Rinaldi's right to an equitable share of their community-like estate.

Bailey also argues that this alleged "dishonesty" on Rinaldi's part in having a "safety fund" "drives a stake in the heart of 'marital-like.'" (App. Br. 30) But requiring courts to hold that a committed intimate relationship cannot exist if there is any evidence of "dishonesty" would impose a code of conduct on partners in a same-sex relationship that is not required, and is in fact forbidden, in considering the property rights of spouses on divorce. See RCW 26.09.080 (court must divide the parties' property in a just and equitable fashion without regard to marital misconduct).

Substantial evidence supports the trial court's finding that the parties were in a committed intimate relationship, based on the **Connell** factors, 127 Wn.2d at 346. This court must reject Bailey's efforts to urge this court to adopt a different, higher standard that would require a partner in a same-sex committed intimate relationship to prove that their bond was somehow "better" than

most mere mortals could ever obtain – a relationship marked with 100% honesty, continued sexual intimacy, emotional safety, and clear communication – before the courthouse doors are open to equitable relief. It is likely that few could prove they had such a perfect relationship – and if they could, they would not likely be looking to dissolve it.

Finally, Bailey asserts that regardless of the evidence showing that the parties were in fact in a committed intimate relationship “no unjust enrichment can be claimed.” (App. Br. 25) But in fact her proposed property distribution at trial, and this appeal, belie this assertion. (See CP 83; *supra* § II.D at 13) The committed intimate relationship doctrine was created to prevent precisely the sort of injustice to the economically less powerful partner that Bailey urges this court to impose as a matter of law here. The trial court properly found that the parties were in a committed intimate relationship, and that an equitable division of the parties’ jointly acquired assets was warranted to avoid unjustly enriching the already economically advantaged partner.

C. The Trial Court Properly Considered Bailey's Pension, Which Was Largely Funded During The Parties' Relationship, In Dividing The Joint Assets.

Over the parties' 15-year relationship, Bailey contributed to a pension through her employer FedEx.⁶ At the time of trial, the present value of the parties' community-like interest in the pension was \$581,933 – nearly 30% of the parties' estate. The trial court properly found that this was an asset that could be considered in equitably dividing the community-like estate. ***Marriage of Chavez***, 80 Wn. App. 432, 436, 909 P.2d 314, *rev. denied*, 129 Wn.2d 1016 (1996) (pension benefits are an asset subject to division by the court). However, out of concern that FedEx would not approve a qualified domestic relations order (QDRO) that awarded an interest in a pension governed by ERISA to a former same-sex partner who did not meet the qualifications of an "alternate payee" as defined by ERISA and the Internal Revenue Code, the trial court decided to award Rinaldi other assets, including a money judgment, rather than an interest in the pension. The trial court also found that

⁶ Although both Bailey's FedEx 401(k) and pension are governed by ERISA, Bailey only complains of the trial court's consideration of the pension in equitably dividing the parties' community-like assets. (See App. Br. 32, 36-37) Bailey has waived any challenge to the trial court's consideration and distribution of her 401(k). ***Port Susan Chapel of the Woods v. Port Susan Camping Club***, 50 Wn. App. 176, 182, 746 P.2d 816 (1987).

“delaying the equalization to a future stream of payments does not achieve the result that the court intended.” (CP 168)

Federal law does not prohibit the trial court’s consideration of Bailey’s pension in equitably dividing the parties’ community-like estate. ERISA generally prohibits the assignment of pension benefits, except that they may be assigned pursuant to a “domestic relations order” that qualifies under 29 U.S.C. § 1056(d)(1), (3)(B)(i), including any judgment or order which “relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant” and is issued “pursuant to a [s]tate domestic relations law.” 29 U.S.C. § 1056(d)(3)(B)(ii)(I),(II).⁷

The Ninth Circuit recently upheld a QDRO that awarded a former cohabitant in a committed intimate relationship an interest in the other party’s pension in ***Owens v. Automotive Machinists Pension Trust***, 551 F.3d 1138, 1142-43 (9th Cir. 2009). The court in ***Owens*** applied a two-part test to determine whether a domestic

