NO. 95618-9

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 74657-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICKY BRINEY, a Washington Individual

Appellant,

and

MARGARET MORGAN, a Washington Individual

Respondent.

PETITION FOR REVIEW

THE HUNSINGER LAW FIRM
Attorney for Appellant NICKY BRINEY

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I. IDENTITY OF PETITIONER

Nicky Warren Briney, Appellant, ("Briney") asks this Court to accept review of the Court of Appeals decision terminating review.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its decision on January 26, 2017. Both parties filed motions for reconsideration: the Appellant's was denied on July 24, 2017, as was the Respondent's on February 14, 2018. Briney seeks review and reversal of that portion of the decision upholding the trial court's award of a $461,675 judgment in favor of the Respondent Margaret Morgan ("Morgan").

III. ISSUES PRESENTED FOR REVIEW

1. Is not the date a CIR begins a factual matter, or at least a mixed matter of fact and law, for which deference to the trial court's factual findings must be given, and is not to be reviewed de novo?

2. Where there was substantial evidence to support the trial court's ruling that the CIR began on or about November 1, 1995, was it not error for the Court of Appeals to instead conclude that it began in mid-1994?

3. Is not the standard for rebutting the presumption of

3. Is not the standard for rebutting the presumption of community property either "clear and convincing" or "direct and positive", do they mean the same thing, and are they not as stringent as "clear, cogent, and convincing"?

4. Whatever the standard is, was it not met by Briney when the house was (a) purchased via a deed solely in his name; (b) with a $74,000 down payment paid solely by Briney from funds he owned and kept entirely separate prior to the inception of the CIR; and (c) the $296,000 purchase money mortgage was solely in his name.

IV. STATEMENT OF THE CASE

A. Factual Background

1. The parties' relationship was "off and on" between 1987 and 1999.

Between 1976 and 2015 Briney and Roger Bel Air were equal partners in a real estate lending business known as Bel Air & Briney, until Mr. Bel Air purchased Briney's one-half interest in 2015. (RP 323-325) Morgan worked as a retail travel agent in Seattle for a company called Auto Venture from 1980 through the trial in 2015, except for three brief stints at retail stores. (RP 37, 156)

Briney and Morgan first met in June 1987. (RP 39-40) In June 1988 she moved to California for two years. (RP 40, 157) She

returned to Seattle in 1990 and lived with Briney for two more years (RP 43, 46), moved out in 1992 (CP 672), returned in mid-1994 (CP 673), left again in 1998 (RP 56), and in 1999 moved back in. (RP 58)

Morgan characterized her relationship with Briney in the early 1990's as "off and on. We would see each other for a while, and then we would separate for a while. And we'd see each other again. Separate. We went through some counseling together. So it was off and on." (RP 175-176)

While living together at various intervals between 1987 and 1994, Briney made all the rent and utilities payments for each apartment, and virtually all of the living expenses, including most of the groceries and all of the meals eaten out. (RP 157, 160).

Between mid-1994 when Morgan moved back in with Briney until he purchased the house in November 1995, the trial court found that he "paid all of the rent, utilities, the majority of the food and meals eaten out, and auto insurance. Ms. Morgan used her significantly smaller earnings on some of the food, groceries, and personal items. She owned a Honda and had little, if any savings." (CP 673) In fact, Ms. Morgan agreed she had no savings. (RP 176-177)

2. Briney purchased a house in November 1995 with his own money, own credit, and in his own name.

As the trial court found, the parties stipulated that in November 1995 Briney purchased a house in the Queen Anne

neighborhood of Seattle ("the house"); the purchase price was $370,000: the down payment of $74,000 was paid solely from Briney's funds; the remaining $296,000 was borrowed and repayment was secured by a first deed of trust against the property for which he was the sole obligor. (FOF 11; CP 673) He did not include Morgan's name on the title because they were not married, he considered it to be his house, and it was his money that was paying for it. (RP 348)

3. Morgan moved out again in 1998 for several months, moved back in 1999 and lived in the house for the next 14 years with Briney, who made all the mortgage, property tax, maintenance, and improvement payments and most of the other living expenses.

By 1998 Morgan was frustrated by Briney's failure to live up to his promise to fix up the house, and moved out. (RP 56, 189) She returned approximately eight months later (RP 58) and lived with Briney until February 2013, when she permanently moved out. (RP 192-193)

The trial court found that after the parties moved into the house, as in the prior eight years of their relationship, "Briney paid all of the mortgage and property taxes, most of the furnishings, maintenance/improvements, homeowner's insurance, utilities, food and meals out, auto insurance and the vast majority of other living expenses for the two. . . . [In addition to paying for all of the plantings in the yard, Morgan] paid for groceries, some of the meals

eaten out and some of the furniture and furnishings for the home as well as her own personal expenses." (CP 674)

Between November 1995 and February 2013 Briney paid approximately $100,000 for all of the automobiles used by Morgan, and the automobile insurance on all of them. (RP 140-143; 206-208; Exh. 37, ¶30) When she left, Morgan took the 2012 Volkswagen Passat with her. (RP 143)

By not paying her share of the rental value of the house between 1996 and 2012 Morgan received over $200,000 in free rent. (CP 238; Exhibit 87)

4. The parties always kept separate all of their income, expenses, assets, and debts.

During their entire relationship, both before and during the CIR, Morgan and Briney always kept all of their income separate, all of their bank accounts separate, and all of their assets and debts separate. (Exhibit 37, ¶29) They never had a joint bank account. (Exhibit 37, ¶29; RP 113) Briney's earned and unearned income always went into his separate bank and investment accounts, and Morgan's income always went into her separate bank account. (Exhibit 37, ¶29) They never commingled any money. (Exhibit 37, ¶29) When Briney paid for something (for the household or for Morgan or for himself), he paid it from one of his separate accounts, and when Morgan bought groceries or supplies or paid for breakfast, or paid her own personal expenses, she paid it from

her own bank account. (Exhibit 37, ¶29)

5. The funds used by Briney for the down payment to purchase the house in November 1995 were his separate property, whether the CIR began in mid-1994 or in November 1995.

