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STATE OF WASHINGTON

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NO. 74657-0-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NICK BRINEY, A Washington Individual

Appellant,

and

MARGARET MORGAN, A Washington Individual

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JULIE SPECTOR

---

BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant Nicky Briney and Respondent Margaret Morgan lived together from March 1999 through February 2013, during which they kept all of their income, expenses, assets, and debts totally separate, while Mr. Briney paid all of the housing expenses and almost all of the parties' living expenses. The trial court nevertheless found that they had a committed intimate relationship ("CIR") from November 1995 through February 2013.

Mr. Briney disagrees with but does not challenge that finding. However, the award to Ms. Morgan of \$1.173 million must be reversed in its entirety because it represents one-half the (miscalculated) increase in the value of Mr. Briney's separate assets during the CIR, none of which was caused by Mr. Briney's or Ms. Morgan's community contributions.

In November 1995 Mr. Briney's net worth of \$1.247 million consisted almost entirely of three assets, all of which were his separate property: his one-half interest in his business; liquid investment and retirement accounts; and a house which he had just purchased in his own name, using his own funds for the down payment and his own credit for the deed of trust securing the loan for the remainder of the purchase price. Ms. Morgan brought no assets into the relationship.

By March 1999, when the CIR began, those three assets were still Mr. Briney's separate property and still comprised almost

his entire net worth, which had grown to \$1.763 million. During the next 14 years Mr. Briney's net worth increased significantly.

The trial court correctly denied Ms. Morgan's request to be awarded any money for Mr. Briney's interest in his business because it was his separate property, and Ms. Morgan presented no evidence showing that community efforts increased its value during the CIR.

The trial court concluded that Mr. Briney's investment and retirement accounts were also his separate property, but erroneously awarded Ms. Morgan one-half the increase in their value during the CIR (\$616,483) anyway, even though there was the same insufficiency of evidence that prevented her from being awarded any money for Mr. Briney's business interest.

The trial court erroneously concluded – without explanation – that the house was a community asset and awarded Ms. Morgan one half of its (erroneously calculated) value less Mr. Briney's down payment, again despite the same absence of evidence of any community contributions.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in concluding that the parties' CIR began in November 1995 instead of March 1999.

2 The trial court erred in awarding Ms. Morgan an interest in the increase in the value of Mr. Briney's investment and retirement accounts during the CIR.

3. The trial court erred in awarding Ms. Morgan an interest in the increase in the value of the house during the CCR, and erred in the calculation of that interest.

4. The trial court erred by not offsetting the award to Ms. Morgan by the benefits she received from the relationship.

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Although in this appeal Mr. Briney does not challenge the trial court's conclusion that a CIR existed between him and Ms. Morgan, it began in March 1999, not November 1995.

A. Before living continuously for 14 years beginning in approximately March 1999, Ms. Morgan moved out three times for a total of approximately five years. Did not the CIR only begin when she moved back in for the last time in March 1999?

2. The trial court erred in awarding Ms. Morgan an interest in the increase in the value of Mr. Briney's investments and retirement accounts during the CIR.

A. Did not Ms. Morgan fail to meet her burden of proving by direct and positive evidence that any increase in the value of Mr. Briney's investment and retirement accounts during the CIR was attributable to community contributions?

B. Was not the trial court's conclusion that Ms. Morgan "has a right and need for half of [Mr. Briney's] retirement accounts" erroneous, because she did not produce evidence of a "right" to any such award and the law does not allow an award of separate property to a party in a CIR based on "need"?

3. The trial court erred in awarding Ms. Morgan an interest in the increase in the value of the house during the CCR.

A. When the house was purchased solely with the separate funds and separate credit of Mr. Briney, with title in his own name and before or only at the start of the CIR, and was not converted to community property during the CIR, was not the house solely his separate property?

B. Did not Ms. Morgan fail to meet her burden of proving by direct and positive evidence that any increase in the value of the house since the creation of the CIR was attributable to community contributions?

(i) Were not the trial court's Conclusions of Law that Ms. Morgan's gardening/landscaping and remodeling efforts improved the value of the house erroneous because she failed to introduce any evidence of that improvement in value? (CP 683)

(ii) Did not Ms. Morgan fail to meet her burden of proving that any increase in the value of Mr. Briney's investment and retirement accounts was attributable to his community labor or funds?

(iii) Even if Ms. Morgan had satisfied that burden, should not the increase in the value of the house been \$427,000, based on the house's assessed value of \$787,000 when the CIR ended, less the \$370,000 purchase price?

4. The trial court erred by not offsetting the award to Ms. Morgan by the benefits she received from the CIR.

A. Should not the amount of any award to Ms. Morgan be offset by the benefits she received from the CIR totaling well over \$400,000?

