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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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LINDA SEVEN,

*Plaintiff/Appellant,*

v.

STOEL RIVES, LLP, an Oregon Limited Liability Partnership; GEORGE W. STEERS and LUCY STEERS, husband and wife, and the marital community comprised thereof, Individually, and GEORGE W. STEERS in his capacity as Personal Representative of the Estate of Robert Resoff and as Trustee of the Shelford Family Trust, the Dean Family Trust, and the Resoff Family Trust; SUSANNA DEAN SUTTON, in her capacity as trustee of the Resoff Testamentary Trust for the benefit of the Dean Family; ROBERT N. HOPE, in his capacity as Trustee of the Resoff Testamentary Trust for the benefit of the Resoff family

*Defendant/Respondents.*

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ORIGINAL

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## I. INTRODUCTION

Robert Resoff was a longtime fisherman and successful businessman. When he died in December 2001, at age 85, Mr. Resoff left Linda Seven assets worth \$2.8 million. CP 129-64, 125-27. Other assets were distributed to specific individuals. The residue of the estate went to various family trusts created under the terms of Mr. Resoff's will. CP 129-64, 1120-1156.

Years later, Ms. Seven alleges that she and Mr. Resoff had a committed intimate relationship ("CIR") between 1993 and 2001, entitling her to an equitable share of Mr. Resoff's community-like property.<sup>1</sup> Specifically, Ms. Seven alleges the estate's personal representatives distributed to the family trusts her share of the "community's" profits generated by Mr. Resoff's Russian crab fishing investment, AAS-DMP, which were approximately \$5.1 million.<sup>2</sup> Ms. Seven demands the estate/family trusts return her share to her with interest. She also alleges Stoel Rives, LLP and her co-personal representative, George Steers, were

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<sup>1</sup> In *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007), the court substituted the term "committed intimate relationship" for "meretricious relationship."

<sup>2</sup> Ms. Seven served as one of the estate's personal representatives from December 2001 until December 2007, when she resigned to bring this claim. CP 37, 129-30.

negligent for failing to tell her she might have an equitable claim to a portion of the \$5.1 million.

Regardless of the nature of their emotional relationship, the record on summary judgment shows not only that Mr. Resoff and Ms. Seven never pooled their resources for joint projects, but also that they consistently and objectively manifested through their conduct and in writing their intent to keep their assets separate.

While he was alive, Mr. Resoff paid Ms. Seven a substantial salary to work as his personal assistant and accountant. In keeping the accounts, Ms. Seven diligently kept her and Mr. Resoff's assets separate. As Mr. Resoff's paid assistant, Ms. Seven ensured that all household expenses were paid using Mr. Resoff's separate funds. She never paid any household expenses herself.

At the same time she was acting as Mr. Resoff's paid assistant, Ms. Seven hired a lawyer of her own to prepare her own estate plan, which addressed only her separate property and did not include what she now claims to be her "community interest" in Mr. Resoff's separate business assets and profits. There is no evidence she ever discussed her estate plan with Mr. Resoff.

Similarly, Mr. Resoff consistently treated his assets as his own. He made specific and substantial gifts of property to Ms. Seven during his

lifetime. He had his own attorneys and prepared his own estate plan. In the will, which he did not share with Ms. Seven while he was alive, Mr. Resoff left her substantial assets, including the homes, race horses and other things they enjoyed together.

While Mr. Resoff was alive, Ms. Seven kept a running tab of her growing net worth in her own accounting notebook. There is no evidence she ever shared this information with Mr. Resoff. In calculating her individual personal wealth, Ms. Seven included only her separate assets, which were derived in large measure from the salary and occasional gifts she received from Mr. Resoff. Ms. Seven bought and sold homes of her own, and there is no evidence Mr. Resoff was involved in those transactions. Consistent with their meticulous separation of their individual assets, Ms. Seven and Mr. Resoff never pooled any resources, time or efforts for joint investments, businesses or projects. They never purchased anything together, they never took on debt together, and they never invested together.

In sum, the record contains undisputed objective evidence that Ms. Seven and Mr. Resoff did not pool resources and, instead, took affirmative steps to keep their businesses, income, profits, and assets separate. This evidence established their unequivocal intent to keep their property separate,

regardless of the nature of the personal relationship that may have developed between them.

Nevertheless, Ms. Seven sought to invoke the “committed intimate relationship” doctrine to defeat the parties’ actions and intent, as well as the express written terms of Mr. Resoff’s will, years after the will had been probated.

On this record, the trial court properly held, as a matter of law, that Mr. Resoff and Ms. Seven never had a CIR calling for a redistribution of his property, in contravention of his will. They never pooled their resources or created a financial “community” as a married couple would. In fact, they went to considerable lengths not to do so. They did not have the intent or take the actions required to establish a CIR, as that term is defined in the controlling Washington case law.

Even if this Court were to conclude the trial court erred by dismissing Ms. Seven’s CIR claim, this Court should still decide, as a matter of law, that Ms. Seven is not entitled to recover an equitable share of the profits from AAS-DMP. It is undisputed Mr. Resoff invested his separate property in that partnership. Ms. Seven has not produced any evidence that AAS-DMP’s profits are attributable to any putative community labor performed by Mr. Resoff or Ms. Seven. As a result, the profits remain

separate, and the trial court properly held that Ms. Seven had no right to receive those profits upon Mr. Resoff's death.

## II. ISSUES

1. Whether the trial court properly held Mr. Resoff and Ms. Seven did not have a CIR requiring the equitable distribution of assets when they did not pool their assets or resources and, instead, went to considerable lengths to separate them?

2. Whether the trial court properly held there was no evidence the increase in the value of Mr. Resoff's separate property investment in AAS-DMP was attributable to putative community labor?

## III. STATEMENT OF FACTS

### A. **Ms. Seven does not appeal the order concluding no CIR before 1993.**

In her complaint, Ms. Seven alleged she and Mr. Resoff had a CIR from 1985 through 2001. During those years:

- Ms. Seven had three serious relationships with other men. One of them lasted two-and-three-quarters years and included discussions of marriage. CP 72, 73, 87, 93, 100.
- By her own admission, Ms. Seven's relationship with Mr. Resoff was neither physically nor emotionally monogamous before early 1993. CP 99-100, 215-216.
- Mr. Resoff and Ms. Seven did not pool their financial resources. Instead, Mr. Resoff paid Ms. Seven a salary for her work as his bookkeeper and, at her request, paid for her work around his Queen Anne home. CP 95-97, 103, 218-19.
- Though she spent time at Mr. Resoff's home, Ms. Seven owned and maintained her own home in Magnolia from 1984 through March 1990. When she sold that home, she

simultaneously bought another one in Ravenna, which she kept until 1994. CP 86, 122, 216-17.

Based on these undisputed facts, the trial court dismissed Ms.

Seven's claim that she and Mr. Resoff had a CIR before January 1993.

CP 563-66. Ms. Seven has not asked this Court to review the trial court's dismissal of that claim. App. Brief at 6.

Ms. Seven's appeal is limited to the trial court's order granting summary judgment to the defendants on two issues: (1) whether she and Mr. Resoff had a CIR between 1993 and 2001, and, if so, (2) is she entitled to an equitable share of the profits from Mr. Resoff's investment in AAS-DMP.