Since the 1980's and at all times through the trial in 2015 over 20 years later, Briney contemporaneously and regularly maintained an electronic check register by posting of all of his financial activities, using the Quicken bookkeeping software. (RP 366-67) He explained, for example, that every time he received a monthly statement for each of his investment and retirement accounts he promptly posted the balance at the end of that month into Quicken. (RP 379 – 381)

Briney testified that since the 1980's "every dime that has ever come into my possession or gone out of my possession has been recorded . . ." in Quicken. (RP 368-369) Briney explained that "it acts like an electronic check register, so every expenditure and every income items is logged into the program, and it captures the data. . ." (RP 366)

This record keeping enabled him to contemporaneously maintain a record of every one of his assets and every one of his debts, and their values and amounts, and print out a report containing that information ("a net worth statement") for any

period of time. (RP 380-381).[1]

The court admitted into evidence, and adopted in its Findings of Fact and Conclusions of Law (COL 6; CP 685), Briney's net worth statements for each of the three dates that the trial court could have determined that a CIR had begun: as of June 30, 1994 when Ms. Morgan moved back in with him[2]; as of October 31, 1995 before Mr. Briney purchased the house[3], and as of March 31, 1999, when Morgan moved back into the house.[4]

These unchallenged statements indicated that the value of each asset on each such date was:

Asset	06/94	10/95	03/99
Bel Air & Briney	$ 679,257	$ 708,267	$ 954,973
IRA accounts	$ 218,499	$ 252,930	$ 488,493
Stocks and bonds	$ 180,478	$ 244,140	$ 89,625
Separate bank acct.			$ 18,083
Home			$ 435,000
Vehicles	$ 13,980	$ 22,480	$ 46,210
Accounts receivable	$ 8,315	$ 10,706	$ 44,331
Personal property	$ 7,567	$ 7,567	$ 7,567
Total Assets	$1,108,096	$1,246,090	$2,084,282
(Mortgage)			($ 321,056)

[1] The value of Bel Air Briney consisted of the outstanding balance of all of the loans it had made, regardless of the likelihood of repayment. (RP 376-377) The values of each investment and retirement account came from the information in the monthly statement for each account. (RP 379) The value of the house was its assessed value at the time. (Exhibit 37, ¶32)

[2] Exhibit 71

[3] Exhibit 72

[4] Exhibit 37, Exh. 4

Net Worth $1,108,096 $1,246,090 $1,763,226

The trial court held that the CIR began at the same time Briney purchased the house in November 1995.[5] The Court of Appeals decided that the CIR began when Morgan moved back in with Briney in June 1994. However, because (a) at both times Mr. Briney had more than twice the amount necessary in his Fidelity accounts to make the $74,000 down payment, (b) during the mere 16 months between the two dates those accounts were maintained as Briney's exclusively separate property, and (c) Ms. Morgan had no savings at either time (RP 176-177), the $244,140 in Mr. Briney's Fidelity accounts on October 31, 1995 as he made the down payment was just as much his separate property as the $180,478 in those same Fidelity accounts in June 1994, which Morgan agreed, and the trial court found, was his separate property.

B. The Trial Court's Ruling

The trial court's Findings of Fact, Conclusions of Law, and holdings in its Decree and Judgment most relevant to this Petition are:

"The parties' committed intimate relationship began on November 1995, the date the parties moved in to the Ward Street residence, and ended on February 2013, the date of Plaintiff's move out of the residence." (Decree and Judgment, ¶3.1; CP 764)

[5] Decree and Final Judgment (CP 764)

"The parties stipulate that the title in the Ward Street residence is solely in Mr. Briney's name. Similarly, the parties agree that the original mortgage of $360,000 was solely in Mr. Briney's name. Also, the parties agree that Mr. Briney paid the initial down payment of $74,000. See Exhibits 73, 74." (FOF 11; CP 673)

"Any rents, income, profits and increase in the value of separate property during the marriage (or CIR) are presumed to remain separate property; it is the other party's burden to prove the increase was the result of community labor or funds. '[E]ach spouse is entitled to 'the increase in value during the marriage of his or her separately owned property, except to the extent to which the other spouse can show that the increase was attributable to community contributions." *Marriage of Lindemann,* 92 Wn. App. 64, 69-70, 960 P.2d 966 (1998). Such evidence must be 'direct and positive.' *Id.* At 70." (COL 3; CP 682)

"The home is clearly a community asset that both parties supported and maintained." (COL 8; CP 686)

"It is also agreed that after the two moved into the Ward Street house in November 1995, Mr. Briney paid all of the mortgage and property taxes, most of the furnishings, maintenance improvements, [and] homeowner's insurance, . . ." (FOF 12; CP 673-674)