#### **IV. STATEMENT OF THE CASE**

##### **A. The Parties Were in Their 40's and Had Separate Careers When They First Met in 1987.**

At the time of trial in May 2015 Appellant Nicky Briney was 73 years old. (RP 318) He had two children from his first marriage, which ended in divorce. (RP 319) Respondent Margaret Morgan was 68 years old. RP 38. She had never married. (RP 670)

After serving in the United States Army and graduating from the University of Washington, Mr. Briney worked for what was then

known as Seattle First National Bank from 1965 to 1985. (RP 320-322) Roger Bel Air also worked at SeaFirst Bank and in 1976 the two formed a side business, the Bel Air & Briney partnership. (RP 323)

Initially Bel Air & Briney renovated and resold “junkier” real estate. (RP 324) Their business ultimately evolved into making private mortgage loans. (RP 324-325) The two left Seafirst Bank in 1985 and worked as equal full-time partners of Bel & Briney until 2015, when Mr. Bel Air purchased Mr. Briney’s one-half interest. (RP 323-324)

Ms. 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)

**B. The Parties’ Relationship Was “Off and On” During the 1980’s and 1990’s, and Almost Completely Paid for By Mr. Briney.**

Mr. Briney and Ms. Morgan first met in June 1987. (RP 39-40) In June 1988 she and her sister moved to Hemet, California in June 1988 to run their mother’s retail leisure ware apparel store. (RP 40,157). She returned to Seattle in 1990 and lived with Mr. 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)

Ms. Morgan characterized her relationship with Mr. 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)

In 1991 Mr. Briney gave her an engagement ring (RP 44). She wore the ring for a while after she moved out in 1992 but then took it off. (RP 46) Although she could not remember the last time she wore the ring, she admitted she had not worn it since at least 2000. (RP 168-169) She also admitted that neither she nor Mr. Briney ever held themselves out to be married. (RP 272)

While living together at various intervals between 1987 and 1994, Mr. 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 Ms. Morgan moved back in with Mr. 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)

**C. Mr. Briney Saves Ms. Morgan's Parents' Property from Foreclosure in 1994.**

In May 1991, Ms. Morgan and her sister purchased the Fifth

Avenue Maternity retail store in downtown Seattle. (RP160-161, 340-341) Their parents paid the cash down payment to purchase the business for their daughters (RP 161), and their obligation to pay the remaining \$120,000 of the purchase price was secured by a deed of trust against real property owned by the parents. (RP 162, 338-341, Exhibit 83)

In 1994 Ms. Morgan and her sister fell behind on the payments due to the seller of the business (RP 164), who began to foreclose on the deed of trust against the parents' real property that secured their daughters' obligation to make those payments. (RP 354) When Mr. Briney learned of the predicament, he used \$79,000 of his own money to buy the note from the seller to stop the foreclosure. (RP 432) Mr. Briney then located a buyer for the property; the Morgans received about \$93,000 in net proceeds instead of losing the property at a foreclosure sale. (CP 672)

**D. Mr. Briney Purchases A House in November 1995 With His Own Money, Own Credit, and in His Own Name.**

In November 1995 Mr. Briney purchased a house in the Queen Anne neighborhood of Seattle ("the house"), via statutory warranty deed in his name only. (RP 344, 348; Exh. 73) The purchase price was \$370,000: the down payment was \$74,000, the remaining \$296,000 was borrowed and repayment was secured by a first deed of trust against the property. (RP 346, Exhibit 74) Mr. Briney paid all of the down payment from his funds, and he was the

sole obligor on the \$296,000 purchase money note. (RP 346-347) He did not include Ms. 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)

Ms. Morgan and Mr. Briney spent several months looking at houses before Mr. Briney decided to purchase the house. (RP 50-51) According to Ms. Morgan, Mr. Briney liked the house because it "was a really good value, and he liked the location, he liked the view". (RP 52) Ms. Morgan was "not as sold on it as he was" because it "needed work"; Mr. Briney agreed to "do the work, do what it takes", and bought the house. (RP 52)

**E. Ms. Morgan Moves Out Again in 1998.**

By 1998 Ms. Morgan was frustrated by Mr. Briney's failure to live up to his promise to fix up the house, and moved out. (RP 56, 189) "We were getting into arguments about it. It was – nothing was being done. It was – it was like I felt like almost like a broken promise, you know. We're going to do this, but then we didn't do it, and it was always some reason, and I guess I just got frustrated with it and felt like I needed to just remove myself from that environment for a while." (RP 56-57)

Ms. Morgan conceded that for several months thereafter there was "very little" communication" with Mr. Briney (RP 189). She returned approximately eight months later (RP 58).

**F. The Parties Live Together for the Next 14 Years, During Which Time Mr. Briney Again Pays For All the Housing and Almost all of the Living Expenses.**

Ms. Morgan lived with Mr. Briney until February 2013, when she permanently moved out. (RP 192-193)

The trial court's Findings of Fact 12 – 21, (CP 673-679) – some of which Mr. Briney challenges -- describe the details of the parties' relationship between November 1995 and February 2013. These findings include Ms. Morgan's involvement in the landscaping and gardening of the property (CP 684); her role in the three remodels (CP 673-674); her care of Mr. Briney while he suffered from depression (CP 676, 678-679); her performance of the majority of the household duties (CP 678); their traveling and entertaining guests together, and the beliefs by others that they were either married or their relationship was "marital-like". (CP 677-679)

In its Findings of Fact, the trial court noted that in October 2005 Mr. Briney drafted a will, which included his two adult daughters, his first wife and Ms. Morgan, each of whom was to share equally in his estate. (CP 678)

However, 19 months after the will was signed the major remodel began, involving a complete renovation of the main living area and two bathrooms. (CP 675-676) It ran way over budget (costing almost \$300,000) and "took longer than either party anticipated (into 2008)." (CP 676) The trial court correctly found that