**B. Mr. Resoff and Ms. Seven's relationship from 1993 to 2001 was not a CIR.**

**1. The relationship was not equivalent to a marriage**

On January 16, 1993, a few weeks after ending her two-and-a-half-year sexually intimate relationship with a man named Gerry Welch, Ms. Seven moved in to Mr. Resoff's home on Highland Drive in Queen Anne. CP 616, 617. According to Ms. Seven, she moved in to help Mr. Resoff because he was in poor health:

Q. Is your moving back into Mr. Resoff's house connected with the end of your relationship with Mr. Welch?

A. No.

Q. Completely unrelated?

- A. It had more to do with Bob's health.
- Q. How do you mean that?
- A. Because I came over the day before to make dinner for him. I had groceries with me and he was in bed. It was 4:00 o'clock in the afternoon. That was unusual. He had a very high fever and so I called his doctor, and his assistant told me he needs to be seen right away, bring him in. So I took him to the emergency room. He had a kidney infection, or a bladder infection, one of those. And they wanted to keep him overnight, but he wouldn't stay. So I took him back home and told him I wanted to move back in.

CP 617-18. Ms. Seven's assessment of Mr. Resoff's health was accurate. He had been diagnosed with Parkinson's disease in February 1992, and it worsened over the remaining nine years of his life. CP 621-22. He also suffered from eye, heart and blood problems. CP 643, 649, and 1161. In December 2001, Mr. Resoff was diagnosed with liver cancer and he passed away within two weeks. CP 642.

**2. Ms. Seven and Mr. Resoff never discussed marriage from 1993 to 2001.**

According to Ms. Seven, she and Mr. Resoff had three general conversations about marriage. Each of these conversations occurred when they were first dating in the 1980s, well before 1993. CP 637-39. The conversations were brief, general, and according to her own testimony, Ms. Seven told Mr. Resoff, "You know I don't need to get married." CP 637-38.

**3. From 1993 through death, Mr. Resoff paid Ms. Seven to be his bookkeeper and personal assistant.**

In 1985, Ms. Seven began working as Mr. Resoff's personal bookkeeper. CP 623, 626, 641, and 644. She first earned \$36,000 per year. CP 97. In 1991, at Ms. Seven's request, Mr. Resoff increased Ms. Seven's salary to \$50,000 per year. CP 98; *see also* Appellant's Brief at 9. The raise was to compensate her for the additional household duties she had assumed:

Q: August 26, 1991, [you] told Bob you want a raise?

A. Oh, yes.

Q. Describe for me that one, if you remember.

A. I told -- I think I told him that a lot of time had gone by since I first moved in, and I was doing more and more and more and, you know, I -<sup>3</sup>

Q. What sort -- I'm sorry. Were you done?

A. Yeah.

Q. What kinds of more and more and more? Just give me a feel for what it was like.

A. More and more responsibilities. I, you know, did things for him. I took care of his family....

Q. I wasn't there, Ms. Seven. When you say "did things for him, took care of his family," what sorts of things are you talking about?

A. Everything.

Q. Name some.

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<sup>3</sup> Between 1985 and 1993, Ms. Seven lived with Mr. Resoff sporadically. *See* CP 217 and Appellant's Brief at 9 (citing CP 77-79, 283).

A. Oh, on a typical day, cook for him, do laundry, do groceries, get groceries, get his dry cleaning, take his car into the shop, you know.

Q. And how about on the family front?

A. Taking care of his brother and sister when they came to visit. And he'd go to work, and I'd chauffeur them around.

CP 619-20. The raise became effective a few months later:

Q. And did this raise conversation generate a raise?

A. Yes.

Q. What did it bump up to?

A. 50.

CP 97-98. Mr. Resoff paid Ms. Seven \$50,000 per year every year until his death in 2001. CP 627-28 (monthly payments of \$4200 to Ms. Seven; she paid taxes "quarterly").

**4. Ms. Seven never financially contributed to the community.**

Despite her steadily increasing wealth and \$50,000 annual salary, Ms. Seven did not pay for any household expenses between 1993 and 2001. If Ms. Seven spent money for household expenses, she reimbursed herself to the penny from Mr. Resoff's personal checking account:

Q. In addition to the \$4,200 [salary] entries, the check registers reflect many entries like the one on [check number] 9717 with a check to you in an irregular amount, in this case \$1,111.02.

A. Yes.

- Q. Are these for household expenses?
- A. Well, what happened was, I took Bob's car in for repairs and I paid the bill for \$1,100 and brought it back, and he reimbursed me.
- Q. Okay. As I go through the check registers, though, there are many, many entries. They're not all car related, are they?
- A. They're almost all reimbursements, though, yes.
- Q. I hear you. Other than the car, what sorts of things would you get reimbursed for?
- A. Everything I did: dry cleaning, groceries, linens, things for the house.
- \* \* \*
- Q. Would you keep the receipts and every now and then add them up and write yourself a check?
- A. Yes.

CP 628-29. Over the course of eight years, the only personal household items Ms. Seven recalls purchasing are a fax machine, movie tickets, and a few pieces of furniture. CP 629-30.

Unlike most married couples, Ms. Seven never deposited any portion of her salary into the account used to pay the household expenses at Highland Drive, where Mr. Resoff and Ms. Seven lived. CP 598. In fact, Ms. Seven's salary came from the same checking account used to pay Mr. Resoff's household expenses. *Id.* Ms. Seven treated that money as ordinary income and paid quarterly income taxes. CP 627, 631.

**5. Ms. Seven managed her separate finances and preserved her separate gains.**

When Ms. Seven met Mr. Resoff, she had a net worth of about \$10,000. CP 102. A month before Mr. Resoff died, Ms. Seven had a separate, individual net worth of approximately \$2.1 million. *Id.* The entire time Ms. Seven lived with Mr. Resoff, she monitored the growth of her wealth in her own personal “net worth calculations notebook.” CP 652-784. Every one or two months, she carefully recorded the value of her separate assets, such as IRAs, stocks, bonds, and cash. *Id.* Ms Seven’s net worth was largely comprised of stocks and bonds, although \$800,000 was in an “AAS trust”—one of two trusts Mr. Resoff created for the benefit of Ms. Seven and five employees of his salmon business, Sea Catch.<sup>4</sup> CP 656 (“AAS 800,000”). Ms. Seven purchased all of the stocks and bonds with her salary and cash gifts she received from Mr. Resoff. CP 102.

Ms. Seven’s personal financial notebook contained a detailed accounting of Ms. Seven’s increasing, separately maintained financial assets up to the time of Mr. Resoff’s death. For example, in March 1995 she purchased a \$100,000 certificate of deposit, a \$50,000 certificate of deposit

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<sup>4</sup> Mr. Resoff conveyed an interest in the Russian crab fishing venture, AAS-DMP, into the trust. CP 791. According to Ms. Seven, she had received \$800,000 in AAS-DMP distributions via the trust by the time of Mr. Resoff’s death. CP 656 (“AAS 800,000”).

and 3,000 shares of Eagle stock. CP 647. She regularly purchased and sold stocks on her own behalf. CP 643, 646 (“sold 100 Yahoo at 395 bought 1,000 Nextel at 29; bought 1,000 Proctor & Gamble”). In March 1996, she sold Cisco stock for a \$50,000 profit. CP 645. On April 18, 1997, Ms. Seven wrote triumphantly in her diary “I became a millionaire today— thanks to Microsoft!” CP 648 (emphasis supplied).

From 1993 through 2001, Ms. Seven kept her own financial accounts and treated her profits and growing assets as her own. At the same time, she was being paid to keep Mr. Resoff’s separate financial accounts and to work his personal assistant. As noted above, whenever she made expenditures for the Resoff home, she reimbursed herself from Mr. Resoff’s separate bank account.

**6. Ms. Seven and Mr. Resoff did not pool resources or share joint projects**

Ms. Seven and Mr. Resoff no doubt enjoyed each other’s company—they played golf, watched movies, and traveled together between 1993 and Mr. Resoff’s death in 2001. Neither the Trustees, Stoel Rives, nor the trial court ever questioned that there was a personal relationship between them.