⁷ This exception to the “general rule” prohibiting assignment makes this case different from ***Marriage of Landauer***, 95 Wn. App. 579, 589, 975 P.2d 577, *rev. denied*, 139 Wn.2d 1002 (1999) (App. Br. 34), which held that the dissolution court could not directly offset the value of Indian trust lands against other assets because federal law prohibits conveyance of the land without the express approval of the Secretary of the Interior.

relations order awarding a former cohabitant an interest in the other party's pension is "qualified" under ERISA: First, the order must relate to child support, alimony payments or marital property rights. Second, the party to whom an interest in the pension will be awarded must be a child, former spouse, or dependent of the pension participant. Relying in large part on the fact that the parties filed joint tax returns, and the woman qualified as a dependent under IRC § 152(d)(2)(H), the Ninth Circuit held that an order awarding a former cohabitant an interest in a pension under the committed intimate relationship doctrine related to "marital property rights," and that the former cohabitant was a "dependent" for purposes of ERISA. **Owens**, 551 F.3d 1143-44, 1147.

While the trial court here recognized that generally ERISA pension benefits can be distributed in a case dissolving a committed intimate relationship, just as in a dissolution of marriage, the court was concerned that there might be difficulty in having a QDRO approved in *this* case, as its deals with a same sex relationship and one in which the parties, unlike in **Owens**, did not (and could not) file joint tax returns. Rather than enter a QDRO that might be rejected, the trial court decided to award other assets

to Rinaldi, including an equalizing judgment. This was not an abuse of discretion. The court can award the entire pension to one party, and compensating assets to the other, or require pension payments be split between the parties. See ***Marriage of Wright***, 147 Wn.2d 184, 190, 52 P.3d 512 (2002); see also ***Partnership of Rhone and Butcher***, 140 Wn. App. 600, 166 P.3d 1230 (2007), *rev. denied*, 163 Wn.2d 1057 (2008).

In ***Rhone/Butcher***, the parties had lived in a committed intimate relationship for 19 years. At the end of the parties' relationship, they reached a settlement providing that the male cohabitant would receive one-half of the female cohabitant's state retirement pursuant to a QDRO. It was thereafter discovered that the male cohabitant could not receive his share of the retirement fund through a QDRO, and he asked the court for an award of "substitute" assets. Division III affirmed the trial court's award of a judgment to the male cohabitant for the equivalent of one-half of the retirement fund, holding that the trial court "properly exercised its discretion in entering an order that provided for substitution of other assets to satisfy the award." ***Rhone/Butcher***, 140 Wn. App. at 607, ¶ 13.

Bailey also complains of the value that the trial court placed on the pension, claiming that it should have been “valued to reflect the many contingencies affecting it and the restriction on distribution.” (App. Br. 35) But trial courts have “broad discretion in valuing property and will only be overturned if there has been a manifest abuse of discretion, and it is not a manifest abuse of discretion if the valuation is within the scope of the evidence.” **Marriage of Gillespie**, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997); **Marriage of Mathews**, 70 Wn. App. 116, 122, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993)).

Here, Rinaldi presented un rebutted evidence from CPA Steven Kessler of the present value of the community-like interest in the pension. The trial court properly adopted this value. While Bailey testified to the alleged highly contingent nature of her pension, claiming that it could be restructured in the future and the pension benefits reduced, the trial court rejected this testimony. This court does not review the trial court's credibility determinations, nor weigh the conflicting evidence. **Marriage of Woffinden**, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983).

The trial court's property distribution of the parties' community-like estate, including its consideration of Bailey's pension, was well within its discretion. It should not be disturbed on appeal.

IV. CONCLUSION

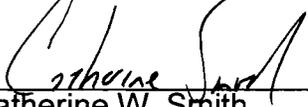
Substantial evidence supports the trial court's determination that the parties were in a committed intimate relationship. The trial court had authority to divide the parties' community-like assets equitably between the parties. The trial court's property distribution was well within its discretion, and this court should affirm.

DATED this 15th day of August, 2011.

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DECLARATION OF SERVICE

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

That on August 16, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of August, 2011.



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