“[it] created a huge strain on their relationship and stressed each of them individually. Unfortunately, this spiraled into Mr. Briney suffering a major depressive episode that lasted in excess of 3 ½ years. . . . The depressive years and the strain of the final and costly remodel proved disastrous for this relationship. As a result, Ms. Morgan and Roger Bel Air testified that Mr. Briney became a different person. He became very abusive and she ultimately had to move out.” (CP 676-677) Ms. Morgan initiated litigation, and Mr. Briney revoked the will. (RP 437)

The trial court found that after the parties moved into the house, as in the prior eight years of their relationship, “Mr. Briney paid all of the mortgage and property taxes, most of the furnishings, maintenance/improvements, homeowner’s insurance, utilities<sup>1</sup>, 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, Margaret] 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. Mr. Briney paid approximately \$100,000 for all of the automobiles used by Ms. Morgan, and the automobile insurance on all of them. (RP 140-143; 206-208; Exh. 37, ¶30) When she left, Ms. Morgan took the 2012

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<sup>1</sup> After Mr. Briney paid the Comcast bill for the first several years (RP 259), Ms. Morgan wanted a faster Internet connection in order to work out of the home, so she assumed responsibility for paying it. (RP 136)

Volkswagen Passat with her. (RP 143)

According to undisputed testimony by experienced Seattle real estate agent Barbara Otterson, by not paying her share of the rental value of the house between 1996 and 2012 Ms. Morgan received over \$200,000 in free rent. (CP 238; Exhibit 87)

Moreover, Mr. Briney obtained an American Express card that Ms. Morgan used to purchase trips for her clients for which she amassed a significant number of “points” that previously had been retained by Auto-Venture. These points enabled her and (sometimes) Mr. Briney to fly abroad for free on several occasions. (Exhibit 37, ¶39)

**G. The Parties Always Kept Separate All of Their Income and Expenses and Assets and Debts.**

During their entire relationship Ms. Morgan and Mr. 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) Mr. Briney’s earned and unearned income always went into his separate bank and investment accounts, and Ms. Morgan’s income always went into her separate bank account. (Exhibit 37, ¶29) They never commingled any money. (Exhibit 37, ¶29) When Mr. Briney paid for something (for the household or for Ms. Morgan or for himself), he paid it from one of his separate accounts, and when Ms. 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)

Ms. Morgan never had any idea how much money Mr. Briney made. (RP 63) He never volunteered that information, she never asked. (RP 178)

**H. All of Mr. Briney's Assets Were Owned Separately By Him When the CIR Began, and Remained His Separate Property Throughout the CIR.**

Since the 1980's Mr. Briney has contemporaneously and regularly maintained an electronic check register by posting of all of his financial activities, using the Quicken bookkeeping software. (RP 366-67) This record keeping has enabled him to create a balance sheet listing his assets and debts, and their values, for any period of time.<sup>2</sup>

At trial Mr. Briney produced balance sheets listing his assets and their value, prepared through the aforementioned process, as of June 30, 1994 when Ms. Morgan moved back in with him<sup>3</sup>; as of October 31, 1995 immediately before Mr. Briney purchased the house<sup>4</sup>, and as of March 31, 1999, when Ms. Morgan moved back

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<sup>2</sup> 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)

<sup>3</sup> Exhibit 71

<sup>4</sup> Exhibit 72

into the house.<sup>5</sup>

<u>Asset</u>	<u>06/94</u>	<u>10/95</u>	<u>03/99</u>
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
Money market 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
<b>Total Assets</b>	<b>\$1,108,096</b>	<b>\$1,246,090</b>	<b>\$2,084,282</b>
(Mortgage)			(\$ 321,056)
<b>Net Worth</b>	<b>\$1,108,096</b>	<b>\$1,246,090</b>	<b>\$1,763,226</b>

According to the trial court the CIR began at about the same time Mr. Briney purchased the house in November 1995.<sup>6</sup> Mr. Briney's net worth was almost \$1.25 million, \$500,000 of which was in liquid investments. Within three and one-half years, without any improvements to the house, Mr. Briney's net worth had increased by over \$500,000. When Ms. Morgan moved out 14 years later, Briney's net worth had increased to \$4,117,876.<sup>7</sup>

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<sup>5</sup> Exhibit 37, Exh. 4

<sup>6</sup> In the trial court's Decree and Final Judgment, the trial court used Mr. Briney's October 31, 1995 balance sheet as the baseline for its calculation of the increase in the value of his investment and retirement accounts during the CIR. (CP 763, 732)

<sup>7</sup> Exh 37, Exh. 5

<u>Asset</u>	<u>02/13 Value</u>
Bel Air & Briney	\$1,362,862
IRA accounts	\$ 654,390
Stocks and bonds	\$ 794,386
Money market acct.	\$ 181,447
Bank accounts	\$ 287,441
Home	\$ 787,000
Vehicles	\$ 30,220
Accounts receivable	\$ 22,734
Personal property	\$ 8,110
<b>Total Assets</b>	<b>\$4,128,590</b>
(Credit Cards)	(\$ 10,714)
<b>Net Worth</b>	<b>\$4,117,876</b>

**I. Ms. Morgan Failed to Introduce Any Direct and Positive Evidence that Any Increase in the Value of Mr. Briney's Assets During the CIR Was Attributable to Community Contributions By Her or By Mr. Briney.**

As will be discussed *infra*, Mr. Briney's October 31, 1995 net worth of \$1.246.090 million and his \$370,000 house were his separate property as were all increases in the value of those assets thereafter except those that Ms. Morgan could prove by direct and positive evidence were attributable to community contributions. However, Ms. Morgan did not produce such evidence.