Regardless of their feelings, the fact remains that Ms. Seven was Mr. Resoff’s paid personal assistant and bookkeeper, and they never merged

their finances in any way. They never shared living expenses and never jointly invested time or money in assets held in common. They maintained separate health insurance. CP 624. They filed separate tax returns. *Id.* They diligently kept separate checking and savings accounts. CP 598, 623. Mr. Resoff and Ms. Seven maintained separate investment accounts as well. CP 652-784. When Mr. Resoff wanted Ms. Seven to have a share in his business, he placed assets in Trust or gifted assets or money to Ms. Seven—and she never asked to have it any other way.

**7. Mr. Resoff and Ms. Seven prepared separate estate plans in which they expressed their specific intentions for disposition of property upon the death of either of them.**

Mr. Resoff hired counsel to draft his own will. CP 623. Ms. Seven hired her own lawyer and prepared her own estate plan. *Id.* They never discussed their estate planning together. CP 632. Ms. Seven knew about a will Mr. Resoff drafted in 1989 and the 1995 revision of that will—because she secretly read and kept copies of those documents in the trunk of her car:

- Q. Were there other Resoff wills in the trunk of your car besides the 89 one?
- A. Yes [the 1995 will].
- Q. When you got it to put in the trunk of your car, you found it in the office at Highland Drive?
- A. Yes. This one, yes.
- Q. All right. Did you copy it and put it in the trunk of your car or take that one and put it in the trunk?
- A. No, I didn't take that one. I would have copied it.

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Q. When Mr. Resoff came home after the 95 will arrived in the mail, you saw it, opened it, did you and he have a conversation about that at all?

A. He didn't see it opened up.

Q. What did you do?

A. I sealed it back in the envelope.

CP 633-34, 636; *see also* CP 632.

Ms. Seven and Mr. Resoff did not merge their finances or invest joint efforts or resources for the future benefit of their putative “community.” They did not pursue the typical activities and plans of a married couple, or of an unmarried couple living in a “marriage-like” relationship. Although they lived in the same house for eight years, Ms. Seven was an employee, not a spousal equivalent. Ms. Seven herself, as a hired bookkeeper and assistant, went to great pains to keep her assets and Mr. Resoff’s assets separate and made absolutely sure she was reimbursed from Mr. Resoff’s separate funds for virtually everything she ever spent to maintain his household.

**C. Robert Resoff invested separate funds into All Alaskan Seafoods and AAS-DMP; as a result, profits from those investments remained his separate property.**

Ms. Seven alleges her putative CIR with Mr. Resoff entitles her to an equitable share of the profits from one of Mr. Resoff’s business investments, AAS-DMP. Even if the trial court had concluded that Mr. Resoff and Ms.

Seven shared a CIR, the record on summary judgment demonstrated that the AAS-DMP profits were Mr. Resoff's separate property, not property that belonged jointly to a community consisting of Mr. Resoff and Ms. Seven.

**1. Mr. Resoff's job was at his own company, Sea Catch, Inc.**

From at least 1991 until his death in 2001, Mr. Resoff managed the day-to-day operations of Sea Catch, Inc., of which he owned 83 percent. CP 788-89. The company processed and canned Alaskan salmon. Mr. Resoff worked at Sea Catch's offices every day. CP 1059. Sea Catch paid Mr. Resoff an annual salary of \$105,000. CP 1071.

**2. Mr. Resoff passively invested in other companies.**

From 1992 until 2001, Mr. Resoff owned investment interests in several other companies, none of which paid him a salary. CP 799, 1059; *see also* CP 794-1034 (Mr. Resoff's tax returns). One of Mr. Resoff's investments was in All Alaskan Seafoods, Inc. (AAS).

Lloyd Cannon was the CEO and had managed the day-to-day operations of AAS since 1975. CP 1038-39. Mr. Cannon and Mr. Resoff were very close friends for more than 40 years. CP 1041. Their offices were near each other; they lunched frequently (perhaps as often as three or four times a week in the later years); and they often vacationed together. CP 1277-78. Mr. Cannon's company, AAS, fished for crab in Alaska until that

resource declined in the early 1990s. CP 1041-42. Mr. Resoff's company, Sea Catch, processed Alaskan salmon.

In 1992, AAS desperately needed an investor. In December 1992, Mr. Cannon approached Mr. Resoff who, through a series of transactions, saved AAS by investing \$1,000,000 of his separate funds into the company in consideration for 33 1/3 percent of its outstanding shares. CP 1048-53. Ms. Seven does not dispute the \$1,000,000 Mr. Resoff invested to save AAS was his separate property. CP 1055, 1085-86.<sup>5</sup> Mr. Cannon and his team<sup>6</sup> continued to operate AAS and kept Mr. Resoff and the other investors apprised of their operations.

In 1994, Mr. Cannon and his team spent six months negotiating a joint venture between AAS and a Russian crab company, Dalmore Product. CP 1044. The two entities formed a limited partnership named AAS-DMP. Once that transaction had been completed, Mr. Resoff and the other owners of AAS contributed additional capital to AAS-DMP in October 1994. Mr.

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<sup>5</sup> In addition, the \$1,000,000 is separate property because the investment was made over Christmas in 1992 and Ms. Seven alleges the CIR with Mr. Resoff did not begin until January 16, 1993, the date she moved in to Mr. Resoff's home on Highland Drive. Even if she and Mr. Resoff had a CIR from that very day, it is still too late.

<sup>6</sup> Jeff DeBell was the CFO and Ken Bowhay was the President of All Alaskan Seafoods. Mr. Bowhay also ran the operational end of AAS-DMP. CP 1054.

Resoff contributed \$333,333 of his *separate property* to AAS-DMP. Of that amount, his net personal investment was \$273,254. CP 1059.<sup>7</sup>

Mr. Resoff was understandably interested in his AAS-DMP investment and regularly discussed the venture with Mr. Cannon over lunch and at other times. While Mr. Resoff held a substantial investment in AAS and AAS-DMP, and was a director and managing member, he was never on the payroll. CP 1054-55, 1071. Moreover, there is no dispute that Mr. Cannon managed the day-to-day operations of AAS-DMP, not Mr. Resoff.<sup>8</sup> CP 1055.

The AAS-DMP investment was very profitable. Mr. Resoff's total investment of \$1,273,000 of his separate property eventually yielded a profit of approximately \$17,500,000. CP 595. Ms. Seven alleges \$5,100,000 of the profits are a "community asset."

#### IV. ARGUMENT

##### A. The usual summary judgment standard applies.

This Court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and the reasonable inferences from those facts in the light most favorable to

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<sup>7</sup> Mr. Resoff used \$60,079 to create two trusts with an interest in AAS-DMP for the benefit of Ms. Seven and five other Sea Catch employees. CP 1059.

the nonmoving party.<sup>9</sup> A moving defendant may satisfy the initial burden by showing there is an absence of evidence to support the nonmoving party's case.<sup>10</sup> In response, the nonmoving party may not rely on the allegations in the pleadings, but must set forth specific facts by affidavit or otherwise showing a genuine issue exists.<sup>11</sup> Summary judgment is appropriate where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”<sup>12</sup> This Court reviews de novo whether there are genuine issues of material fact and, if not, whether Ms. Seven and Mr. Resoff had a CIR as a matter of law.

Ms. Seven argues the trial court should have determined whether “the jury could have returned a verdict that a reasonable judge would have found a committed intimate relationship,” rather than decide outright

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<sup>8</sup> Messrs. Cannon, DeBell and Bowhay received annual salaries for the work they performed. In contrast, neither AAS nor AAS-DMP paid Mr. Resoff any salary. CP 1054.