The trial court awarded judgments to Ms. Morgan of $461,675 for half of the value of the house when she moved out less Briney's down payment (¶3.2; CP 764) and $711,157.15 for half of the increase in Briney's retirement and investment accounts. (*Id.*)

C. The Court of Appeals Opinion

The Court of Appeals reversed the trial court's award of one-half the increase in Briney's retirement and investment accounts

because Morgan did not dispute that the assets were presumptively Briney's separate property, and she failed to prove that Briney's income during the CIR was commingled with the income from the investment accounts or that his community efforts during the CIR increased the value of the investment accounts. *Morgan v. Briney*, 200 Wn. App. 380, 393-394, 403 P.3d 86 (2107). ("*Morgan*")

However, the Court of Appeals upheld Morgan's judgment for one-half the value of the house minus Briney's down payment using a four-part analysis:

1. Although the Court agreed "it was not error for the court to conclude that the CIR had begun by the time [the parties] moved into the house in 1995, . . . we disagree with the trial court's conclusion that the CIR began in 1995, and hold that the CIR began when Morgan moved into the apartment with Briney in mid-1994." *Morgan,* at page 389

2. This conclusion was the result of the de novo review of the trial court's holding because "the existence of a CIR, or the date it begins, is a legal conclusion, . . ." *Morgan,* fn 18

3. As a result, the Court imposed upon Briney the "burden of proving it was acquired with separate funds." *Id.,* at page 390, which required him to present

> "***clear, cogent, and convincing evidence*** that the asset falls within a separate property exception. Burgess v. Crossan, 189 Wn. App. 97, 103, 358 P.3d 416 (2015). The party cannot meet this burden by "mere self-serving" declarations that the partner "acquired it from separate funds and a showing that separate funds were available for that purpose." Berol v. Berol, 37 Wn.2d 380, 382, 223 P2d 1055 (1950). The party must be able to trace the funds "with some degree of particularity." Berol, 37 Wn.2d at 382. *Id.*, at page 390 (emphasis added)

In a later footnote, the Court acknowledged that *In Re Lindemann*, 92 Wn. App. 64, 70, 960 P. 2d 966 (1998) "phrases the burden of proof as ***'direct and positive'*** evidence, but the Supreme Court has indicated that we should conclude that burden is equal to the more general ***'clear and convincing'*** standard," citing *In Re Estate of Borghi,* 167 Wn.2d 480, 490, 219 P.3d 932 (2009). *Id.,* footnote 23 (emphasis added)

4. The Court concluded that Briney failed to meet that standard because he "does not trace the funds he used for the down payment to a specific separate account or show that the funds came from separate income." *Id.,* at page 391

On September 14, 2017 the Court of Appeals granted a motion to publish its previously unpublished opinion filed by a nonparty, the Perry Law Group, PLLC.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals' disregard of the substantial evidence supporting the trial court's finding that the CIR began when Briney purchased the house in November 1995 contradicts one of the most fundamental principles in appellate law. Moreover, there is no authority whatsoever for, and clear authority contradicting, the Court of Appeals' holding that the appellate review of the trial court's ruling on not only the existence of a CIR ***but the date it began*** is de novo.

Moreover, the Court of Appeals' unclear explanation of the evidence necessary for a party to rebut the presumption of community property, coupled with its erroneous application of that standard, conflicts with other appellate rulings in the state of Washington, and resolving the current unclear of this important aspect of community property law is a matter of substantial public interest.

Accordingly the Supreme Court should grant this Petition and review and reverse what is now published precedent that starkly contradicts and upends long-held and important fundamental principles of community property law in the state of Washington.

A. The Court of Appeals' Decision Presents Conflicts with the Supreme Court's Prior Decisions under RAP 13.4(b)(1)

1. The Court of Appeals' own opinion describes this Court's prior decisions regarding CIR's which it then proceeds to disregard.

The Washington State Supreme Court essentially invented the concept of the CIR (initially called a "meretricious relationship") with its pioneering opinions in *In Re Marriage of Lindsey,* 101 Wn.2d 299, 678 P.2d 328 (1984), followed by *Connell v. Francisco,* 127 Wn. 2d 339, 898 P.2d 831 (1995). *Connell* established the five relevant factors to analyze whether a CIR exists that are still applied in all CIR cases: "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,* at page 346, citing *Lindsey* at 304-305.

Five years after *Connell* the Supreme Court created the framework for how CIR's are to be evaluated by trial and appellate courts – and have been evaluated ever since – by reviewing, and reversing, two trial courts' holdings that meretricious relationships existed, in the landmark opinion of *In re Marriage of Pennington,* 142 Wn. 2d 592, 14 P.3d 764 (2000), which is cited extensively in *Morgan* at page 387.

The *Pennington* principles include the applicable standard of review on appeal at page 602 – 603: ". . . we must review and decide whether the trial courts erred in concluding ***the facts*** gave rise to meretricious relationships at all. We view this determination as a ***mixed question of law and fact***; as such, ***the trial court's factual findings are entitled to deference, but the legal conclusions flowing from those findings are reviewed de novo.***" (citations omitted, emphasis added)

The Court of Appeals opinion also (correctly) cites another Supreme Court CIR opinion, *Soltero v. Wimer,* 159 Wn. 2d 428, 433, 150 P.3d 552 (2007) for the proposition that the appellate court "***reviews the trial court's findings of fact for substantial evidence and the conclusion of law de novo.***" *Morgan,* at page 387 (emphasis added)

Here, the trial court was presented with three possible dates the CIR began (if it existed at all) during what even Morgan testified was an "on and off relationship": mid-1994, November 1995, and mid-1999. There was substantial evidence supporting the trial court's finding that the CIR began in November 1995; in fact the Court of Appeals did not find otherwise, it reversed merely because

some facts "***suggest*** that the CIR began earlier . . ." *Morgan*, at page 389 (emphasis added)

This, a Washington appellate court cannot do.