While there was evidence supporting the trial court's aforementioned findings of fact regarding Ms. Morgan's gardening,

landscaping, and remodeling of the house, she produced no evidence that any of that work increased the value of the house at all. And, because she and Mr. Briney painstakingly avoided any commingling of any bank or investment or retirement accounts and she did no work for Mr. Briney, Ms. Morgan made no contributions to Mr. Briney's liquid assets.

The best source of information regarding Mr. Briney's income earned during the CIR would have been his federal income tax returns. However, Ms. Morgan introduced into evidence only one such return, for 2012, which showed that Mr. Briney's adjusted gross income for that year was a negative \$47,233, before additional deductions of another \$22,310. (Exhibit 36, Bates nos. 01008 – 01014)<sup>8</sup>

The best evidence of the causes of the increase in the value of Mr. Briney's investment and retirement accounts would have been the monthly statements for those accounts, but Ms. Morgan also failed to produce any of those except for January through April 1999 and January and February 2013. (Exhibit 35, 00855 – 00885)

The account statements for the first four months of 1999

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<sup>8</sup> She did introduce the federal income tax returns for Bel Air & Briney for 1995 and 1999, (Exhibit 36), but they contained no useful information regarding income or other benefits Mr. Briney received in either year.

showed that the net value of the combined accounts increased by \$36,693, \$34,517 of which was created solely by the increase in the market value of investments. (Exhibit 35, 00855 - 00885). The modest average monthly deposits of \$11,792 were exceeded by Mr. Briney's expenditures that averaged \$14,400 per month. (Exhibit 35, 00855 - 00885)

Finally, virtually all of the increased value of the house from \$370,000 in November 1995 to the appraisal value of \$1.09 million as of December 2014 obtained by Ms. Morgan (Exhibit 52) was from the soaring increase in the value of the land. The house's assessed value in 2013 when the CIR ended was \$787,000, 79.3% of which consisted of the land value of \$624,000. (Exhibit 85)<sup>9</sup> Ms. Morgan's appraiser concluded the site was worth \$800,000, 73.4% of the appraised value in December 2014. (Exhibit 52, 01206) Not one cent of that increase was attributable to community contributions.

Ms. Morgan did produce one sentence in a ten-page Declaration Mr. Briney supplied in support of his earlier Motion for Summary Judgment Dismissal in which he stated that "[t]he value of my assets increased during those 18 years [1995 – 2013]

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<sup>9</sup> The same exhibit showed that the assessed value of the house when Mr. Briney purchased it was \$315,100, \$234,000 of which (73.7%) was for the land.

because of market appreciation and the money and work I invested in them.” (Exhibit 37, ¶37) At trial Mr. Briney acknowledged that the increase in his IRA accounts during the CIR was caused by a combination of his contributions and market appreciation (RP 484), while explaining that he still had a significant net worth in 2013 “[b]ecause I save and I invest and I’m financially prudent.” (RP 383)

At the end of closing arguments the trial court expressed its great frustration with Ms. Morgan’s failure to produce proof that any of the increase in Mr. Briney’s net worth during the CIR was attributable to community contributions.

The problems that I’m having with this case is exactly what Mr. Hunsinger said at the beginning, which is I don’t know what evidence I have, what facts I have of income by Mr. Briney. I have a summary, and I have spread sheets, the Quicken check registers, that kind of shows everything he has spent, but I don’t have the money coming in. That’s the biggest problem I think I have from an academic one. ***And I think an appellate court would have difficulty in making a determination.*** The only thing I really had is Mr. Bel Air’s testimony that he received a check for \$790,000, which was approximately half of whatever that moving target is of the value of the business, and I think there were some rentals. I’m not sure what other income Mr. Briney may have had from helping out family members, his own daughters and the like.

So I have a lot of spread sheets, but I don’t have income, as Mr. Hunsinger has correctly pointed out. So it’s very difficult for the court to try to figure out a just and equitable split of this community. And

that's what is upon me, and that's the conundrum that I face, and i probably have said too much already, but I want to give the parties at least an idea of where the court is going, and I recognize the problem that this court has based on the record that has been established or has not been established, and I can't reopen, and I don't think that would be fair. I mean, I have the record that I have. And all I am doing right now is going through the exhibits that were admitted and the sub-numbers. . . . (RP 582-583) [emphasis supplied]

The trial court nevertheless erroneously entered a judgment in favor of Ms. Morgan in the amount of \$1,172,832.15, consisting of:

- \$461,675.00 “which represents half of the appraised value (\$1,090,000.00) of the [house] less 8.5 percent (\$92,650.00), minus Defendant's original down payment (\$74,000.00)”; and
- \$711,157.15, “which represents half of Defendant's retirement and investment accounts pro-rated value from 1995 to February, 2013 . . .” (CP 764).

The figure of \$711,157.15 uses the October 31, 1995 value of the accounts as the baseline for calculating the increase in the value of the retirement and investment accounts. (CP 732)

## **V. ARGUMENT**

### **A. Standard of Review.**

This Court reviews the trial court's Conclusions of Law *de novo*, while its Findings of Fact need to be supported by substantial

evidence. *Soltero v. Wimer*, 159 Wn. 2d 428, 433, 150 P.3d 552 (2007) (citation omitted) All of the errors cited by Mr. Briney herein are from the trial court's Conclusions of Law except its erroneous factual findings that Ms. Morgan's services contributed to the increase in the value of the house.