<sup>9</sup> *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322, 327 (2002).

<sup>10</sup> *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

<sup>11</sup> *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

<sup>12</sup> CR 56(c).

whether she and Mr. Resoff had a CIR as a matter of law.<sup>13</sup> This was not the proper summary judgment standard below, nor is it a proper formulation of this Court's standard of review.

*First*, Ms. Seven never formulated this summary judgment standard in response to the defendants' summary judgment below. In her opposition to the Trustees' motion for summary judgment, Ms. Seven agreed the usual summary judgment standard applied.<sup>14</sup> CP 1185.

*Second*, Ms. Seven is simply wrong. Neither the trial court, nor this reviewing Court, are required to decide what a hypothetical jury might conclude a hypothetical "reasonable judge" might conclude about the nature of Ms. Seven's relationship with Mr. Resoff. This was a summary judgment motion like any other. Judge Shaffer had to (1) determine whether there were any material facts in dispute; and, (2) in the absence of a material dispute of fact, to apply the law to the undisputed facts. The trial court's legal conclusions based on undisputed facts are reviewed *de novo*.<sup>15</sup>

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<sup>13</sup> Appellant's Brief at 16 – 17.

<sup>14</sup> The term "Trustees" refers to defendants Washington Trust Bank, Susanna Dean Sutton in her capacity of Trustee, and Robert N. Hope, in his capacity of Trustee.

<sup>15</sup> *In re Marriage of Pennington*, 142 Wn.2d 592, 603, 14 P.3d 764 (2000).

This case is just like *In re Marriage of Pennington*,<sup>16</sup> where the Supreme Court considered whether two couples had “committed intimate relationships.” Some of the facts found by the trial court in that case suggested a possible CIR, but others did not. The *Pennington* Court, viewing the facts as a whole, determined *as a matter of law* neither couple had a CIR:

In these consolidated cases, we must determine whether the ***legal requirements*** to establish a meretricious relationship were satisfied so as to allow for equitable relief under our holdings in *Connell v. Francisco*, 127 Wash.2d 339, 898 P.2d 831 (1995) and *In re Marriage of Lindsey*, 101 Wash.2d 299, 678 P.2d 328 (1984). ***We hold the facts of these cases do not support concluding the existence of stable, cohabiting relationships for either of the parties.***<sup>17</sup>

The fact that Ms. Seven has alleged professional negligence against Stoel Rives and Mr. Steers (“Stoel Rives”) did not require Judge Shaffer to engage in a different analysis, nor does it change the standard of review of the trial court’s summary judgment order. If Washington law does not recognize a CIR on the facts in the record, that is the end of the analysis.

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<sup>16</sup> 142 Wn.2d 592.

<sup>17</sup> *Pennington*, 142 Wn.2d at 594 (emphasis added). *Pennington* was not a summary judgment case, but the trial court’s findings of fact were not contested before the Supreme Court.

Ms. Seven’s allegations of professional negligence do not change the standard of review. Liability for legal professional negligence, like other torts, “requires proof of duty, breach of duty, causation, and damage.”<sup>18</sup> If Ms. Seven and Mr. Resoff did not have a legally cognizable CIR, Stoel Rives could not have caused Ms. Seven any harm.<sup>19</sup>

This case is like *Geer v. Tonnon*, in which this Court affirmed an order entering summary judgment on a professional negligence claim.<sup>20</sup> In *Geer*, the client filed an action for legal professional negligence after his attorney failed to file a third party claim against an insurer, based on an “equitable lien” theory, within the applicable one-year contractual suit limitation. However, this type of third-party equitable lien claim is not a recognized cause of action under Washington law. As a result, the trial court dismissed the plaintiff’s professional negligence claim on summary judgment. This Court affirmed:

To demonstrate that Tonnon’s failure to timely file suit against Lloyd’s based upon an equitable lien theory was the cause in fact of Geer’s claimed damages, Geer must also prove that he had a cause of action to sue Lloyd’s directly to enforce the equitable lien.<sup>21</sup>

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<sup>18</sup> *Griswold v. Kilpatrick*, 107 Wn. App. 757, 760, 27 P.3d 246 (2001).

<sup>19</sup> Stoel Rives does not concede any elements of the professional negligence claim.

<sup>20</sup> 137 Wn. App. 838, 155 P.3d 163 (2007).

<sup>21</sup> 137 Wn. App. at 845.

Like Geer, Ms. Seven must prove she and Mr. Resoff had a legally cognizable CIR, under controlling Washington law, to prove Stoel Rives caused her any harm.<sup>22</sup>

Ms. Seven's reliance on this Court's decision in *Brust v. Newton*<sup>23</sup> is misplaced. The *Brust* Court recognized, "the line between questions for the judge and those for the jury in legal malpractice actions has generally been drawn *between questions of law and questions of fact.*"<sup>24</sup> The Court held that the amount of damage caused by an attorney's negligence is a question of fact. Consequently, it should be determined by a jury, whether or not the property division in the underlying dissolution action would have been decided by a judge.<sup>25</sup> In contrast, and directly analogous to this case, in *Brust*, this Court noted the trial court had properly decided the sole legal question in the case—whether there was an enforceable prenuptial agreement.<sup>26</sup>

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<sup>22</sup> See also *Halvorsen v. Ferguson*, 46 Wn. App. 708, 713, 735 P.2d 675 (1986) (whether an attorney erred is a question of law reserved for the court; whether the attorney's negligence caused the error is a question of fact).

<sup>23</sup> 70 Wn. App. 286, 852 P.2d 1092 (1993).

<sup>24</sup> *Id.*, 70 Wn. App. at 290-91 (emphasis added) (citing *Chocktoot v. Smith*, 280 Or. 567, 571 P.2d 1255, 1259 (1977)).

<sup>25</sup> *Id.* at 293-94.

<sup>26</sup> *Id.* at 292 n.4.

Here, following the basic distinction recognized in *Brust*, the trial court properly determined a *question of law* based on undisputed facts—i.e., whether there was a CIR between Mr. Resoff and Ms. Seven.

**B. Ms. Seven cannot establish a CIR between 1993 and 2001. She and Mr. Resoff steadfastly kept their finances separate and unequivocally indicated their intent *not* to treat their financial resources as community property.**

A CIR is a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.”<sup>27</sup> Courts created the meretricious/CIR doctrine to prevent unjust enrichment:

We have never divorced the meretricious relationship doctrine from its equitable underpinnings. For example, in both *Connell* [*v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995)] and *Peffley-Warner* [*v. Bowen*, 113 Wn.2d 243, 249, 778 P.2d 1022 (1989)], we stated that “property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.”<sup>28</sup>

To implement the doctrine’s purpose, a court must consider a number of factors, including “continuous cohabitation, duration of the relationship, purpose of the relationship, *pooling of resources and services*

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<sup>27</sup> *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995) (citations omitted).

<sup>28</sup> *In re Pennington*, 142 Wn.2d at 602 (emphasis added by *Pennington* court).

for joint projects, and the intent of the parties.<sup>29</sup> While not exclusive, these factors “are meant to reach all relevant evidence helpful in establishing whether a meretricious relationship exists.”<sup>30</sup>

**C. The Trustees and Stoel Rives concede three factors: continuity of cohabitation, duration of the relationship, and purpose of the relationship.**

For purposes of this appeal, the Trustees and Stoel Rives concede Ms. Seven and Mr. Resoff’s relationship between 1993 and 2001 satisfies three *Pennington* factors: continuity of cohabitation, duration of the relationship, and purpose of the relationship.

The issue this Court must resolve is whether Ms. Seven and Mr. Resoff could have had a CIR where the evidence shows there was absolutely no pooling of resources and no mutual intent to be in a CIR that would result in a division of property in the event of a breakup or the death of one of the parties.