> As we have consistently stated, where the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982) (citations omitted)

The trial court must decide whether a CIR exists at all and if so, when it begins, based on findings of fact followed by the application of the *Connell* factors. Under *Pennington* and all of its progeny, the standard of review of that determination is not de novo.

B. The Court of Appeals' Holding That Briney Failed to Rebut the Presumption of Community Property Conflicts with Other Decisions of the Court of Appeals Under RAP 13.4(b)(2), and Review Would Further A Substantial Public Interest Under RAP 13.4(b)(4).

In *Morgan* at page 390 the Court cites *Burgess v. Crossan*, 189 Wash. App. 97, 103, 358 P.3d 416 (2015) for the proposition that "the party must present ***clear, cogent, and convincing evidence*** that the assets falls within a separate property exception." (emphasis added) However, that quote in *Burgess* cites

as its sole source, *In Re Marriage of Chumbley*, 150 Wn. 2d 1, 5, 74 P.3d 129 (2013), which does not refer to "clear, cogent, and convincing evidence"; it instead stated, "[t]o rebut the presumption, a party must present ***clear and convincing evidence*** that the acquisition fits within a separate property provision". (citations omitted, emphasis added)

The "direct and positive evidence" standard was applied by the trial court here in its Conclusion of Law 3, quoting a frequently-cited excerpt from *Marriage of Lindemann,* 92 Wn. App. 64, 69-70, 960 P.2d 966 (Div 1, 1998). As noted earlier, the Court of Appeals here acknowledged in footnote 23 "the 'direct and positive' evidence standard", citing *Lindemann,* , but decided that "the Supreme Court has indicated that we should conclude that burden is equal to the more general 'clear and convincing' standard", citing *In Re Estate of Borghi,* 167 Wn.2d 480, 490, 219 P.3d 932 (2009).

No effort was made in any of those opinions, or in *Morgan*, to define what any of the three standards means. However, Division Three recently undertook that effort in *In Re Marriage of Schwarz,* 192 Wn. App. 180, 368 P.3d 173 (2016).

That Court, like Division One in *Morgan,* held that the applicable standard was "clear and convincing", citing *Borghi.*

Schwarz, fn 1, then discussed what that meant:

> Proof by clear and convincing evidence denotes a quantum or degree of proof greater than a mere preponderance of the evidence, but something less than proof beyond a reasonable doubt. Ordinarily, the testimony of a single credible witness can qualify as clear and convincing evidence, even if the witness's testimony is contradicted by other witnesses. But as earlier noted, overcoming the community property presumption requires more than the "mere self-serving declaration" of a spouse that she acquired an asset with separate funds and that separate funds were available: *Berol,* 37 Wash. 2d at 382, 2223 P.2d 1055. This makes sense, since in most cases the source of funds used for a purchase is not the sort of fact that even an honest person would reliably recall years later. It is reasonable to require the party's testimony to be supported by, e.g., documentary evidence, an admission by their party-opponent, or the testimony of any witness. *Schwarz* at page 190-191. (citations omitted)

Morgan cites the same two quotes from *Berol,* at page 390. However, there is no similarity between the facts in *Berol* with this case. In *Berol,* a life insurance policy on the life of the husband was taken out 14 months after the parties were married, with his mother instead of his wife as the beneficiary. "There was no attempt to establish that the payment made on the policy, a lump sum of $4,467.94, came from the husband's separate fund, save his statement to that effect." *Berol,* at page 381. The Supreme Court had no choice but to reverse the trial court and rule that the

husband failed to establish the separate character of the insurance policy. *Id.* at page 382

Moreover, the evidence produced by Briney satisifed the "clear and convincing evidence" test in *Schwarz.*

Briney's meticulous and unchallenged documentary evidence established that he had $180,478 in his Fidelity investment accounts on June 30, 1994, which were undisputedly his separate property. That same evidence proved that he had $244,140 in those same accounts when he made the $74,000 down payment in early November 1995. Moreover, the trial court found that during those 16 months (and for the remainder of the 19-year long CIR) those accounts were never commingled with "community" income nor used for "community" expenses. (RP 381)

It would both resolve a possible conflict between the courts and/or further a substantial public interest for the Supreme Court to clearly establish the quantum of evidence needed to rebut the presumption of community or separate, and if it adopts and applies *Schwarz,* it must reverse *Morgan.*

VI. CONCLUSION

Without the Supreme Court's review of this published opinion,

- Appellate courts will be urged to review trial court's rulings regarding the existence and term of CIR's de novo, without deferring to the trial court's findings of fact and even if substantial evidence supports them;

- The current state of confusion regarding what standard should be used to determine whether a party has introduced enough evidence to rebut the presumption of community or separate property and how it shall be applied will continue, and probably be exacerbated.

Accordingly, the trial court's judgment entered in favor of the Respondent should be reviewed and reversed.