**B. A CIR Existed Between the Parties, But It Did Not Begin Until March 1999.**

In *Connell v. Francisco*, 127 Wash. 2d 339, 898 P.2d 831 (1995), the Washington Supreme Court essentially created as a matter of law what it referred to as a meretricious relationship, now called a committed intimate relationship ("CIR"). It "is not the same as a marriage", *Id.* at 349, but was instead "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Id.* at 346

The Court established that relevant factors to be considered in determining whether a meretricious relationship existed include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties ("the *Connell* factors"). *Id.* at 346

Although the parties agree that they never pooled any resources, assets, income, or debts, and Mr. Briney disputes that there was any material pooling of services or mutual intent to maintain a CIR, he does not challenge the Court's conclusion that

he and Ms. Morgan had were in a CIR, once the cohabitation became continuous, which did not occur until March 1999.

Had Ms. Morgan not moved back into Mr. Briney's house in 1999, or had done so but moved out within a few years thereafter, the "continuous cohabitation" factor – and perhaps the "duration of relationship" factor – would have joined the "material pooling of resources" and "mutual intent to maintain a CIR" factors in *Connell* that would not have been satisfied. See, e.g., *In Re Marriage of Pennington*, 142 Wash. 2d 592, 603, 14 P.3d 764 (2000)

Moreover, Ms. Morgan's admitted reason for moving out in 1998 – simple frustration due to Mr. Briney's three-year delay in beginning the improvements to his house – hardly justifies calling their relationship "committed" in 1998. Ms. Morgan's subsequent contributions to the relationship support the conclusion that a CIR existed once she returned in March 1999, but does not justify an award of approximately \$250,000 for the increase in the value of Mr. Briney's separate property over the previous three-plus years.

**C. Separate Property is Not Subject to Distribution in a CIR.**

Even though a CIR was established, the only assets available to be equitably distributed are those that would have been characterized as community property if the parties were married. *Connell, supra*, at 352 (1995) "Unlike a property distribution in a divorce, the separate property of the parties is *not* subject to distribution. [Connell] at 350, 898 P.2d 831. If there is no

community-like property, then there is nothing to justly and equitably distribute.” *Soltero, supra*, 159 Wn.2d 428, 434, citing *Connell*.

Whether the CIR began in November 1995 or March 1999, Mr. Briney’s interest in Bel Air & Briney and his house and investment and retirement accounts were his separate property throughout the CIR, and were not subject to distribution by a court.

**D. The Same Presumptions of Community and Separate Property Apply for a CIR as for a Marriage.**

The trial court’s Conclusion of Law no. 3 correctly states the following fundamental rules of Washington state community property law that also apply to a CIR:

- The character of property as separate or community is determined at the point of acquisition. *Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000);
- Property acquired prior to the marriage (or CIR) is separate. *Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001);
- Although property acquired during a marriage (or CIR) is presumed to be community, it has the same character as the funds used to purchase the property, so if it was purchased with separate funds, it continued to be characterized as separate property. *Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999);

- 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. (CP 681-682)

**E. The Trial Court Correctly Denied Any Award for Mr. Briney's One-Half Interest in Bel Air & Briney.**

In Conclusions of Law 5 and 7, the trial court held that Mr. Briney's interest in Bel Air & Briney was his separate property, and that Ms. Morgan failed to meet her burden of proving what, if any, community efforts by Mr. Briney increased the value of that interest.

5. In so far as Mr. Briney's acquisition of Briney & Bel Air in January, 2015, this company predated the parties' involvement as a CIR. It is presumed separate (see *In re Lindemann*, 92 Wn. App. 64, 69 (1998) and there is insufficient evidence before the court to determine what community efforts increased its value from 1995 onward until the couples' split in February 2013. Although *Lindemann* stands for the proposition that separate assets of one party may be subject to an equitable distribution to the extent that that asset increased in value because of community contributions of labor and funds, there is insufficient evidence to make that finding of fact or conclusion of law. *Id.* At 70 [sic] the party seeking the equitable interest must show with direct and positive evidence that the increase stemmed from community funds. *Id.* **The failure of having tax returns entered**

***into the record simply ties the court's hands to make an analysis other than what is presumed to be separate property.*** There 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 (house improvements, utilities, taxes, insurance, etc.)

7. The business of Bel Air & Briney, although sold recently to Mr. Briney for \$790,000 (presumably half the value of the overall asset), it remains unclear how community labor added to the value of that asset without a comparison of tax records from 1995 through 2013. Although Mr. Briney testified that the increase in the value of all assets in his name are [sic] attributable to his labor during the relationship and his strategic investment approach during such time, ***the court is sympathetic to Ms. Morgan's need for and right to equitable division of the community assets. However, the business of Bel & Air [sic] cannot be so divided without additional evidence, specifically the tax returns.*** (CP 684 – 686) (emphasis added)

The trial court made two materially erroneous statements in these Conclusions of Law. First, no “exhibit from Mr. Briney dating back to 2006” was ever introduced into evidence: in fact no document from any date was admitted “that demonstrates Mr. Briney received income from his investment accounts into the bank accounts he would use to support the community expenses” except the account statements for January through April 1999, which showed a substantial increase in the investments’ market value, but markedly little income. (Exhibit 35)

Second, Mr. Briney did not testify “that the increase in the value of all assets in his name are [sic] attributable to his labor during the relationship and his strategic investment approach during such time . . .”. As noted in the Statement of the Case, *supra*, Mr. Briney stated that the increase in value of his separate assets was “because of market appreciation and the money and work I invested in them” (Exhibit 37, ¶37) and “[b]ecause I save and invest and I’m financially prudent.” (RP 383)

Nevertheless, the trial court refused to award Ms. Morgan any interest in the \$247,000 increase in the value of Mr. Briney’s one-half interest in Bel Air & Briney between 1995 and 2013 because (a) it was Mr. Briney’s separate property; and (b) Ms. Morgan did not meet her burden of providing direct and positive evidence that the increase was attributable to Mr. Briney’s community contributions due to her failure to introduce his tax returns or other evidence of his income during the CIR.

**F. The Trial Court Erred in Awarding Ms. Morgan an Interest in the Increase in the Value of Mr. Briney’s Investment and Retirement Accounts During the CIR.**

The trial court awarded Ms. Morgan one half of the increase in the value of Mr. Briney’s investment and retirement accounts from October 31, 1995 through February 2013. By using October 1995 as the baseline for its calculation of Ms. Morgan’s one-half interest in the increase in the value of Mr. Briney’s investment and

retirement accounts, the trial court indicated that those accounts were his separate property, as was Mr. Briney's interest in Bel Air & Briney.

The basis for the denial of any award for Mr. Briney's ownership interest in Bel Air & Briney should have also been the death knell for Ms. Morgan's claim to any increase in the value of his investment and retirement accounts. As the trial court complained at the end of closing arguments, it had Mr. Briney's balance sheets but it "didn't have the money coming in. That's the biggest problem I think I have from an academic one. And I think an appellate court would have difficulty in making a determination."

In its Conclusion of Law no. 6 the trial court stated that "[i]n so far as Mr. Briney's investments and retirement accounts, those records are before the court." (CP 685) But the only "records before the court" regarding those accounts were Mr. Briney's four balance sheets and six of his monthly investment account statements, four from 1999 and two from 2013. And the sparse information in those statements shows that all of the increase in the value of those accounts came from the increase in the market value of the assets and the gains from the sale of those assets, neither of which involved community labor or contributions.

It appears the trial court granted Ms. Morgan this gargantuan award simply because it would be unfair not to, which is unequivocally not prohibited where separate property in a CIR is involved. In Conclusion of Law no. 9 the trial court implied that Ms. Morgan may have cost herself one-quarter of Mr. Briney's estate by helping him come out of the severe depression he suffered due to the absurdly expensive and lengthy remodeling project (CP 682), and in Conclusion of Law no. 10 it concluded that as a result of her 26-year relationship with Mr. Briney Ms. Morgan "**has a right and a need** for half of his retirement accounts pro-rated from 1995 (when the two moved into the Ward Street home) – 2003." (CP 687) (emphasis added)

This sort of reasoning was expressly rejected by the Washington Supreme Court in *Soltero, supra*, 159 Wn. 2d 428, 431 (2007) *supra*, where during the parties' nine-year CIR Mr. Wimer's net worth – all of which was his separate property -- grew from \$1.5 million to more than \$4.5 million, while Ms. Soltero's net worth did not grow materially. The trial court found that none of the increase in Mr. Wimer's net worth during the CIR was attributable to community contributions, but granted Ms. Soltero a judgment for \$135,000 as an "equitable distribution". The Court of Appeals

reversed and the Supreme Court agreed, holding that “since the trial judge identified no community-like assets to distribute, no equitable distribution under the meretricious relationship doctrine is possible.” *Soltero*, at page 435.

Here, like the trial judge in *Soltero*, Mr. Briney’s retirement and investment accounts, like his interest in Bel Air & Briney, was his separate property and, like Ms. Soltero, Ms. Morgan failed to provide the trial court with any direct and positive evidence of any community contributions to those separate assets. Here, like in *Soltero*, this Court must now reverse the trial court’s equitable award of non-distributable separate assets in this CIR.

**G. The Court Erroneously Awarded Ms. Morgan an Interest in the Increase in the Value of the House During the CIR.**

**1. The house was and is the separate property of Mr. Briney.**

The trial court correctly found that the house was purchased solely with Mr. Briney's money (the \$74,000 cash down payment), solely with Mr. Briney's credit (a \$296,000 first deed of trust that the Court erroneously stated was \$360,000), and that title was solely in Mr. Briney's name. (CP 673) The trial court also correctly found that Mr. Briney made all the payments for the mortgage, property tax, homeowners insurance, maintenance and improvements for the house during the entire CIR. (CP 673-674) Moreover, the Court

house during the entire CIR. (CP 673-674) Moreover, the Court properly cited the aforementioned applicable principles of “community-like” and separate property for a CIR, including the presumptions that property purchased with separate funds will be characterized as separate property as will all increases in the value therefrom except to the extent that the other “spouse” can show with direct and positive evidence that the increase was attributable to community contributions. (CP 681-682)

Merely having one’s name on title is generally not controlling, but buying the asset with one’s separate property certainly is. The key to the characterization of real property is “the source from which the fund is derived which is used in paying the purchase price of the property. If the fund is derived from the separate property of one of the spouses, the property purchased is the separate property of that spouse; if it is derived from the community property of both the spouses, it is the community property of both of them.” *Merritt v. Newkirk*, 155 Wn. 517, 520-21, 285 P. 442 (1930)

Ms. Morgan admitted (RP 13), and the trial court found (CP 673), that the down payment came from Mr. Briney’s separate property, his credit was used to borrow the rest of the purchase price, and title to the house was and is in his name only.

The trial court also found that the CIR began at around the same time that Mr. Briney purchased the house in November

1995.<sup>10</sup> It is not clear whether the Court found that when the house was purchased by Mr. Briney the CIR had or had not begun, nor is it relevant. The down payment was made solely from Mr. Briney's separate funds, the purchase money mortgage for the remainder was based solely on Mr. Briney's credit, and nothing transpired during the CIR to convert the separate nature of the house to a community asset.

The trial court nevertheless concluded without any explanation that as a matter of law "the home is clearly a community asset *that both parties supported and maintained.*" (CP 686) (emphasis added) Such a conclusion of law is clear error.

As with its award of one-half the increase in the value of Mr. Briney's investment and retirement accounts, the trial court offered no explanation for its inexplicable legal conclusion. The italicized phrase from the trial court's Conclusion of Law and some of its Findings of Fact are the only clues of a possible basis for its erroneous characterization of the asset.

As stated *supra*, the trial court found that Ms. Morgan "performed extensive landscaping and gardening for the property" (CP 674), paid for the property's plantings and some of the furniture and furnishings for the home, (CP 674), and was "directly involved" in all three remodeling projects. (CP 675)

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<sup>10</sup> Footnote 6, *supra*.

However, as the Washington Supreme Court stated in *Hamlin v. Merlino*, 44 Wn.2d 851, 857-858, 272 P.2d 125 (1954):

It is a well settled principle that separate property continues to be separate through all of its changes and transitions as long as it can be clearly traced and identified, furthermore, that rents, issues, and profits from separate property remain separate property. (citations omitted) . . .

In *re Dewey's Estate*, 13 Wash.2d 220, 124 P.2d 805, 807, we quoted from *Guye v. Guye*, 63 Wash. 340, 115 P. 731, 37 L.R.A.N.S., 186, as follows: "Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and, when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear.*" (italics ours.)

The house was Mr. Briney's separate asset when he purchased it in his name alone, using solely his own separate funds and pledging his separate credit. During the CIR Mr. Briney made all the payments for the mortgage, property tax, homeowners insurance, maintenance and improvements. The modest extent of Ms. Morgan's "maintenance and support" is nowhere enough evidence – not substantial, and neither direct nor positive – to rebut the presumption that the house is Mr. Briney's separate property.

2. **Ms. Morgan failed to meet her burden of proving by direct and positive evidence that any increase in the value of the house since the creation of the CIR was created by community funds or labor.**

Like Mr. Briney's interests in Bel Air & Briney and his investment and retirement accounts, because the house was Mr. Briney's separate property it was error for the trial court to award Ms. Morgan any interest in it because she failed to meet her burden of proving by direct and positive evidence that any increase in the value of the house during the CIR "was attributable to community contributions." *Marriage of Lindemann, supra*, 92 Wn. App. 64, 69 – 70

The trial court concluded that "the house appreciated in its value due to the *improvements each party contributed* to the home", that Ms. Morgan's "gardening/landscaping efforts certainly improved the outward appearance of the home *and its value* [and] her services inside the home, as well as her efforts during all three remodels *also improved the value of the home over the years*". (CP 683) (emphasis added)

Whether these were findings of fact or – as characterized by the trial court – conclusions of law, they were erroneous.

**a. Ms. Morgan made no contributions that were attributable to the increase in the value of the house.**

First, it is undisputed that Ms. Morgan provided no money towards the house except the purchase of plants and some furniture and furnishings, and she took almost all of the latter with her when she moved out of the house. (CP 674, RP 418)

Second, although Ms. Morgan introduced evidence of services she provided in the form of gardening and providing plants for the yard and assisting Mr. Briney with respect to the three remodels, she introduced no evidence – substantial, direct, or positive – that any portion of the increase in the value of the house was attributable to any of those efforts.

**b. Ms. Morgan provided no direct and positive evidence that Mr. Briney made community contributions that were attributable to the increase in the value of the house.**

As noted already with respect to Mr. Briney's other separate assets – his investment and retirement accounts and interest in Bel Air & Briney -- Ms. Morgan produce virtually no evidence of Mr. Briney's income or deposits into his investment or retirement accounts during the CIR.

For the house Ms. Morgan did produce proof of some expenditures made by Mr. Briney: remodels costing a total of about \$415,000 over an approximately nine- year span (CP 675), and his 17 years of mortgage payments. (Exhibit 34) However, that proved only that Mr. Briney had enough money to make those payments, and is neither direct or positive evidence that the source was community funds or labor.

It appears that the trial court awarded Ms. Morgan an interest in the increase in the value of the house based only upon

an erroneous conclusion of law: it mischaracterized the house as community property.

**3. Even if Ms. Morgan were entitled to an interest in the increase in the value of the house, the trial court's calculation of that value was erroneous.**

As stated *supra*, Mr. Briney purchased the house in November 1995 for \$370,000. The CIR ended when Ms. Morgan moved out in February 2013. (CP 687) The assessed value of the house in 2013 was \$787,000. (Exhibit 85) Ms. Morgan produced no evidence of the house's value at the end of the CIR: she only provided an appraisal report as of December 16, 2014, almost two years later, when its appraised value was \$1.09 million. (Exhibit 52)

The trial court arbitrarily, and sloppily, made an attempt to establish the value of the house when the CIR ended in February 2013. It subtracted 8.5% from its value in Conclusion of Law 4 (CP 683), and 15% in Conclusion of Law 8 (CP 687), without any explanation or any basis in the trial record of either. It later chose 8.5% as the "correct" amount of the deduction, again without explanation. (CP 729).

The trial court awarded \$461,675 to Ms. Morgan as one-half of the alleged \$923,350 increase in the value of the house during the CIR: its December 2014 appraised value of \$1.09 million less Mr. Briney's down payment (\$74,000) and 8.5% of the appraised value. (CP 730)

This calculation contained three glaring errors, even if the CIR began in 1995 and not 1999.

First, the trial court failed to recognize that the purchase price of the house was \$370,000, not \$74,000, the difference being the \$296,000 mortgage that Mr. Briney paid off during the CIR.

Second, the trial court should have used the proven, objective \$787,000 assessed value of the house, rather than making up out of thin air an 8.5% reduction in the value of the house 21 months after the CIR ended, ignoring the equally unsupportable 15% reduction also included in its Conclusions of Law.

Third, at least 75% of the increase in the value of the house during the CIR was attributable to the increase in the value of the land, none of which had anything to do with community contributions. The trial court correctly found that "[t]he market improved vastly since the purchase of the home in 1995" (CP 683), as demonstrated by the 2013 assessed value and 2014 appraisal, which stated the land was worth \$624,000 and \$800,000, and between 73% and 79% of the total value of the house, respectively.<sup>11</sup> Even if all of the trial court's erroneous calculations were correct, Ms. Morgan would have been entitled to a portion of no more than \$231,000, 25% of the increase in the value of the house between 1995 and 2013.

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<sup>11</sup>Page 17, *supra*

Finally, the trial court held that *Merrick, supra*, 155 Wash. 517, 520 (1930) was somehow applicable, when it has nothing to do with the issue.

**H. Even if Ms. Morgan Had Met her Aforementioned Burden of Proof, Her Award Should Have Been Entirely Offset By the Benefits She Received From the CIR.**

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." *Connell* at 351; also *Lindemann* at 74

Ms. Morgan received several hundred thousand dollars of benefits from her relationship with Mr. Briney, including over \$200,000 in free rent; over \$100,000 in free automobile ownership, use, and insurance; tens of thousands of dollars in payments for utilities and other living expenses, and even \$95,000 that her parents received when Mr. Briney saved their property from foreclosure.

Even if there were a CIR, and even if there were "community-like property" to be divided by the trial court, it should not have done so because such a distribution would be entirely offset by the benefits Ms. Morgan received from the CIR.

In Conclusion of Law no. 4 the court concluded that "it would be inequitable to offset any rent 'owed' against Ms. Morgan's half of the house's value. Ms. Morgan is not charging back wages for

caring for the home, tending to Mr. Briney, cooking, cleaning and gardening. The couple behaved as if in a marital-like relationship, therefore, no back rent is owed nor are wages she would be entitled to as a cook, laborer, painter, gardener, laundress or twenty-four hour care taker. The two offset each other as an equitable resolution.” (CP 684)

This conclusion of law might make sense if the house had been correctly treated as Mr. Briney’s separate asset and Ms. Morgan therefore been denied any interest in it. But the trial court had already used the above reasoning to mischaracterize the house as a community asset in Conclusion of Law no. 8. (CP 686) and support an award for one-half of the increase in the value of Mr. Briney’s investment and retirement accounts in Conclusion of Law no. 10 (CP 687), resulting in an award of over \$1.1 million contrary to the very legal principles the trial court espoused in Conclusion of Law no. 3 and the implementation of those principles in Conclusions of Law 5 and 7.

The trial court cannot have it both (actually, three) ways. The law does not allow Ms. Morgan’s marital-like services to constitute a community contribution when they do not increase the value of Mr. Briney’s house and investment accounts, both of which are his

separate property. But if that treatment were appropriate, as the trial court held, they could not also be used to prevent the offset of the benefits she received in the amount of over \$400,000 during the CIR.

## VI. CONCLUSION

At the end of the trial the trial court admitted that it and the appellate courts would have great difficulty finding that any of the increase in the value of Mr. Briney's assets was attributable to community contributions because of Ms. Morgan's failure to produce the necessary evidence pursuant to *Lindemann*, and *Soltero, supra*.

In the trial court's Findings of Fact and Conclusions of Law it explicitly pledged fealty to the principles of community and separate property as they apply to a CIR, and then correctly applied them to Mr. Briney's interest in Bel Air & Briney for the same reasons that it expressed at the trial: Ms. Morgan's failure to produce the necessary evidence.

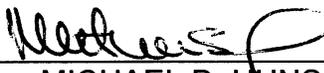
But the trial court then totally disregarded those principles of law and ignored the absence of evidence to award Ms. Morgan a \$1.173 million judgment against Mr. Briney, without even attempting to make a single finding of act or conclusion of law that

supports any portion of that award.

The trial court's ruling must be reversed in its entirety and Ms. Morgan's case must be dismissed with prejudice.

DATED this 13th day of April, 2016.

THE HUNSINGER LAW FIRM  
Attorneys for Appellant

By:   
MICHAEL D. HUNSINGER  
WSBA NO. 7662

### CERTIFICATE OF SERVICE

I certify that on the 13th day of April, 2016, I caused a true and correct copy of this Statement of Arrangements to be served on the following on April 13, 2016, in the manner indicated below:

Counsel for Respondent

Zeshan Khan  
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