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<sup>29</sup> *Id.*, 142 Wn.2d at 603 (emphasis added) (citing *Connell*, 127 Wn.2d at 346).

<sup>30</sup> *Id.* at 602.

**D. The record permits only one conclusion: Ms. Seven and Mr. Resoff did not pool their resources or engage in joint projects for the benefit of a “marriage-like” community; instead, Mr. Resoff paid Ms. Seven a substantial salary for her services and the two of them went to great lengths to keep all of their financial interests separate.**

An “absence of constant or continuous copayments or investment of time and effort in any significant asset” goes against the finding of a CIR.<sup>31</sup> The *Pennington* Court identified the types of activities a court should consider to determine whether the parties had pooled resources or engaged in joint projects:

While the evidence establishes the parties shared some living expenses, under *Connell [v. Francisco]* these facts are not sufficient to show a significant pooling of resources and services for joint projects. As noted above, the relationship had gaps where no expenses were shared. *Van Pevenage has no evidence to suggest she made constant or continuous payments jointly or substantially invested her time and effort into any specific asset so as to create any inequities . . . [W]e cannot conclude the parties jointly invested their time, effort, or financial resources in any specific asset to justify the equitable division of the parties’ property acquired during the course of their relationship.*<sup>32</sup>

In *Pennington*, Mr. Pennington provided vehicles for Ms. Van Pevenage to drive, placed her on his automobile insurance policy, and named Van Pevenage as the beneficiary of a \$50,000 life insurance policy.<sup>33</sup> Ms. Van Pevenage acquired credit cards in the name of “Sammi

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<sup>31</sup> *Pennington*, 142 Wn.2d at 605.

<sup>32</sup> *Id.* at 604-05 (emphasis added).

<sup>33</sup> *Id.* at 596.

Pennington,” and the pair registered as Clark and Sammi Pennington in the phone book.<sup>34</sup> Mr. Pennington and Ms. Van Pevenage also held joint checking accounts and shared some living expenses.<sup>35</sup> But even those shared endeavors—indisputably absent in Ms. Seven’s relationship with Mr. Resoff—were not enough to satisfy the pooling of resources and services for joint projects factor so necessary to demonstrate a CIR.

In *Pennington’s* companion case, *Chesterfield v. Nash*, James Nash and Diane Chesterfield both deposited money into a joint checking account for living expenses. When they lived together in Chesterfield’s home, they helped each other with their work and shared mortgage payments. Nonetheless, the parties did not pool their time, effort and financial resources enough to establish a CIR:

The trial court found Chesterfield and Nash had a joint checking account for living expenses, into which they both deposited money. During their period of continuous cohabitation, Nash assisted Chesterfield with some work-related travel logs. Chesterfield assisted Nash with his office emergencies, his accounts payable, his role as secretary for his study club, and his office correspondence. The court found the parties resided in Chesterfield’s home and shared the mortgage payments. However, the parties maintained separate bank accounts. They also purchased no property jointly. Each maintained his or her own career and financial independence, contributing separately to their respective retirement accounts. When these facts are examined as a whole, the trial court’s findings do not fully establish the parties jointly pooled their time, effort, or

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 596, 604.

financial resources enough to require an equitable distribution of property, as contemplated by *Connell*, [*supra*].<sup>36</sup>

In stark contrast to both *Pennington* and *Chesterfield*, there is no evidence Ms. Seven made community investments of time, effort or financial resources. Ms. Seven was paid for her services on behalf of Mr. Resoff. She made her own investments and diligently monitored the growth of her personal assets. Despite becoming a millionaire in 1997 and earning \$50,000 per year, she never paid for household expenses. Over the course of living in Mr. Resoff's house for eight years, the only purchases she made were a fax machine and some furniture. She and Mr. Resoff maintained separate checking accounts, separate investment accounts and separate health insurance. They had separate wills drawn by separate attorneys. They owned no property together. Until 1994, Ms. Seven owned and maintained her own home. She paid the expenses for those homes with her own money. When she sold her homes, she retained the gains on those properties.

Ms. Seven argues she did not contribute financial resources to the community because Mr. Resoff would not let her pay for anything, but she contributed her services, such as "caring for Bob and the household, nursing

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<sup>36</sup> *Id.* at 606-607.

him in illness and running errands.”<sup>37</sup> This argument contradicts the undisputed evidence. Ms. Seven was paid for those tasks, and Ms. Seven herself negotiated a raise based on those tasks:

- Q: August 26, 1991, [you] told Bob you want a raise?
- A. Oh, yes.
- Q. Describe for me that one, if you remember.
- A. I told -- I think I told him that a lot of time had gone by since I first moved in, and I was doing more and more and more and, you know, I -<sup>38</sup>
- Q. What sort -- I'm sorry. Were you done?
- A. Yeah.
- Q. What kinds of more and more and more? Just give me a feel for what it was like.
- A. More and more responsibilities. I, you know, did things for him. I took care of his family....
- Q. I wasn't there, Ms. Seven. When you say "did things for him, took care of his family," what sorts of things are you talking about?
- A. Everything.
- Q. Name some.
- A. Oh, on a typical day, cook for him, do laundry, do groceries, get groceries, get his dry cleaning, take his car into the shop, you know.
- Q. And how about on the family front?

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<sup>37</sup> Appellant's Brief at 24.

<sup>38</sup> Between 1985 and 1993, Ms. Seven had lived with Mr. Resoff sporadically. See CP 217 and Appellant's Brief at 9 (citing CP 77-79 and 283).

- A. Taking care of his brother and sister when they came to visit. And he'd go to work, and I'd chauffeur them around.

CP 619-20. Mr. Resoff paid Ms. Seven a monthly salary for the very kinds of activities she argues were her contributions to the community—bookkeeping, shopping, laundry, cooking, and entertaining relatives. She did not contribute any of that salary back to the community and never used it to invest in a joint project with Mr. Resoff. Instead, she used her salary and various gifts from Mr. Resoff to amass her own wealth, which she studiously recorded in her own accounting notebook. Mr. Resoff and Ms. Seven never pooled any resources, and every bit of objective evidence shows they never wanted or intended to do so.

As a result, this case is like *In re Relationship of Eggers*,<sup>39</sup> which affirmed the trial court's rejection of meretricious relationship claim and equitable division of property where one person had not contributed towards the purchase of assets and was paid for her work:

[T]here is no evidence Ann contributed any money toward the purchase of any property. Because she was paid wages at an agreed rate for her work, she cannot claim her efforts showed a joint venture. She did not contribute her earnings to the businesses, nor did she share in the decision making. There is therefore no implied partnership between the two. The trial court was correct in not awarding Ann property based on the

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<sup>39</sup> 30 Wn. App. 867, 638 P.2d 1267 (1982).

equitable theories developed in reaction to *Creasman* [*v. Boyle*, 31 Wn.2d 345 (1948)].<sup>40</sup>

Although *Creasman* has been overruled, the equitable theories developed in reaction to it are the underpinnings of the CIR doctrine in Washington.

**E. The undisputed evidence shows Ms. Seven and Mr. Resoff did not intend to have a committed intimate relationship with the financial ramifications of a marriage.**

To satisfy the intent factor of the *Connell* analysis, the parties must have “the mutual intent to form a meretricious relationship.”<sup>41</sup> Ms. Seven argues intent to be in a CIR means “the intent to be in a stable relationship” and “the commitment to form a permanent union”<sup>42</sup>—despite unequivocal evidence that she and Mr. Resoff intended to draw a clear line of demarcation between what was his and what was hers, including very clear provisions for payment for services, for the gifting of property while alive, and for the distribution of property at death.