DATED this 13th day of March, 2018

THE HUNSINGER LAW FIRM
Attorneys for Appellant Nicky Briney

By: _____
MICHAEL D. HUNSINGER
WSBA NO. 7662

CERTIFICATE OF SERVICE

I certify that on the 13th day of March, 2018, I caused a true and correct copy of this Petition to be served on the following on March 13, 2018, in the manner indicated below:

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THE HUNSINGER LAW FIRM

March 13, 2018 - 11:04 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARGARET ELLEN MORGAN, a Washington individual,	)	
	)	No. 74657-0-I
Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
NICKY WARREN BRINEY, a Washington individual,	)	
Appellant.	)	FILED: June 26, 2017

TRICKEY, J. — Nicky Briney appeals the trial court's distribution of property after the termination of his committed intimate relationship (CIR) with Margaret Morgan.[1] Briney argues that his CIR with Morgan began in 1999 not 1995 because she moved out of their shared residence for eight months, returning in March 1999. Because the parties moved into a jointly-selected home in 1995 and cohabitated for a decade after Morgan moved back, it was not error to conclude that the CIR had begun by 1995.

Briney also maintains that the trial court erred by characterizing the home he and Morgan lived in as a community asset.[2] The house was presumptively community property because it was acquired after the CIR began. Because Briney did not meet his burden of showing it was purchased with his separate funds, we

[1] In the past, courts referred to CIRs as "meretricious" relationships, but, because the term has a negative connotation, courts now use the term "committed intimate relationship," which "'accurately describes the status of the parties and is less derogatory.'" Olver v. Fowler, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007) (quoting Olver v. Fowler, 131 Wn. App. 135, 140 n.9, 126 P.3d 69 (2006)).

[2] Although we recognize that, by definition, there is no "community" property outside a marriage, we refer to the property as community property because property acquired during a CIR is "characterized in a similar manner as income and property acquired during marriage." Connell v. Francisco, 127 Wn.2d 339, 351, 898 P.2d 831 (1995).

affirm the court's award to Morgan based on her interest in the value of the house.

Finally, Briney argues that the court erred by awarding Morgan an interest in the increase in value of his separate property. Because Morgan did not show that the increase in value was due to community efforts, we reverse that award.

FACTS

Briney and Morgan began a romantic relationship in 1987.[3] In the early years of their dating, Morgan moved to California to work for her family's business.[4] While Morgan lived in California, both Morgan and Briney "remained committed to the relationship."[5] Morgan visited Seattle regularly and stayed with Briney in his apartment, they talked by phone, and they "exchanged loving correspondence."[6]

In 1990, Morgan returned to Seattle. She and Briney decided to live together. Briney proposed to Morgan in 1991. He gave her an engagement ring, which she kept for the next 20 years.

In 1992, after Briney's adult daughter came to live with him, Morgan moved into her own apartment nearby. Morgan and Briney continued to date but saw each other less frequently. During this time, Briney helped Morgan's family while they were experiencing a financial crisis.

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[3] Briney does not assign error to any of the court's findings of fact except its "findings that Ms. Morgan's services contributed to the increase in the value of the house." Br. of Appellant at 20. Accordingly, the remaining findings of fact are verities on appeal. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

[4] The trial court gives 1998 as the date for this move. Both parties give the date for Morgan's move to California as 1988. Br. of Appellant at 6; Br. of Resp't at 6. They do not mention that the trial court dated the move as 1998. Given that the court also found that Morgan moved back from California in 1990, we assume that the 1998 date was a scrivener's error.

[5] Clerk's Papers (CP) at 671.

[6] CP at 671.

In mid-1994, Morgan moved back in with Briney. The two lived together in an apartment until November 1995. While they lived in the apartment, Briney paid for the rent, utilities, and most meals. In 1995, Morgan and Briney began looking for a house to buy.

In November 1995, they agreed to buy a house in the Queen Anne neighborhood of Seattle. Briney's name was the only one on the title to the house, he provided the initial down payment of $74,000, and he was the sole obligor on the original mortgage.

The house was "dated" and "'needed work.'"[7] The parties agreed to remodel it but took very little action. In 1998, Morgan moved out due to tensions about the lack of remodeling. They lived apart for approximately eight months.[8]

In the spring of 1999, Morgan moved back into the house.[9] The couple took on three major remodels of the home. Briney paid for the remodels, but Morgan and Briney collaborated on what should be done. Morgan performed extensive landscaping and gardening.

They were "couple-like in all aspects of their lives."[10] They had a "two-way supportive relationship during good times and bad times."[11] Briney was the primary earner, and Morgan, though working full-time, took on a greater share of

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[7] CP at 673.
[8] The trial court refers to this break as a year and a half break in its findings of fact. Both parties describe this as a shorter separation in their briefs. Br. of Appellant at 9; Br. of Resp't at 10. They do not mention that the trial court described the break as longer. We assume that the parties agree the break was eight months and that the court's description of it as a year and a half was a scrivener's error.
[9] CP at 674.
[10] CP at 678.
[11] CP at 678.

the household duties. Morgan "cooked, cleaned, and did [Briney's] laundry throughout the entire relationship."[12]

Unfortunately, Briney became depressed and suicidal during the third remodel. Even after it was completed, Briney remained in a "severe depressive state" for years, while Morgan provided unwavering aid and support.[13]

In 2013, Morgan moved out after Briney became "very abusive."[14] In August 2013, Morgan initiated this action to divide the property.

In May 2015, the case proceeded to a bench trial. The court found that Morgan and Briney were in a CIR from the time they moved into the house in November 1995 until they broke up in 2013, that the house was a community asset, and that Morgan was entitled to nearly half the value of the house and half of the increase in value of some of Briney's separate property.

Briney appeals.

ANALYSIS

Property Distribution at Termination of CIR

A CIR "is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." Connell, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Washington has a "three-prong analysis" for disposing of property after a CIR. In re Marriage of Pennington, 142 Wn.2d 592, 602, 14 P.3d 752 (2000). First, the trial court must determine whether a CIR existed. Pennington, 142 Wn.2d at 602. Second, if such a relationship existed,

[12] CP at 677.
[13] CP at 676.
[14] CP at 670, 677.

"the trial court evaluates the interest each party has in the property acquired during the relationship. Third, the trial court then makes a just and equitable distribution of such property." Pennington, 142 Wn.2d at 602.

This court reviews property distribution at the end of a CIR for an abuse of discretion, but it reviews the trial court's findings of fact for substantial evidence and the conclusions of law de novo. Soltero v. Wimer, 159 Wn.2d 428, 433, 150 P.3d 552 (2007).

Briney challenges the trial court's determinations for each prong. He argues that the CIR came into existence in 1999 not 1995. He argues that the trial court erred by concluding that the house was a community asset and awarding Morgan an interest in the increase in the value of his separate property, including the house. He also argues that the court erred in its division of the community property. We address each argument in turn.

Existence of a CIR

Briney argues that the trial court erred when it determined that Morgan and Briney's CIR began in 1995. Specifically, Briney argues that, because Morgan moved out for eight months between 1998 and 1999, their CIR only began after Morgan moved back in for the last time in March 1999. Looking at the totality of the circumstances, Morgan and Briney's CIR continued during the eight months they lived apart. Therefore, their CIR began at least as early as 1995.

Five factors are relevant to the existence of a CIR: "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 not exclusive, and no one factor is more important than the others. Pennington, 142 Wn.2d at 602, 605. Ultimately, the existence of a CIR depends on the facts of each case, and the "factors are meant to reach all relevant evidence" that may be helpful. Pennington, 142 Wn.2d at 602.

Here, Morgan and Briney had a relationship of long duration. Briney concedes that the CIR lasted at least 14 years. They had also continuously cohabitated for about four years before Morgan moved out in 1998.[15] In the context of an almost 20-year relationship, an eight-month separation is not very significant. Even while they were not living together, Morgan and Briney "remained in contact" and did not date other people.[16] This suggests the couple still intended to be in a romantic relationship.

The court specifically found that the two "lived and worked together as a couple" from 1995 to 2013, even during the time they did not cohabitate.[17] The record supports this finding. Morgan moved only three blocks away, Morgan said she did not consider them to be breaking up when she moved out, and Briney continued to pay for the insurance on Morgan's truck during the physical separation.

Based on all the relevant evidence, it was not error for the court to conclude that the CIR had begun by the time they moved into the house in 1995. In fact, the trial court's findings that Morgan and Briney lived in an apartment continuously

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[15] The exact dates are not clear from the record, but Morgan moved into an apartment with Briney in mid-1994 and moved out of the house summer 1998 (approximately eight months before spring 1999).
[16] CP at 674-75. The court did not find Briney's assertions that he had dated other people during the eight months credible.
[17] CP at 677.

together for months starting sometime in 1994, looked for a house together in 1995, "agreed to buy" a house that needed work, and moved into that house together, suggest that the CIR began *before* Morgan and Briney moved into the house in Queen Anne in November 1995. Therefore, we disagree with the trial court's conclusion that the CIR began in 1995, and hold that the CIR began when Morgan moved into the apartment with Briney in mid-1994.[18]

Property Characterization

House

Briney argues that the trial court erred by awarding Morgan a share in the value of the house. Briney says it was separate property because it was acquired before the CIR began. Briney also maintains that even if the house was acquired after the CIR began, he purchased it with his separate funds. The trial court properly determined that the house was a community asset because Briney acquired it after the CIR had begun and Briney did not meet his burden to show he used separate funds to buy it.

The character of property, whether community or separate, is determined at the time of acquisition. In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). When the purchase of property includes a real estate contract or a mortgage, it is "acquired when the obligation is undertaken." In re Estate of

[18] In its decree and final judgment, the court stated that the CIR began in November 1995, when the parties moved into the house. Elsewhere it described the CIR as existing more loosely from 1995 to 2013. Briney notes that Morgan did not challenge the court's conclusion that the CIR began "at the same time" that Briney purchased the house. Reply Br. of Appellant at 3-4. But, as Briney has already made clear, the existence of a CIR, or the date it begins, is a legal conclusion, which this court reviews de novo. As explained below, this court must determine when the CIR began because the legal character of assets depend on whether they were acquired before or after the beginning of the CIR.

Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) (citing Harry M. Cross, The Community Property Law in Washington, 61 WASH. L. REV. 13, 39 (1986)). Property acquired before a CIR began is presumed to be separate property; property acquired during a CIR is presumed to be community property. Skarbek, 100 Wn. App. at 447, 449.[19]

But the property retains the character of the funds used to purchase it. If one partner purchases property with separate funds during the CIR, the property is that partner's separate property. Merritt v. Newkirk, 155 Wash. 517, 520-21, 285 P. 442 (1930). The party asserting that an asset acquired during the CIR is separate property "has the burden of proving it was acquired with separate funds." Skarbek, 100 Wn. App. at 449. The party must present "clear, cogent, and convincing evidence that the asset falls within a separate property exception." Burgess v. Crossan, 189 Wn. App. 97, 103, 358 P.3d 416 (2015). The party cannot meet this burden by "mere self-serving" declarations that the partner "acquired it from separate funds and a showing that separate funds were available for that purpose." Berol v. Berol, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). The party must be able to trace the funds "with some degree of particularity." Berol, 37 Wn.2d at 382. The absence of a finding of fact on an issue is "presumptively a negative finding against the person with the burden of proof." Taplett v. Khela, 60 Wn. App. 751, 759, 807 P.2d 885 (1991).

Here, the trial court determined that the house was "clearly a community

[19] In a CIR, separate property is not subject to division at the end of the relationship. In re Marriage of Lindemann, 92 Wn. App. 64, 68-69, 960 P.2d 966 (1998).

asset."[20] As explained above, the CIR began in mid-1994. The house was purchased in November 1995. Therefore, the house is presumptively a community asset.

To rebut that presumption, Briney needed to show that he acquired the house with separate funds. The parties agree that Briney paid the initial $74,000 down payment, but the trial court's findings of fact do not contain any specific information about the source of the funds that Briney used to make that down payment.[21] Briney does not trace the funds he used for the down payment to a specific separate account or show that the funds came from separate income.

In his briefing, Briney points to his self-serving testimony that it was his money, Morgan's admission that it was his money, and statements showing his net worth at the time of acquisition. That is not the type of proof required to satisfy his burden, and there is no finding that he met his burden with clear and convincing evidence. Therefore, we presume that the court made a finding against Briney on this issue. Accordingly, we conclude that the trial court did not err by characterizing the house as a community asset.

Briney's Separate Property

Briney argues that the trial court erred by determining that Morgan had an interest in the increase in the value of his retirement and investment accounts, which were his separate property. Specifically, Briney argues that Morgan

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[20] CP at 686.

[21] The court describes the money for the down payment as Briney's "funds" in one of its legal conclusions, but also talks about Morgan's "efforts" to improve the property during the CIR in the same conclusion. CP at 682-83. Noting that one partner provides a service or asset is not the same as legally characterizing that service or asset as separate rather than community.

provided no proof that the increase in the value of these separate assets was attributable to community efforts. Morgan contends that the trial court did not err because her support to the community allowed the assets to increase in value and Briney admitted that his labor increased the value of these assets during the CIR. We agree with Briney.

The court presumes that any increase in the value of one party's separate property during a CIR remains separate. Lindemann, 92 Wn. App. at 69. The community is not entitled to any increase in value attributable to natural increases in value or separate efforts, which include rents, issues, profits, and "other qualities inherent in the business." Lindemann, 92 Wn. App. at 70. But the community "is entitled to the fruits of all labor performed by either party to the relationship because each [partner] is the servant of the community." Lindemann, 92 Wn. App. at 72.[22]

Accordingly, the other party can rebut the presumption that the increase in value is separate by showing with clear and convincing evidence that the increase is attributable to community efforts, including "community labor or funds."[23] Lindemann, 92 Wn. App. at 70. If a party's community labor or funds increases the value of separate property, the community may be entitled to reimbursement for that labor. Connell, 127 Wn.2d at 351. When a party has not segregated his income from separate property from the income he produced by community labor

[22] The community in a CIR is entitled to those fruits "to the same extent" as if it was a marital community. Lindemann, 92 Wn. App. at 72.
[23] Lindemann phrases the burden of proof as "direct and positive" evidence, but the Supreme Court has indicated that we should conclude that burden is equal to the more general "clear and convincing" standard. 92 Wn. App. at 70; Borghi, 167 Wn.2d at 490.

income, and he uses his income to increase the value of separate property, a presumption arises that "the increase in value belongs to the community." Lindemann, 92 Wn. App. at 70.

Here, the trial court awarded Morgan an interest in the increase in value of Briney's investment and retirement accounts. Morgan would presumptively be entitled to a share of these assets only if they were community property or if they were separate property but the increase in their value was attributable to community efforts. There are no findings of fact to support an award on either of these grounds.

Morgan does not appear to dispute that, because Briney acquired these assets before the CIR began, the assets are presumptively separate. But Morgan argues that these assets are, nevertheless, presumed to be community assets because Briney commingled the income he earned during the CIR with the income earned from the separate accounts. To support her commingling argument, Morgan cites Briney's statements that he contributed to these accounts during the CIR and Briney's admissions that he does not know whether the increase in value of his accounts was due to his contributions or market appreciation. But there was no finding that Briney comingled the income attributable to community efforts with income from the separate sources. Accordingly, Morgan was not entitled to a share in the increase in the value of Briney's separate financial assets on that basis.

Thus, in order to rebut the presumption that the increase in value remained separate, Morgan had to show that it was attributable to community efforts. There

are no trial court findings of fact confirming that she met her burden. Morgan argues that the trial court's conclusion that "[t]here is only one exhibit from Mr. Briney dating back to 2006 that demonstrates Mr. Briney received income from his investment accounts into the bank accounts he would use to support the community expenses" demonstrates that community efforts increased the value of Briney's separate property.[24] But the fact that Briney used income from his investment accounts, separate assets, to pay for some community expenses does not prove that community efforts increased the value of those investment accounts.