The trial court properly rejected Ms. Seven’s argument that the intent to remain “stable,” standing alone, is sufficient to establish a CIR and can trump the parties’ clear mutual understanding concerning the division of property. This Court should reject her argument on appeal. Ms. Seven’s position undermines the fundamental policy underlying

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<sup>40</sup> 30 Wn. App. at 872.

<sup>41</sup> *Pennington*, 142 Wn.2d at 604.

<sup>42</sup> Appellant’s Brief at 25 and 27.

Washington's CIR jurisprudence—to prevent the unjust enrichment that would otherwise occur merely because the parties did not obtain a marriage license.

To justify an equitable redistribution of assets, the relevant “intent” must include some expression of the parties' intent to commingle assets and services, to share in gains and losses and to treat assets held in common as a married couple would in the event their relationship is “dissolved” or ended by the death of one of the partners.

The record here establishes beyond a shadow of doubt that Mr. Resoff and Ms. Seven did and intended exactly the opposite. A husband does not pay his wife a salary for keeping his books and acting as his personal assistant. A wife does not obtain full reimbursement for all household expenses from her husband's separate bank account. She does not keep a private accounting book containing a running tab of her growing, separate assets and investments. A husband and wife do not independently and separately retain attorneys to make out separate wills which specifically provide for disposition of the property the parties have studiously kept separate during their lifetime.

As Judge Shaffer recognized, the requisite “intent to form a [CIR]” must include some intent to pool and commingle assets and resources:

There's a difference between people who have long-term, committed and loving relationships that don't involve marriage who merit the application of community property law principals and those who don't, and we have all met them in our daily lives. Plenty of people have romantic, committed, long-term relationships that involve a lot of love and intimacy who don't pool their resources and also don't intend to be in a relationship where ultimately they will divide their assets in some fair and equitable form....There's lots of reasons why people will be together without the intent to form a meretricious relationship. Sometimes that's because people have children that they don't want to accept. Sometimes that's because people didn't enjoy the strictures and limits of marriage. Sometimes that's because people are in a later period of their life the desire to be involved in joint enterprises and joint projects is behind them.

RP (August 21, 2009) at 70.

When most couples marry, they intend not only to permanently unite, but also to own property together, to pay for expenses together, to save for retirement together, and to dispose of their property at death according to an agreed estate plan. None of that ever happened here, for the simple reason neither Ms. Seven nor Mr. Resoff intended it or expected it. Instead, regardless of the fondness they may have developed for one another, Mr. Resoff and Ms. Seven went to considerable lengths to keep their financial lives separate and maintained an employer/employee relationship for more than eight years.

**1. Ms. Seven cannot testify to Mr. Resoff's intent.**

A CIR may only be established through the *mutual* intent of the parties—one party may not unilaterally impose a CIR on the other, *post hoc*. Mr. Resoff is no longer alive to testify concerning his intent. The only admissible evidence of his intent is what he did and what he wrote down in his will while he was alive. The Court should consider Mr. Resoff's and Mr. Seven's objective manifestations of their intent while Mr. Resoff was alive, not Ms. Seven's self-serving, after-the-fact statements—particularly when those statements flatly contradict what the parties did and wrote down when Mr. Resoff was living.

On appeal, Ms. Seven offers the following excerpt from one of her own declarations in an attempt to create a genuine issue of material fact related to Mr. Resoff's intent:

When Bob asked me to move back in with him in January of 1993, he made me promise that I would not leave. I made that promise to him and I kept that promise until the day he died. We were a close and loving couple from that time, indeed, earlier, as I have stated, until the day he died.<sup>43</sup>

This Court should not consider the statement because it was not part of the record before the trial court. The statement comes from a declaration Ms. Seven submitted in opposition to a different motion for

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<sup>43</sup> Appellant's Brief at 25.

summary judgment, not the motion that forms the basis of this appeal.<sup>44</sup> The trial court granted summary judgment to the Trustees, and Ms. Seven does not appeal.<sup>45</sup> Moreover, when deciding the other motion for summary judgment, the trial court did not consider this statement. The Court *struck* the portion purporting to recount Mr. Resoff's statements because it violated the Dead Man's Statute, RCW 5.60.030. CP 1415-16. Ms. Seven has not assigned error to that order, and it is a verity on appeal.

Washington law does not provide any authority for Ms. Seven's argument that the statement may be considered because it was struck on a motion brought by the Trustees and not formally joined by Stoel Rives. The purpose of RCW 5.60.030 is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased.<sup>46</sup> The statute does not limit the type of action to which it

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<sup>44</sup> Specifically, Ms. Seven submitted this declaration in opposition to an earlier motion submitted by the Trustees arguing that she and Mr. Resoff did not have a CIR between 1985 and 1993. *See* CP 211-24, 28, 284. In the facts section of her appeal brief, Ms. Seven quotes another part of the same declaration, "Bob did want to get married, but was satisfied with the closeness and the intimacy of our relationship and our being a couple." Appellant's Brief at 10. This statement was also not before the court on the Trustees' second motion for summary judgment, which addressed the years 1993 through 2001.

<sup>45</sup> Appellant's Brief at 6.

<sup>46</sup> *In re Estate of Miller*, 134 Wn. App. 885, 890, 143 P.3d 315 (2006).

applies.<sup>47</sup> For purposes of the summary judgment motion and the motion to strike, Stoel Rives' interests aligned with the Trustees: both defendants argued that Ms. Seven does not have an interest in Mr. Resoff's estate beyond the assets she received during his lifetime and from the will.

Even if this statement were not inadmissible hearsay and this Court were to consider it, the statement attributed to Mr. Resoff merely evinces his intent to have Ms. Seven act as his long-term, paid companion, not an intent to be in a CIR that would result in a division of assets upon dissolution or death, as though the parties were legally husband and wife. As explained above, Mr. Resoff's actions while he was alive unequivocally demonstrate an intent to keep his assets completely separate from Ms. Seven's.

**2. Ms. Seven's after-the-fact statements do not create a genuine issue of material fact**

In her opposition to the Trustees' second motion for summary judgment, Ms. Seven submitted more self-serving statements, written after-the-fact, related to her and Mr. Resoff's intent:

I intended throughout 1993 until the date of Bob's death to be with him at all times and to be, with the exception of a marriage license, in essence his spouse;

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<sup>47</sup> RCW 5.60.030; *Jones v. Peabody*, 182 Wash. 148, 154, 45 P.2d 915 (1935) (excluding testimony by party in interest about contract with the deceased in action to recover attorneys' fees).

I know what Bob and I intended and we intended to be together for the rest of our lives. We had a warm close loving relationship and I did not move back in with Bob solely because of his health, I moved back in because I loved him.

CP 1202, 1207.

The first statement speaks only to Ms. Seven's intent, not the mutual intent of the parties. The second speaks to Mr. Resoff's intent in a conclusory fashion. Both statements contradict her own deposition testimony—that she moved in with Mr. Resoff a few weeks after she broke up with another man because of Mr. Resoff's poor health.

Most importantly, Ms. Seven's *post hoc* statements do not address intent as it relates to the parties' assets and resources. To the extent they do, the statements contradict the parties' objective manifestations of their intent while they were both alive.

Ms. Seven and Mr. Resoff did not pool any financial resources, and Ms. Seven was paid for the time and effort she spent on household matters. Ms. Seven testified she did not want to marry Mr. Resoff and, between 1993 and 2001, they never discussed marriage. Ms. Seven did not provide for Mr. Resoff in her will, nor did her will provide for distribution of her share of any "community" property. She knew what was hers and what was his, and throughout their time together Ms. Seven studiously kept their books separately—and was paid a salary for doing so,

which she also kept entirely to herself. She did not provide Mr. Resoff with a power of attorney or even grant him the power to make medical decisions on her behalf if she was incapacitated. Ms. Seven never contributed to household expenses.

For his part, Mr. Resoff made substantial gifts of property to Ms. Seven during his lifetime and specifically bequeathed substantial property to her in his will. He paid Ms. Seven a salary and, when he wanted her to have something more, he gave it to her.

None of this would have occurred if Mr. Resoff and Ms. Seven had intended to establish a marriage-like financial community. Ms. Seven and Mr. Resoff were long-term companions, and Ms. Seven was a well-compensated personal assistant and bookkeeper for Mr. Resoff. However, they did not have a CIR that resembled what anyone would consider a “marriage.” Comparing the undisputed facts of this case with the facts in *Pennington*, Ms. Seven cannot establish she and Mr. Resoff had a CIR intended to create a community interest in the assets of Mr. Resoff.

**F. The failure to pool resources and the objective manifestations of intent are dispositive.**

The purpose of the CIR doctrine is *to prevent the unjust enrichment of one party at another's expense*.<sup>48</sup> For example, the core issue in the case

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<sup>48</sup> *Pennington*, 142 Wn.2d at 602.

establishing Washington's CIR doctrine, *In re Lindsey*,<sup>49</sup> was whether the wife had an equitable interest in insurance proceeds stemming from a barn that she and her husband had built together before they were married when she "helped in framing, cementing, siding and roofing the barn/shop, ...and did almost all the painting."<sup>50</sup> Whether the parties jointly invested time, money, and efforts in acquiring or increasing the value of assets is critical when determining whether two people had a CIR with a resulting community property arrangement for the disposition of assets. Ms. Seven cannot avoid the undisputed fact that she and Mr. Resoff did not pool time, money, resources, or efforts during their relationship. These facts alone should defeat Ms. Seven's claim to a CIR.

Here, in addition, the record is replete with indications of Mr. Resoff's and Ms. Seven's intent to keep their assets and resources separate. They kept careful track of what belonged to whom, and both made plans to dispose of their separate property after death. In those plans, no piece of property was left unaccounted.

The manifestations of intent, taken with the complete failure to pool resources, mean Ms. Seven cannot establish a CIR as a matter of law

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<sup>49</sup> 101 Wn.2d 299, 678 P.2d 328 (1984).

<sup>50</sup> 101 Wn.2d at 306.

regardless of the companionship and any emotional bond she and Mr.

Resoff shared. This Court should affirm the trial court's order.

**G. Mr. Resoff contributed his separate money to AAS-DMP and Ms. Seven failed to offer any evidence that profits derived from the AAS-DMP investment were attributable to community labor.**

This Court should also affirm on the alternative ground that the profits from AAS-DMP were Mr. Resoff's separate property.

At the termination of a CIR, whether by death or otherwise, only property acquired *jointly* during the relationship may be divided.<sup>51</sup> Separate property is not subject to division.<sup>52</sup> The character of property—whether it is separate or community—is determined at the date of acquisition.<sup>53</sup> Property acquired during the relationship is presumed to be community, unless the party asserting its separate interest can show the asset was acquired with separate funds.<sup>54</sup> Any increase in the value of separate property is presumed separate.<sup>55</sup> At the end of a CIR, each person is entitled to “the increase in value during the [CIR] of his or her separately owned

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<sup>51</sup> *Olver v. Fowler*, 161 Wn.2d 655, 668, 168 P.3d 348 (2007).

<sup>52</sup> *Id.* (“where a couple remains unmarried, only the property acquired *jointly during the relationship* can be equitably divided to prevent unjust enrichment.”) (emphasis in original).

<sup>53</sup> *In re Binge's Estate*, 5 Wn.2d 446, 485, 105 P.2d 689 (1940).

<sup>54</sup> *Connell v. Francisco*, 127 Wn.2d 339, 351-52; 898 P.2d 831.

<sup>55</sup> *Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982).

property, except to the extent which *the other [person] can show* that the increase is attributable to community contributions.”<sup>56</sup> If the court is persuaded by “direct and positive evidence that the increase in value of separate property is attributable to community labor or funds, the community may be equitably entitled to reimbursement for the contributions that caused the increase in value.”<sup>57</sup>

**1. The \$1,000,000 investment in AAS was Mr. Resoff’s separate property.**

It is undisputed the \$1,000,000 investment in AAS was Mr. Resoff’s separate property.<sup>58</sup> Ms. Seven’s accounting expert so stated, and the investment occurred over Christmas 1992, before Ms. Seven alleges her CIR with Mr. Resoff began. CP 1049-51.<sup>59</sup>

**2. Ms. Seven has not challenged the trial court’s conclusion that Mr. Resoff’s \$333,333 investment in AAS-DMP was his separate property.**

If Mr. Resoff and Ms. Seven had a CIR, the \$333,333 investment in AAS-DMP occurred during the relationship and is presumed to be community. However, the Trustees presented undisputed evidence that Mr.

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<sup>56</sup> *Marriage of Lindemann*, 92 Wn. App. 64, 69, 960 P.2d 966 (1998) (quoting *Elam*, 97 Wn.2d at 816).

<sup>57</sup> *Id.*, 92 Wn. App. at 70.

<sup>58</sup> The parties do not dispute this \$1,000,000 was Mr. Resoff’s separate property. CP 1055, 1085-86.

<sup>59</sup> Ms. Seven moved into Mr. Resoff’s home on January 16, 1993.

Resoff used his separate funds for the \$333,333 investment. Although Mr. Resoff routed the money through his household account, it came from his money market account, which was the initial destination for bond and other passive investment income that belonged to Mr. Resoff. CP 598, 1082, 1088; *see also* CP 576-77. Mr. Resoff not only invested his separate funds into AAS-DMP, he also preserved a traceable record of its separate character.

Based on this unequivocal evidence, Judge Shaffer concluded the \$333,333 investment in AAS-DMP was Mr. Resoff's separate property. RP (August 21, 2009) at 61. Ms. Seven does not challenge that conclusion on appeal.<sup>60</sup>

3. **In her attempt to avoid summary judgment, Ms. Seven failed to offer any evidence that (1) Mr. Resoff performed work for AAS-DMP on behalf of a "community" or (2) that any such "community work" increased the value of his AAS-DMP holdings.**

Because the Trustees showed the investment in AAS-DMP was made with Mr. Resoff's separate property, any increase in the value of that investment is presumed to be his separate property.<sup>61</sup> To avoid dismissal on summary judgment, the burden was on Ms. Seven to offer admissible

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<sup>60</sup> *See* Appellant's Brief at 35-36. The parties have never disputed that the money market account was Mr. Resoff's separate property.

<sup>61</sup> *Elam*, 97 Wn.2d at 816.

evidence to show “the increase in value” was “attributable to community contributions.”<sup>62</sup> The proper analysis is described in *Connell v. Francisco*:

In the case before us, the majority of real property was purchased during Connell and Francisco’s meretricious relationship. This real property is presumed to be owned by both parties, notwithstanding the fact the real property is not held in both parties’ names. Francisco may overcome this presumption with evidence showing the real property was acquired with funds that would have been characterized as his separate property had the parties been married.

With respect to any real property found by the trial court to be owned by Francisco, *Connell* may establish that any increase in value of Francisco’s property occurred during their meretricious relationship *and* is attributable to “community” funds or efforts. If Connell can establish Francisco’s property increased in value due to unreimbursed community funds or efforts, then there arises in the “community” a right of reimbursement for those contributions.<sup>63</sup>

The Trustees argued below that Mr. Resoff’s involvement with AAS-DMP was passive—no more than the reasonable effort a person may employ to manage his or her separate assets. CP 585-86. Judge Shaffer opined that there was a question whether Mr. Resoff was merely managing his separate property or contributing community labor in his interactions with AAS-DMP management. RP (August 21, 2009) at 62. However, that

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<sup>62</sup> *Lindemann*, 92 Wn. App. at 69.

<sup>63</sup> 127 Wn.2d at 352 (emphasis added).

conclusion is insufficient to establish a communal interest in the AAS-DMP profits under *Connell* and *Lindemann*. As Judge Shaffer also concluded, Ms. Seven failed to produce any evidence to show that the increase in AAS-DMP's value occurred because of Mr. Resoff's efforts on behalf of their putative "community." Nothing in the declarations of Ms. Seven, Mr. Cannon or Mr. DeBell shows that the increase in the value of AAS-DMP was attributable to community labor. Although they tended to show that Mr. Resoff contributed his time to the enterprise, they failed to make a causal connection between Mr. Resoff's work and the increase in AAS-DMP's value. *See* RP (August 21, 2009) at 63-65.

To avoid summary judgment, Ms. Seven was required to produce admissible evidence of a causal connection between Mr. Resoff's labor and the profits of the enterprise, and, as Judge Shaffer observed, she failed to produce any such evidence.<sup>64</sup>

Ms. Seven argues the AAS-DMP asset was a community or a mixed asset when Mr. Resoff invested his \$333,333 because he contributed his community labor leading up to the merger. This argument ignores the undisputed fact that Mr. Resoff's \$1,000,000 investment in AAS was his

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<sup>64</sup> *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989); *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (plaintiff must set forth specific facts by affidavit or otherwise to show existence of genuine issue of material fact).

separate property. Any labor Mr. Resoff expended before AAS-DMP came into existence was directed towards AAS, and Ms. Seven has the burden to show any profits from AAS were attributable to Mr. Resoff's community labor.

Ms. Seven, relying on *Lindemann*, argues the "contemporaneous segregation rule" applies. However, as Division Two has made clear, the rule is not applicable to this case because there is no evidence of a commingling of separate and community property and income:

The rule of contemporaneous segregation was devised to cope with problems of identification arising from the hopeless commingling or confusion of income from separate property, usually an unincorporated business, with income from community labor. In such cases the difficulty lies in ascertaining the extent or proportion to which these sources have produced the resulting income.<sup>65</sup>

The record in our case does not present a "hopeless commingling or confusion of income," as it did in *Lindemann*. Here, Mr. Resoff and Ms. Seven studiously maintained separate assets and income. CP 1320. Mr. Resoff and Ms. Seven meticulously maintained separate financial accounts and separate estate plans. Every aspect of their financial lives was separate. Ms. Seven's expert, George Johnson, was able to calculate a precise value for Mr. Resoff's alleged "community labor" related to AAS-DMP: \$235,804. CP 1061, 1069.

Far more than that amount was available to Ms. Seven and Mr. Resoff to support their shared lifestyle while Mr. Resoff was alive.

**4. The community was adequately reimbursed.**

Ultimately, whether the source of AAS-DMP's profits was Mr. Resoff's community labor does not matter, because the community was adequately reimbursed throughout Mr. Resoff's life. A court may offset a marital community's right to reimbursement against "any reciprocal benefit received by the 'community' for its use and enjoyment of the individually owned property."<sup>66</sup>

Mr. Resoff's compensation from Sea Catch was \$105,000 per year. CP 597, 1322. But between 1993 and 2001, Mr. Resoff annually deposited more than \$400,000 into his personal account. CP 599. From this account, Mr. Resoff paid for his and Ms. Seven's travel, social activities, entertainment and all household expenses. He also purchased several race horses that he gifted to Ms. Seven on his death.

The cost for Mr. Resoff's and Ms. Seven's lifestyle far exceeded Mr. Resoff's Sea Catch salary. Over the course of eight years, the community was more than adequately reimbursed for the \$235,804 worth of

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<sup>65</sup> *In re Marriage of Johnson*, 28 Wn. App. 574, 578, 625 P.2d 720 (1981).

<sup>66</sup> *Connell*, 127 Wn.2d at 351.

community-like labor Mr. Resoff allegedly contributed to AAS-DMP. Ms. Seven contributed no money for any joint or community-like expenses and made no contributions to Mr. Resoff's personal account—yet she has already benefitted greatly from that labor. Thus, even assuming that a CIR existed and that the community should have been compensated for Mr. Resoff's labor on behalf of AAS-DMP, there is no harm because the community has been more than compensated.

Thus, this case is just like *Toivonen v. Toivonen*, where the court found, “while the respondent and her husband rendered services in the conduct of the husband's separate business, these services were compensated by the payment of their living expenses out of the business.”<sup>67</sup>

Ms. Seven argues this case is like *Koher v. Morgan*,<sup>68</sup> but the reported case is readily distinguishable. As Ms. Seven herself observes at page 37 of her opening brief, in *Koher v. Morgan*, this Court found Koher had *undercompensated* the community and had “continuously intermixed large sums of separate and relationship income in his personal and business accounts.”<sup>69</sup> Despite earning \$355,516 during the course of the relationship, he had contributed only \$80,000 to community expenses. He used his

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<sup>67</sup> 196 Wash. 636, 644, 84 P.2d 128 (1938).

<sup>68</sup> 93 Wn. App. 398, 968 P.2d 920 (1998).

<sup>69</sup> 93 Wn. App. at 403.

remaining salary and profits from the business to acquire other property.<sup>70</sup>

Upon separation from his meretricious partner, Koher argued the acquired property was his separate property.<sup>71</sup>

Here, the record established that Mr. Resoff applied a large portion of the profits he received from AAS-DMP to his and Ms. Seven's living expenses. He also conveyed an interest in the joint venture to a trust he created for Ms. Seven's benefit. By the time of Mr. Resoff's death, Ms. Seven had received at least \$800,000 from this trust—a value far exceeding the value of Mr. Resoff's work for AAS-DMP, according to Ms. Seven's own expert. CP 656. Ms. Seven paid for nothing, and did not contribute her own salary to the community. Considering that Mr. Resoff entirely supported the community and then bequeathed Ms. Seven assets worth \$2.8 million, she has been more than adequately reimbursed for the value of any community labor Mr. Resoff contributed to AAS-DMP.

## V. CONCLUSION

The trial court properly held that Ms. Seven and Mr. Resoff did not have a legally cognizable CIR entitling her to an equitable share of AAS-DMP profits. Between 1993 and 2001, they never pooled any resources. They consistently made expressions of mutual intent to maintain entirely

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<sup>70</sup> *Id.*

<sup>71</sup> 93 Wn. App. at 400.

separate property. Mr. Resoff made specific and generous gifts to Ms. Seven while he was alive. He paid her a fixed salary for her services around the home and bookkeeping work. She meticulously kept their finances separate, and, when it came to living expenses, made sure every dime came from Mr. Resoff's account. Mr. Resoff and Ms. Seven drafted their own wills, an act that in itself indicates their intent to keep all of their property separate. Ms. Seven, by alleging a CIR that would "undo" the will, is now trying to defeat Mr. Resoff's express intent for the disposition of his property.

The trial court also properly held that Ms. Seven failed to put forth any evidence showing the AAS-DMP profits can be attributed to any labor contributed by Mr. Resoff on behalf of the putative "community." Mr. Resoff invested his separate money into the partnership. Its profits are presumed separate. The record contains no evidence to overcome that presumption.

The Trustees and Stoel Rives respectfully request this Court affirm the order entering summary judgment.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of April, 2010.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on 04/15, 2010, a copy of  
RESPONDENTS' REPLY BRIEF was served at the following addresses  
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