Morgan also relies on Briney's statement that the value of those "'assets increased during [the] 18 years [of their CIR] because of market appreciation and the money and work [he] invested in them.'"[25] While that may be proof that some portion of the increase in value was attributable to Briney's efforts during the CIR, his statement is not sufficient evidence to support awarding Morgan half of the increase in value of Briney's separate property.

Finally, Morgan relies on exhibits 76, 77, and 78, which were not admitted at trial, to show that the commingling of Briney's separate and community assets and that community efforts increased the value of Briney's separate property. Briney argues that this court should not consider those exhibits because the trial court did not admit them during trial. We agree with Briney.

This court does not "accept evidence on appeal that was not before the trial court." State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 (2011) (citing RAP 9.11).

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[24] CP at 685.
[25] Br. of Resp't at 41 (quoting CP at 37).

Here, the trial court listed the exhibits it considered in its findings of fact and conclusions of law. It did not include exhibits 76, 77, and 78. Briney proposed admitting these exhibits at trial, Morgan objected, and the court reserved ruling on whether to admit them. The court also reserved ruling on exhibits 71 and 72, but admitted them after Briney offered them at trial. Although Briney reviewed exhibits 76, 77, and 78 during his testimony, he never moved to admit them.

In her brief, Morgan says that the court "referred to" exhibit 78 in its conclusions of law. In its fifth conclusion of law, the court mentions that "[t]here is only one exhibit from Mr. Briney dating back to 2006 that demonstrates Mr. Briney received income from his investment accounts into the bank accounts he would use to support the community expenses."[26] But the court did not cite any exhibit by number.[27] And, further, the court did not admit exhibit 78 at trial.

In June 2016, long after the trial had concluded, Morgan moved to have the trial court include exhibits 76, 77, and 78 in the record for appeal. The court granted Morgan's motion. This ruling, which specifically orders that the exhibits be "included in the court record," does not order that the exhibits be admitted into evidence or indicate that the court considered them at trial.[28] Accordingly, we do not consider these exhibits as evidence on appeal.

Lastly, Morgan places great emphasis on the "incalculable" contributions

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[26] CP at 685.
[27] When Briney moved for reconsideration, he pointed out that the court referred to an unspecified exhibit in its findings. In response, Morgan attached the contents of exhibit 78, without labeling it as exhibit 78. Briney objected to its use on the basis that the court had not admitted it at trial. Briney requested that, if the court were to rely on the information in exhibit 78 to support its findings and conclusions, he be granted an opportunity to rebut Morgan's and the court's use of the exhibit.
[28] CP at 916.

she made to Briney's mental health during the CIR.[29] These contributions show why equity may favor a generous division to Morgan of the community assets that were before the court. But the trial court did not link Morgan's efforts to the increase in value of Briney's separate property and Briney's separate property is not before the court for distribution. Thus, her efforts do not entitle her to a share of Briney's separate property.

We conclude that the trial court erred in awarding Morgan an interest in the increase in value of the separate property because Morgan did not meet her burden of proving that any increase in value of Briney's investment and retirement accounts was attributable to community efforts. Accordingly, we reverse that award.

Property Distribution

Value of House

Briney argues that, even if the trial court did not err by awarding Morgan a share in the value of the house, the court's award to Morgan for the house was too high. Briney makes several arguments about what portion of the value of the house is an increase in the value due attributable to community efforts. Because the court awarded Morgan a share in the value of the house as a community asset, not based on the increase in value of separate property, we do not address these arguments.

Briney also argues that the court erred by incorrectly assessing the value of the house. We conclude that the trial court's assessment of the value of the house

[29] Br. of Resp't at 45.

was supported by substantial evidence.

Although the court labeled its determination of the house's value a conclusion of law, it is essentially a finding of fact. See Para-Med. Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987). The parties offered competing valuations of the house, and the trial court chose Morgan's valuation. The trial court relied on a professional appraisal of the house, completed in the fall of 2014 to calculate the value. Because the appraisal occurred over a year after the CIR ended, the court reduced the value of the house by 15 percent. The court apparently rejected Briney's suggestion that the court determine the value of the house from an assessment completed in 2013 for tax purposes. We affirm the trial court's award to Morgan for her share in the value of the house.

Offset

Briney contends that the trial court erred by refusing to offset any award to Morgan by the value of the benefit Morgan enjoyed from using Briney's separate property during the CIR. We disagree.

The court is required to make an equitable distribution of community property at the conclusion of a CIR. Connell, 127 Wn.2d at 351. If the court has determined that the community should be reimbursed for one party's labor, it "may" offset that reimbursement "against any reciprocal benefit received by the 'community.'" Connell, 127 Wn.2d at 351.

We conclude that declining to offset Morgan's award was within the trial court's discretion. Because we reverse the court's award to Morgan of an interest in Briney's separate property, Morgan's award is a share of the community

property, not a reimbursement to the community of value added to the separate property. Regardless, the court identified several reasons why equity would favor a large award to Morgan, including that Briney had originally included Morgan in his will, that Morgan was responsible for nursing Briney through a crippling depression, and that they spent a majority of their adult lives together. The court's reasons justify its award.

We affirm the trial court's award to Morgan of an interest in the house, but reverse its award to her of an interest in Briney's separate financial assets. We remand for entry of a new judgment.

Trickey, J

WE CONCUR: