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NOV 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 292100
(Consolidated with No. 297462)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

BETTE LYN KELLY,

Plaintiff-Appellant,

v.

PETER MOESSLANG,

Defendant-Respondent.

BRIEF OF APPELLANT

Attorneys for Plaintiff-Appellant:

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I. INTRODUCTION

This case presents questions of whether, and under what circumstances, the applicable statute of limitations or the doctrine of laches bar a claim for just and equitable division of property acquired during a meretricious or committed intimate relationship.¹

After living together for approximately 19 of 22 years between August 1984 and November 2006, and working together for the entire time, Peter Moesslang (Moesslang) and Bette Lyn Kelly (Kelly) agreed that they should live in separate residences. In November 2006, Kelly moved out of the home she and Moesslang built almost 20 years earlier, into another home that they had built more recently. They continued working together after the separation, and attempted to divide the property acquired during their relationship amicably. However, in the summer of 2009, when settlement negotiations reached an impasse, Moesslang “fired” Kelly from her job and commenced an unlawful detainer action seeking to evict her from the home where she resided. In response, Kelly

¹ Although the superior court below used the adjective “meretricious” to describe the type of non-marital relationship at issue in this case, this brief uses the phrase “committed intimate relationship” in accordance with the convention adopted in *Olver v. Fowler*, 161 Wn.2d 655, 658 n.1, 168 P.3d 348 (2007). The difference in nomenclature does not reflect a difference in substance, as “intimacy” and “commitment” are just two of the non-exclusive factors that a superior court may consider in deciding whether and how to fairly and equitably divide property acquired during the relationship. See *In re Long & Fregeau*, 158 Wn.App. 919, 922, 244 P.3d 26 (2011).

filed this action to obtain a just and equitable judicial division of the property acquired during her relationship with Moesslang.

On successive summary judgment motions, the superior court below ruled that Kelly's claim was barred by the statute of limitations and the doctrine of laches, ejected her from her home, awarded damages against her in the amount of \$20,722 for occupancy of the home prior to ejectment, and ordered her to pay \$10,619.48 of Moesslang's attorney fees and costs. From these rulings, Kelly now appeals.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by dismissing on summary judgment Kelly's claim for just and equitable division of property acquired during her relationship with Moesslang. CP 600-02 (order); CP 618-22 (oral decision).
2. The superior court erred by ejecting Kelly from her home on summary judgment. CP 825-30 (order); CP 800-805 (memorandum decision).
3. The superior court erred by awarding damages against Kelly for occupancy of the home prior to ejectment. CP 1044-45 (judgment).
4. The superior court erred by including findings of fact in its summary judgment orders. CP 600-02, 825-30.
5. The superior court erred by awarding attorney fees and costs against Kelly. CP 1073-74 (judgment); CP 1046-49 (memorandum decision).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When does a claim for just and equitable division of property acquired during a committed intimate relationship accrue for purposes of the applicable statute of limitation? (Assignments of error #1-4.)
2. What is the limitations period applicable to such a claim? (Assignments of error #1-4.)
3. Under what circumstances does the doctrine of laches bar such a claim? (Assignments of error #1-4.)
4. Is an award of attorney fees and costs warranted under the circumstances of this case? (Assignment of error #5.)

IV. STATEMENT OF THE CASE

A. Living together.

Kelly and Moesslang began dating in October 1983, and they started living together in August 1984. CP 369 (B.L. Kelly Decl., ¶¶ 2-4). Initially, along with Kelly's son, Ty, they moved into a house located on Liberty Lake, Washington, which was owned by one of Moesslang's friends. CP 369 (B.L. Kelly Decl., ¶ 4); CP 379 (T. Kelly Decl., ¶ 3). Then, in the summer of 1985, they moved into an attached apartment owned by the same friend. CP 369 (B.L. Kelly Decl., ¶ 5); CP 379 (T. Kelly Decl., ¶ 3).

B. Construction of the Liberty Lake home.

Beginning in late 1985 or early 1986, Kelly and Moesslang started looking for a home of their own. CP 369 (B.L. Kelly Decl., ¶ 6). After

looking for a period of time without success, they decided to purchase a lot on Liberty Lake to build a home for themselves instead. CP 369-70 (B.L. Kelly Decl., ¶ 7). Construction began in late 1986, and was completed with the participation of both Moesslang and Kelly. CP 370 (B.L. Kelly Decl., ¶ 8); CP 379 (T. Kelly Decl., ¶ 3, stating Moesslang and Kelly “jointly designed and built” the house).

Near the end of September or the beginning of October 1987, Moesslang, Kelly and Kelly’s son moved into the home they had built. CP 370 (B.L. Kelly Decl., ¶ 9); CP 379 (T. Kelly Decl., ¶ 4). Although Kelly’s son eventually left home to go to college, Moesslang and Kelly continued living together in the Liberty Lake home. CP 379 (T. Kelly Decl., ¶ 4).²

C. Purchase of the Coeur d’Alene home.

Some time in 1999, Moesslang and Kelly purchased another home in Coeur d’Alene, Idaho, under the name of MacKelly Construction, Inc.

² The record does not reflect the source of funds used to purchase the Liberty Lake lot or build the Liberty Lake home. When they were living in the friend’s apartment, around the same time that they were building the Liberty Lake home, Kelly paid rent, utilities and other expenses for the family. CP 369 (B.L. Kelly Decl., ¶ 5). Moesslang claims that Kelly “never contributed any funds to any project of mine whatsoever,” and “never pooled any assets toward a project or for any other reason.” CP 63. However, Moesslang does not specifically address the Liberty Lake home, and it is not apparent whether he considers the Liberty Lake lot and home a “project” within the meaning of his declaration. Moreover, it is not apparent that the money contributed toward any of Moesslang’s projects was separate as opposed to community-like property. (Property jointly owned by partners in a committed intimate relationship shall be referred to in this brief as “community-like” in accordance with the convention adopted in *Soltero v. Wimer*, 159 Wn.2d 428, 430 n.1, 150 P.3d 552 (2007).)

CP 373 (B.L. Kelly Decl., ¶ 24). MacKelly Construction is a corporation formed by Moesslang and Kelly. CP 372 (B.L. Kelly Decl., ¶ 21). Following the purchase of the Coeur d'Alene home, Moesslang lived there for about two years, although not on an exclusive basis. CP 373 (B.L. Kelly Decl., ¶ 24). Kelly and Moesslang continued to see each other "on a near daily basis." *Id.* They worked together, ate dinner together, and attended gatherings with family and friends. *Id.* For her part, Kelly continued to purchase Moesslang's clothing and cut his hair. She purchased joint gifts for family and friends, and even did yard work at the Coeur d'Alene home. *Id.* For his part, Moesslang never changed his permanent address from the Liberty Lake home. *Id.* MacKelly Construction sold the Coeur d'Alene home some time in 2002, and Moesslang moved back to the Liberty Lake home.³

D. Construction of the Trail Creek home.

In the meantime, Moesslang and Kelly began building another home near Livingston, Montana, known as the Trail Creek home. CP 372 (B.L. Kelly Decl., ¶ 20). Kelly was originally from Montana, and the parties originally intended that the Trail Creek home would belong to her alone. CP 372 (B.L. Kelly Decl., ¶ 20). Moesslang told others that the

³ As with the Liberty Lake home, the record does not reflect the source or character of funds used to purchase the Coeur d'Alene home, nor does it reflect the disposition of the proceeds from the sale of the home.

home would belong to Kelly. CP 383-84 (P. Holtappels Decl., ¶ 6); CP 388 (D. Frederick Decl., ¶ 5). Moesslang, Kelly and Kelly's son were actively involved in designing and building the home. CP 373 (B.L. Kelly Decl., ¶ 22); CP 388-89 (D. Frederick Decl., ¶¶ 4-10). Construction started in 1998 and was completed in 2001. CP 372-73 (B.L. Kelly Decl., ¶¶ 20 & 23).

Admittedly, construction of the Trail Creek home prompted Kelly to think that Moesslang no longer wanted to live with her. CP 372 (B.L. Kelly Decl., ¶ 21). For his part, Moesslang described the Trail Creek home to a friend of 30 years as a "retreat" for Kelly, "whenever they would be separated by age, sickness or for whatever other reason." CP 383-84 (P. Holtappels Decl., ¶ 6). Moesslang described the Trail Creek home to the builder as intended for Kelly "particularly in her later years when she would want to spend more time surrounded by her family and friends." CP 388 (D. Frederick Decl., ¶ 5).

In any event, the parties originally intended that Kelly would live in and work from the Trail Creek home. CP 373 (B.L. Kelly Decl., ¶ 23). However, it proved impossible to work long distance, so Kelly spent a limited amount of time in Montana and continued to reside principally in

the Liberty Lake home. *Id.* The Trail Creek home was sold in 2005. CP 384 (P. Holtappels Decl., ¶ 7); CP 389 (D. Frederick Decl., ¶ 11).⁴

E. Construction of the River Run home.

After the sale of the Trail Creek home, the parties decided to build another home for Kelly in Spokane, Washington, known as the River Run home. CP 376 (B.L. Kelly Decl., ¶ 28). Kelly was personally involved in the construction of the home. CP 396 (D. Largent Decl., ¶¶ 3-4). As with the Trail Creek home, Moesslang told Kelly and others that the River Run home would belong to her alone. CP 376 (B.L. Kelly Decl., ¶ 28); CP 384 (P. Holtappels Decl., ¶ 7); CP 396-97 (D. Largent Decl., ¶¶ 3, 7); CP 398-99 (T. Murphy Decl.). Moesslang also told Kelly and her now-adult son that, even though they would be living separately, he still considered them to be a family. CP 376 (B.L. Kelly Decl., ¶ 28). In November 2006, Kelly moved into the River Run home. CP 376 (B.L. Kelly Decl., ¶ 35); CP 397 (D. Largent Decl., ¶ 6); CP 399 (T. Murphy Decl.).⁵

⁴ As with the Liberty Lake and Coeur d'Alene homes, the record does not reflect the source or character of the funds used to purchase the Trail Creek home, nor does it reflect the disposition of the proceeds from the sale of the home.

⁵ Moesslang claims that "I have made all payments" for the River Run home, and Kelly "has paid nothing toward the home." CP 543. However, the record does not reflect the character of the payments, i.e., whether they were made from separate or community-like property.

F. Working together.

From the beginning of their relationship, Kelly and Moesslang worked together. CP 371 (B.L. Kelly Decl., ¶ 17). Initially, Kelly maintained a regular job during the week, and worked nights and weekends with Moesslang on various investment projects that became known as the Shenandoah partnership. CP 371-72 (B.L. Kelly Decl., ¶ 17). In 1991, they formed MacKelly Construction. CP 371-72 (B.L. Kelly Decl., ¶ 17). In March 1992, at Moesslang's urging, Kelly quit her weekday job so that she could work full time for Shenandoah, MacKelly Construction, and other business ventures. CP 370 (B.L. Kelly Decl., ¶ 12). By Moesslang's own account, Kelly's work was "instrumental in the success" of the business ventures. (P. Holtappels Decl., ¶ 5). Moesslang "often commented on what an excellent job [she] did[.]" CP 392 (T. Sanner Decl., ¶ 5).

G. Summary of the parties' relationship.

In total, Moesslang and Kelly lived together for approximately 19 of 22 years between August 1984 and November 2006, excluding the time that Moesslang lived in the Coeur d'Alene home, and the occasions that that Kelly lived in the Trail Creek home.⁶ In addition, Moesslang and

⁶ A condensed timeline of the parties' cohabitation with record citations is contained in the Appendix. Moesslang and Kelly shared a bedroom from the beginning of their relationship until 1999. CP 374 (B.L. Kelly Decl., ¶ 25). When they resumed living

Kelly worked together for approximately 25 years, on a part-time basis from August 1984 through March 1992, and on a full-time basis from March 1992 until approximately five years post-separation.

Throughout their relationship, Moesslang, Kelly and Kelly's son lived as a family. CP 379-80 (T. Kelly Decl., ¶¶ 4, 7-8). Moesslang referred to Kelly as his "wife" and to Kelly's son as his own "son." CP 379-80 (T. Kelly Decl., ¶¶ 2, 8); CP 392 (T. Sanner Decl., ¶ 4, former long-term employee). They took family vacations together. CP 379 (T. Kelly Decl., ¶ 5). They visited and entertained Moesslang's friends and family. CP 370 (B.L. Kelly Decl., ¶¶ 8, 16). CP 379-80 (T. Kelly Decl., ¶ 5). They jointly supported Kelly's son during his schooling. CP 380 (T. Kelly Decl., ¶ 6). Moesslang and Kelly executed reciprocal general powers of attorney in 1994, and Moesslang executed a will in 1995, naming Kelly as sole beneficiary if she survived him, and naming her son as his sole beneficiary if she did not. CP 371 (B.L. Kelly Decl., ¶¶ 13-14).

By outward appearances, Moesslang and Kelly were a family. One of Moesslang's friends of 30 years states that Moesslang lived with Kelly "as his wife, or spouse" through 2008. CP 383 (P. Holtappels Decl., ¶ 4). A long-term employee, from the mid-1980s through the spring of 2004,

together in 2002 at the Liberty Lake home, they had not been sexually intimate for an extended period of time, and they started sleeping in separate bedrooms. CP 374 (B.L. Kelly Decl., ¶¶ 25-26).

states that Moesslang and Kelly “always held themselves out as a married couple, living together as a family unit.” CP 391 (T. Sanner Decl., ¶ 2). According to the employee their relationship was “that of a typical husband and wife,” and he “was surprised to learn that they were not actually married.” CP 392 (T. Sanner Decl., ¶ 4). The builder of the River Run home “assumed they were married” in 2005-2006 time frame. CP 396-97 (D. Largent Decl., ¶ 5).

H. Summary of property acquired during the relationship.

During their relationship, Moesslang and Kelly accumulated real property, including the Liberty Lake home, several lots on Liberty Lake, the Trail Creek home, and the River Run home. CP 372 (B.L. Kelly Decl., ¶ 21). They also accumulated personal property, including interests in the Shenandoah partnership and MacKelly Construction. *Id.*; CP 5 (Complaint, ¶¶ 17-18, listing additional real & personal property).

I. The end of the relationship.

In the early 2000s, Kelly sought legal advice regarding the nature of her interest in property acquired during her relationship with Moesslang. However, she did not take any action at that time.

In 2007, after she moved into the River Run home and stopped living with Moesslang, Kelly became concerned about the lack of formality in her relationship with Moesslang. CP 375 (B.L. Kelly Decl.,

¶ 29). Moesslang contacted their business attorney and obtained a referral for Kelly to a family law attorney. CP 375 (B.L. Kelly Decl., ¶ 29). The parties engaged in amicable negotiations with the assistance of counsel, culminating in a formal mediation in the summer of 2009. CP 375-76 (B.L. Kelly Decl., ¶¶ 30-32).

When settlement negotiations proved to be unfruitful, Moesslang removed Kelly from his will, “fired” her from her job, and commenced an unlawful detainer action against her, seeking to evict her from the River Run home. CP 376 (B.L. Kelly Decl., ¶¶ 32-33). Kelly successfully avoided eviction in the unlawful detainer action and commenced this lawsuit, seeking a just and equitable judicial division of property acquired during her relationship with Moesslang. CP 3-7 (Complaint).⁷

J. Other relationships.

During their relationship with each other, Moesslang and Kelly also had relationships with other people. When Moesslang and Kelly first started living together in August 1984, Kelly was still married to the father of her son, although she had been separated from him for approximately six years. CP 368-69 (B.L. Kelly Decl., ¶ 6(1)). Kelly commenced dissolution proceedings on December 12, 1984, and obtained a decree of

⁷ Kelly also filed a separate wrongful termination lawsuit, which was dismissed and not appealed.

dissolution on June 30, 1986. CP 102-05 (summons & petition for dissolution); CP 112-14 (decree of dissolution).

Moesslang claims that he “dated” another woman named Denise Cole, “although not exclusively,” from 1989 or 1990 until some time in 1995. CP 62 (P. Moesslang Decl.) According to Moesslang, that dating relationship “trailed off,” but then he and Cole “reconnected at some time in 1999 or 2000” and formed what he describes as “a significant romantic relationship.” *Id.* Moesslang does not deny any significant romantic relationships with Kelly or anyone else. *See id.*

Although Moesslang never told her about affairs with Cole or anyone else, Kelly gradually became aware of them. CP 368 (B.L. Kelly Decl., ¶ 5). When confronted, Moesslang “adamantly denied” having an affair, or was dismissive of Kelly’s concerns and “reiterated his commitment” to her. CP 368, 373 (B.L. Kelly Decl., ¶¶ 5, 24). For her part, Kelly engaged in affairs of her own beginning in the early 2000s.

K. Procedural history.

Moesslang moved for summary judgment of dismissal of Kelly’s complaint on grounds that it was barred by the statute of limitations. In response to the motion, the superior court ruled that the 3-year statute of limitations, RCW 4.16.080, applies to claims for division of property

acquired during a meretricious or committed intimate relationship, and that the limitations period begins to run from the end of the relationship.⁸

The court asked the parties to provide additional briefing on the issues of “[w]hether a meretricious relationship existed,” and, if so, “when did the relationship commence and when did it terminate?” CP 214. The court subsequently found that the relationship began in 1986 and ended in 1999. CP 646. Because Kelly’s complaint was filed on October 9, 2009, more than three years after the end of the relationship as determined by the court, the court granted the motion for summary judgment and dismissed Kelly’s claims with prejudice. CP 646-48. Sua sponte, the court also ruled that Kelly’s claims were barred by the doctrine of laches as an independent and alternative basis for summary judgment. CP 647.

Following entry of summary judgment, the court gave Kelly an opportunity to amend her complaint to establish an alternate grounds for her interest in the River Run home. However, the court ultimately dismissed the amended complaint on summary judgment as well, granted Moesslang’s cross motion for summary judgment to eject Kelly from the home, awarded Moesslang \$20,722 damages for her occupancy of the home prior to ejection, and awarded \$10,619.48 attorney fees and costs on grounds of “intransigence.” CP 800-805 (memorandum decision re:

⁸ The superior court declined to specify which subsection(s) of RCW 4.16.080 formed the basis for its decision. CP 647.

ejectment); CP 825-30 (summary judgment order re: ejectment); CP 1044-45 (judgment re: ejectment damages); CP 1046-49 (memorandum & order re fees & costs). From these rulings, Kelly timely appeals to this court. CP 1050-72 (notice of appeal); CP 644-648 (interlocutory notice of appeal).

V. SUMMARY OF ARGUMENT

Property acquired during a committed intimate relationship is analogous to community property acquired during marriage. The property is presumptively owned by both parties in equal and undivided shares, regardless of who holds nominal title. The parties' respective ownership interests arise on the date that the property is acquired, and neither party loses their ownership interest upon termination of the relationship. Instead, the parties continue to own the property as tenants in common, unless and until there is a judicial distribution of the property, adverse possession (in the case of real property), or conversion (in the case of personal property).

There is no limitation period for judicial distribution of jointly owned property, and the parties are free to continue their joint ownership indefinitely. The limitations period for adverse possession of real property is 7-10 years under RCW 4.16.020(1) or RCW 7.28.050 (depending on color of title). The limitations period for conversion of personal property is three years under RCW 4.16.080(2). Regardless of whether the property in

question is realty or personalty, a cause of action does not accrue, and the limitations period does not begin to run, until one party is deprived of possession or use of the jointly owned property by ouster.

Moesslang has failed to satisfy his burden of proving that Kelly's claim for a just and equitable division of property acquired during their meretricious relationship is barred by the statute of limitations. As a result, the superior court erred when it granted summary judgment in favor of Moesslang on his statute of limitations defense. Because the superior court's subsequent orders ejecting Kelly from her jointly owned home and awarding damages for occupancy of the home prior to ejectment are premised upon the statute of limitations defense, they are likewise in error.

The superior court's sua sponte reliance upon the doctrine of laches as an independent and alternative basis for summary judgment is in error because there is no evidence of prejudice suffered by Moesslang as a result of the timing of Kelly's lawsuit.

The superior court's award of attorney fees and costs is an abuse of discretion because it is based on inadequate findings.

VI. ARGUMENT

A. Overview of committed intimate relationships and the nature of the parties' interests in property acquired during such a relationship.

A “committed intimate relationship” refers to a stable, marital-like relationship where both parties live together (cohabit) with knowledge that a lawful marriage between them does not exist. *See Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Prior to 1984, a party living in such a relationship was presumed law not to have any interest in property acquired during the relationship unless the property was titled or held in that party’s name. *See Marriage of Lindsey*, 101 Wn.2d 299, 301-304, 101 Wn.2d 299 (1984) (discussing *Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948)). This presumption, described in subsequent decisions as the *Creasman* presumption, resulted in patent unfairness:

The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship.

Lindsey, 101 Wn.2d at 303 (quoting *Estate of Thornton*, 81 Wn.2d 72, 79, 499 P.2d 864 (1972) (Finley, J., concurring)). In tacit recognition of this unfairness, courts developed a number of exceptions to the *Creasman*

presumption. *See Lindsey*, at 303-04. However, the exceptions proved to be “unpredictable and at times onerous” to apply. *Id.* at 304.⁹

As a result, the Washington Supreme Court overruled *Creasman* in 1984. *See Lindsey*, 101 Wn.2d at 304. In its place, the Court adopted a rule that property acquired during a committed intimate relationship is subject to a just and equitable disposition between the parties. *See id.* In rejecting *Creasman* and adopting the new rule, the Court in *Lindsey* drew an express analogy to the division of community property in marital dissolution cases under RCW 26.09.080. *See id.*

The Court subsequently elaborated on the nature of the *Lindsey* rule and the analogy to marital dissolution cases in *Connell*, 127 Wn.2d at 348-52. Income and property acquired during a committed intimate relationship is characterized in the same manner as income and property acquired during marriage. *See id.* at 351. Property that would have been characterized as community property if the parties were married is properly before the court and subject to a just and equitable distribution.

⁹ The recognized exceptions are: (1) implied partnership; (2) resulting or constructive trust; (3) tracing of funds; (4) contract; and (5) tenancy in common. *See Peffley-Warner v. Bowen*, 113 Wn.2d 243, 251 n.9, 778 P.2d 1022 (1989) (listing exceptions); *Marriage of Pennell*, 142 Wn.2d 592, 600, 14 P.3d 764 (2000) (similar list); *Connell*, 127 Wn.2d at 347 (similar list); *Lindsey*, 101 Wn.2d at 303-04 (similar list). These exceptions appear to retain their vitality as independent bases for claiming an interest in property, both within and outside of a committed intimate relationship. *See Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.3d 735 (2001) (remanding for trial on independent theories of “meretricious relationship, implied partnership, and equitable trust”). However, they are not at issue in this case.

See id. at 349. In making the necessary characterization, all property acquired during a committed intimate relationship is presumed to be community-like, and, therefore, owned by both parties. *See id.* at 350-51. While the presumption of common ownership is rebuttable, the fact that title has been taken in the name of only one of the parties is not sufficient, by itself, to rebut the presumption. *See id.* at 351. This approach ensures that one party is not unjustly enriched at the end of a committed intimate relationship, and it avoids the difficulties created by the *Creasman* presumption. *See id.* at 349-50.¹⁰

Following *Lindsey* and *Connell*, the courts employ a three-step analysis to claims for a just and equitable division of property acquired

¹⁰ The analogy to the division of property in marital dissolution cases is limited in only one respect, i.e., separate property owned by each party before their committed intimate relationship began is not before the court for distribution at the end of the relationship. *See Connell*, 127 Wn.2d at 349-51; *Soltero v. Wimer*, 159 Wn.2d 428, 434, 15 P.3d 552 (2007).

Of course, apart from the division of property, parties in a committed intimate relationship do not enjoy the rights that attach to the status of being legally married. *See, e.g., Davis v. Employment Sec. Dep't*, 108 Wn.2d 272, 278-79, 737 P.2d 1262 (1987) (holding unmarried cohabitant not entitled to unemployment benefits based on “marital status” under RCW 50.20.050(4)); *Peffley-Warner*, 113 Wn.2d at 252-53 (holding unmarried cohabitant not entitled to inherit as “spouse” under intestacy statute, RCW 11.04.015(1)); *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 753-54, 953 P.2d 88 (1998) (holding unmarried cohabitants not entitled to protection from discrimination based on “marital status” under Washington Law Against Discrimination, RCW 49.60.180(2)-(3)); *Western Comm. Bank v. Helmer*, 48 Wn.App. 694, 699, 740 P.2d 359 (1987) (holding unmarried cohabitants not entitled to attorney fees under marital dissolution statute, RCW 26.09.140); *Roe v. Ludtke Trucking, Inc.*, 46 Wn.App. 816, 819, 732 P.2d 1021 (1987) (holding unmarried cohabitant not “wife” under wrongful death statute, RCW 4.20.020); *Continental Cas. Co. v. Weaver*, 48 Wn.App. 607, 610-12, 739 P.2d 1192 (1987) (holding unmarried cohabitant not within definition of insured’s “immediate family” under insurance contract). These types of rights based on marital status are not at issue in this case.

during a committed intimate relationship. *See Marriage of Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). First, the court must determine whether a meretricious relationship exists. *See id.* Second, if such a relationship exists, the court then evaluates the interest each party has in the property acquired during the relationship. *See id.* Third, the trial court then makes a just and equitable distribution of such property. *See id.*

The first step of the analysis involves a fact-intensive determination whether the parties lived together in a long-term, stable, nonmarital family relationship. *See Pennington*, 142 Wn.2d at 603. Relevant factors include continuous cohabitation, the duration of the relationship, the purpose of the relationship, the pooling of resources and services for joint projects, and the intent of the parties. *See id.* These factors are intended to reach all of the relevant evidence, and they do not comprise an exclusive list or “a rigid set of requirements.” *See Lindsey*, 101 Wn.2d at 305; *Vasquez*, 145 Wn.2d at 108.

Under the second step of the analysis, property acquired during a committed intimate relationship is characterized based on the analogy to the division of property in marital dissolution. *See Connell*, 127 Wn.2d at 351-52. As described above, all income and property acquired during the relationship is presumed to be community-like, and, therefore, owned by both of the parties. *See id.* at 351. Each party has a present, undivided and

fully vested interest in each and every item of community property, and is considered to be a one-half owner thereof. *See Olver v. Fowler*, 161 Wn.2d 655, 670, 168 P.3d 348 (2007) (holding interest in community-like property survives dissolution of committed intimate relationship by death; citing *Lyon v. Lyon*, 100 Wn.2d 409, 413, 670 P.2d 272 (1983)).

Property owned by one of the parties before the relationship began, and property acquired from a separate-property source, such as gift or inheritance, is presumed to be separate property of that party. *See Connell*, 127 Wn.2d at 351-52. When the funds or services of both parties are used to increase the equity or to maintain or increase the value of property that would otherwise be characterized as separate, the “community” has a right of reimbursement, subject to an offset for any reciprocal benefit received from the use and enjoyment of the property. *See id.*; *Soltero*, 159 Wn.2d at 434-35.

Under the third and final step of the analysis, the court makes a just and equitable division of community-like property, considering the nature and extent of such property, the nature and extent of any separate property, the duration of the parties’ relationship, and the economic circumstances of each party, among other things. *See Connell*, 127 Wn.2d at 348 & n.3 (quoting former RCW 26.09.080). The ostensible “fault” of either party is not a proper consideration. *See Marriage of Muhammad*, 153 Wn.2d 795,

806-07, 108 P.3d 779 (2005) (reversing distribution of property in dissolution proceedings, including property acquired when the parties were living in a committed intimate relationship, where distribution was tainted by considerations of fault).

With a proper understanding of the nature of committed intimate relationships and the nature of the parties' interests in property acquired during such a relationship, it is possible to address the issues raised by the superior court's summary judgment orders.

B. Review of the superior court's summary judgment orders is de novo, and must take account of the fact that Moesslang has the burden of proving that Kelly's claims are barred by the statute of limitations and the doctrine of laches.

The superior court dismissed Kelly's claim for a just and equitable division of property acquired during her relationship with Moesslang, and ejected Kelly from her home on summary judgment. CP 600-02, 825-30. Review of summary judgment orders is de novo, and the decision of the superior court is entitled to no deference. *See Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Although the superior court included findings of fact in its summary judgment orders, CP 600-01, 826-28, they are superfluous and do not constrain this court in any respect. *See Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 249 n.10, 178

P.3d 981 (2008); *Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002).¹¹

Summary judgment is warranted only when there are no genuine issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. *See* CR 56(c). The evidence must be viewed in the light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences from the evidence. *See Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

Since summary judgment in this case was granted in favor of Moesslang, the evidence must be viewed in the light most favorable to Kelly, and all reasonable inferences from the evidence must be drawn in her favor. With respect to committed intimate relationships, such as the one alleged in this case, an appellate court may independently assess the legal sufficiency of facts that are undisputed or determined at trial, *see Pennington*, 142 Wn.2d at 602-03, but it should be reluctant to affirm summary judgment where the facts of the relationship are complicated or contested, *see Vasquez*, 145 Wn.2d at 108.

Moreover, summary judgment review must account for the burden of proof. The party having the burden of proof is obligated to produce

¹¹ The court has authority to enter findings narrowing the issues for trial only when the case is not fully resolved by summary judgment. *See* CR 56(d). As a result, Kelly has assigned error to the superior court's summary judgment "findings" pursuant to RAP 10.3(g).

evidence supporting every element of that party's claim or defense in order to avoid summary judgment. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (adopting standard for summary judgment from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The party not having the burden of proof may simply point to the absence of evidence supporting one or more elements of the opposing party's claim or defense. *See id.*

In this case, Kelly's claim was dismissed based on the statute of limitations and the doctrine of laches. As an affirmative defense, Moesslang has the burden of proving that Kelly's claim accrued and that the limitations period expired before she filed her complaint. *See Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). In addition, while the superior court raised the doctrine of laches sua sponte as an independent and alternative basis for summary judgment, this is likewise an affirmative defense on which Moesslang bears the burden of proof. *See King County v. Taxpayers of King County*, 133 Wn.2d 584, 642, 949 P.2d 1260 (1997). As a result, Moesslang is obligated to produce competent evidence to support every element of these defenses, while Kelly may simply point to the absence of any such evidence.

C. The superior court erred in concluding that Kelly’s claim accrued at the end of her relationship with Moesslang, and that the limitations period expired three years after the end of the relationship.

The superior court did not specifically identify an accrual date in its summary judgment orders. CP 600-01, 826.¹² Nonetheless, it appears that the court relied on the end of Kelly’s relationship with Moesslang for accrual of her claim. The court requested additional briefing because “the record was not sufficient to indicate when the relationship ended.” CP 214. After receiving additional briefing, the court concluded that “[t]he meretricious relationship cause of action does not survive because of the time lapse.” CP 601. In the context in which this conclusion—styled as a finding of fact—appears, the time lapse to which the court refers could only be the time after end of the relationship with Moesslang or the time after Kelly learned that she had a potential claim. CP 601-02. Since Kelly never claimed the limitations period was tolled pending discovery of her claim, it appears that the court relied on the end of the relationship as the accrual date for purposes of the statute of limitations. *See id.*¹³ This reading of the summary judgment order also seems to be confirmed by the superior court’s oral decision. *See* CP 619 (esp. lines 6-10, indicating

¹² This brief uses “accrual” to refer to the time when the applicable limitations period begins to run. *See Black’s Law Dictionary, s.v. “accrue”* (9th ed. 2009).

¹³ It appears that the court relied on Kelly’s knowledge of her potential cause of action for purposes of applying the doctrine of laches, which is addressed *infra*.

Kelly's rights based on her relationship with Moesslang, if any, arose at the end of the relationship).¹⁴

To the extent the superior court relied on the end of the relationship between Kelly and Moesslang as the date of accrual, the court erred. There is no authority that supports the court's decision, and it is contrary to the nature of community-like property (and marital community property to which it is analogous). The significance of this error is to render the date that the relationship ended immaterial to Moesslang's statute of limitations defense.

As noted above, each party in a committed intimate relationship has a present, undivided and fully vested interest in each and every item of community property, and is considered to be a one-half owner thereof. *See See Olver*, 161 Wn.2d at 670 (citing *Lyon*, 100 Wn.2d at 413). The duties of the parties with respect to the management of the property change upon termination of the relationship, but the parties do not lose their interest in the property. Before the end of the relationship, the parties owe each other the highest fiduciary duties in managing community property. *See Peters v. Skalman*, 27 Wn.App. 247, 251, 617 P.2d 448, *rev. denied*, 94 Wn.2d 1025 (1980); *see also Marriage of Chumbley*, 150 Wn.2d 1, 9, 74 P.3d

¹⁴ The court may rely on a superior court's oral decision to elucidate a summary judgment order. *See Baumgartner v. Department of Corrections*, 124 Wn.App. 738, 742-43, 100 P.3d 827 (2004); *Hurlbert v. Gordon*, 64 Wn.App. 386, 396 n.7, 824 P.2d 1238 (1992).

129 (2003) (citing *Peters* for this proposition). Afterward, they deal with each other at arm's length. See *Peters*, 27 Wn.App. at 252 (stating "termination of the marriage relieves the managing spouse of his or her duty to act for the benefit of the lapsed community").

To reflect both the change in the nature of their obligations to each other and also the continuation of their respective ownership interests, the parties are deemed to be tenants in common after the end of their relationship. In the venerable case of *Ambrose v. Moore*, 46 Wash. 463, 465-66, 90 Pac. 588 (1907), the Court explained:

Where no disposition of the property rights of the parties is made by the divorce court, the separate property of the husband prior to the divorce becomes his individual property after divorce, the separate property of the wife becomes her individual property, and, from the necessities of the case, their joint or community property must become common property. After the divorce there is no community, and in the nature of things there can be no community property. The divorce does not vest or divest title, the title does not remain in abeyance, and it must vest in the former owners of the property as tenants in common.

(Emphasis added.) Similarly, in *Peters*, 27 Wn.App. at 253-54, the court held that spouses owned community property as tenants in common once their marriage became defunct, so that one spouse could acquire the other spouse's interest by adverse possession. While *Ambrose* and *Peters* involve marital relationships, the principles they set forth cannot be ignored in the context of committed intimate relationships without doing

violence to the analogy between both types of relationships. *See Oliver*, at 670.¹⁵

Tenants in common are free to continue their joint ownership indefinitely, and there is no time limit within which they must pursue court action in order to retain or preserve their ownership interest. The statute of limitations is not even applicable unless and until one of the cotenants engages in acts or words—often described as an “ouster”—which clearly convey an intent to claim possession in his or her sole capacity and not as a tenant in common. *See Shull v. Shepherd*, 63 Wn.2d 503, 505, 387 P.2d 767 (1963) (pre-*Lindsey* case, stating ouster is essential to assertion of statute of limitations defense in an action to enforce interest of cotenant in property acquired during committed intimate relationship); *see also Silver Surprise, Inc. v. Sunshine Mining Co.*, 88 Wn.2d 64, 67, 558 P.2d 186 (1977) (holding cotenant could not claim defenses of statute of limitations or laches unless it first established ouster). There are compelling reasons for requiring ouster before a cause of action accrues

¹⁵ While a tenancy in common is often conceived in terms of an estate in land, it can also arise with respect to personal property. *See, e.g., MacKenzie v. Barthol*, 142 Wn.App. 235, 238, 173 P.3d 980 (2007) (recognizing Canadian dissolution decree awarding real and personal property located in Washington as tenants in common); *Lambert v. Peoples Nat'l Bank*, 89 Wn.2d 646, 648, 574 P.2d 738 (1978) (referring to mutual fund stocks held as tenants in common); *Mayo v. Jones*, 8 Wn.App. 140, 145, 505 P.2d 157 (1972) (citing rule that tenants in common must be joined in actions involving personalty); *Cline v. Price*, 39 Wn.2d 816, 821, 239 P.2d 322 (1951) (citing rule that tenants in common of personal property may seek partition or sale); *Yarwood v. Billings*, 31 Wash. 542, 543, 72 Pac. 104 (1903) (involving partition of personal property owned as tenants in common).

and the applicable limitations period begins to run; namely, “ensuring that the parties do not have to engage in litigation while their cotenancy relationship is ongoing, and clearly giving the affected party notice that the time limitation begins running.”¹⁶

Ouster must occur, if at all, with respect to each item of real or personal property that is held as tenants in common. This follows from the nature of ouster, which necessarily relates to a particular piece of property. It is also consistent with, if not mandated by, the “item theory” of community property followed in Washington. Under the item theory, the parties’ interest in community property extends to each and every item of property, as opposed to community property in the aggregate. *See Lyon*, 100 Wn.2d at 413; *see also Estate of Patton*, 6 Wn.App. 464, 477, 494 P.2d 238, *rev. denied*, 80 Wn.2d 1009 (1972) (prohibiting decedent-spouse from devising whole interest in specific items of community property even if surviving spouse received more than one-half of the community estate in the aggregate). Accordingly, ouster as to one item of property does not necessarily constitute ouster as to any other item of property, let alone as to all property owned in common.

¹⁶ The quoted language is from Judge Bridgewater’s unpublished opinion for the court in *Lambrecht v. Steinman*, 1997 WL 724975, at *3 (Wn.App., Div. II, Nov. 21, 1997). Counsel has not found a clearer statement of the reason for the rule elsewhere. However, because *Lambrecht* is an unpublished decision, it is cited for attribution rather than as authority.

When ouster does occur, it triggers different limitations periods depending on the nature of the property in question. The limitations period following ouster from real property is either seven years under RCW 7.28.050, which governs actions to recover property adversely possessed under color of title; or 10 years under RCW 4.16.020(1), which governs actions to recover real property in other cases of adverse possession. *See Peters*, 27 Wn.App. at 250-51 (applying RCW 7.28.050). Presumably, the limitations period following ouster from personal property is three years under RCW 4.16.080(2), which governs actions for “taking, detaining, or injuring personal property, including an action for the specific recovery thereof.”

With a proper understanding of the accrual principles and limitations periods applicable to a claim for just and equitable division of property acquired during a committed intimate relationship, it is apparent that Moesslang cannot satisfy his burden to prove that Kelly’s claims are barred by the statute of limitations. There is no evidence of ouster from personal property at all in the record, and there is no evidence of ouster from real property except for the River Run home, when Moesslang instituted his unlawful detainer action against Kelly seeking to evict her. Since Kelly filed this lawsuit shortly thereafter, it is unquestionably timely under the applicable limitations period. *See* CP 376 (B.L. Kelly Decl.,

¶ 33, stating sequence of events); CP 801 (memorandum decision, describing sequence of lawsuits).

D. The superior court's findings that the parties' relationship began in 1986 and ended in 1999 are immaterial to Moesslang's statute of limitations defense, and they are incorrect in any event.

In its summary judgment orders, the superior court included several overlapping findings of fact that “[t]he parties arguably had a meretricious relationship from 1986 to 1999,” that “[i]f the parties did have a meretricious relationship, it ended in 1999,” “[i]f a meretricious relationship did exist, it existed between 1986 and 1999,” and “[n]o meretricious relationship existed as a matter of law between [Kelly] and [Moesslang] from 1999 to the present day inclusive.” CP 600 (Findings #2-4); CP 826 (Finding #1). To the extent that these findings reflect the court’s determination that there is a question of fact regarding the existence of a committed intimate relationship between Kelly and Moesslang at some point in time, they are correct. However, to the extent that the findings reflect a determination, as a matter of law, that the relationship did not begin before 1986, or that it did not continue after 1999, the findings are incorrect.

As an initial matter, however, it should be noted that the superior court’s findings regarding the *start date* of the parties’ relationship are not

material to the statute of limitations defense or any other issue involved in the superior court's summary judgment orders or this appeal. The superior court's findings regarding the *end date* of their relationship are only material if Kelly's claim accrued upon termination of her relationship with Moesslang. To the extent accrual is actually based on ouster, as discussed above, the precise timing of the end of parties' relationship is of no consequence to this appeal.¹⁷

At any rate, the superior court's findings are in error. The findings that the relationship between Kelly and Moesslang began in 1986 are premised on the court's view that their cohabitation could not rise to the level of a committed intimate relationship so long as Kelly remained married to her former husband, without regard for the fact that the marriage was defunct and dissolution proceedings were then pending. The findings that the relationship ended in 1999 are premised on the court's view that the parties' temporary living arrangements for a period of approximately two years and their affairs with other people essentially ended their relationship, notwithstanding the fact that they resumed cohabitation for approximately four more years. In both respects, the

¹⁷ Of course, both the starting date and the ending date of the relationship are material to the division of property, because only property acquired during the relationship is treated like community property. See *Connell*, 127 Wn.2d at 349-51; *Soltero*, 159 Wn.2d at 434.

superior court's findings are based on an incorrect understanding of the law, and an improper weighing of the facts on summary judgment.¹⁸

1. **Kelly's prior defunct marriage does not foreclose a committed intimate relationship between her and Moesslang from the beginning of their cohabitation in August 1984.**

The superior court explained its findings regarding the start date of the committed intimate relationship between Kelly and Moesslang as being based on the date of dissolution of Kelly's prior marriage.¹⁹ As noted above, Kelly and her ex-husband separated in the summer of 1978. CP 368-69 (B.L. Kelly Decl., internal ¶ 6(1)). Kelly commenced dissolution proceedings on December 12, 1984, and obtained a decree of dissolution on June 30, 1986. CP 102-105 (summons and petition for dissolution); CP 112-14 (decree of dissolution). Kelly and Moesslang started cohabiting in August 1984, approximately six years after Kelly's separation from her ex-husband, and approximately two years before the dissolution of Kelly's prior marriage. CP 369 (B.L. Kelly Decl., internal ¶¶ 2-3).

¹⁸ The court noted its reliance on the Supreme Court's decision *Pennington*, but it did not acknowledge the different procedural posture of *Pennington* and its consolidated companion case (*In re Chesterfield & Nash*), both of which involved review of the sufficiency of the evidence following trial rather than summary judgment. *See* CP 619.

¹⁹ CP 619 (oral decision, stating "I look at that as from the time she was divorced from her prior husband"); *see Baumgartner*, 124 Wn.App. at 742-43 (permitting recourse to oral decision to elucidate summary judgment order); *Hurlbert*, 64 Wn.App. at 396 n.7 (same).

Kelly's prior marriage appears to have been defunct when she began cohabitating with Moesslang, based on physical separation from her ex-husband, lapse of time, her relationship with Moesslang, and commencement of dissolution proceedings. *See generally* 19 Kenneth W. Weber, et al., Wash. Prac., *Family & Community Property Law* §§ 6.1-6.3 (2010-11) (discussing defunct marriage). Regardless, marriage to one person does not preclude a committed intimate relationship with another. *See Long & Fregeau*, 158 Wn.App. 919, 925-26, 244 P.3d 26 (2010). While the existence of a marriage may be relevant, it is only one among several non-exclusive factors, and it is not dispositive. *See id.*; *see also Pennington*, 142 Wn.2d at 606 (indicating evidence of intent to be in a committed intimate relationship was merely "equivocal," notwithstanding one party's marriage to another person during the relationship). One factor tending to show the presence or absence of a committed intimate relationship is not more important than another, and the facts must be viewed as a whole. *See Pennington*, at 592; *Vasquez*, 145 Wn.2d at 107-08.

For example, in *Long & Fregeau*, a husband did not formally separate from his wife until approximately one year after starting to cohabitate with another person in a committed intimate relationship, and he did not obtain a divorce until approximately eight years later. *See* 158

Wn.App. at 923 (referring to cohabitation in “fall 1999,” and separation in “September 2000”); *id.* at 924 (referring to divorce in February 2007). The superior court found, and the Court of Appeals affirmed, that the overlapping marriage did not foreclose a committed intimate relationship. *See id.* at 924-28.

The overlap between Kelly’s prior marriage and her relationship with Moesslang (approximately two years) is substantially shorter than the overlap between the marriage and the relationship involved in *Long & Fregeau* (approximately eight years). Moreover, Kelly’s separation from her ex-husband occurred approximately six years before she began cohabiting with Moesslang, whereas the husband in *Long & Fregeau* did not separate from his ex-wife until approximately one year after he started cohabiting with another person. In light of these comparisons, Kelly’s prior marriage should constitute even less of an impediment to finding a committed intimate relationship in this case than it was in *Long & Fregeau*.

Notwithstanding the favorable comparisons, the procedural posture of this case on summary judgment should militate against weighing evidence of Kelly’s prior marriage against the other evidence in the record regarding her relationship with Moesslang under the guise of comparing and contrasting the facts of reported decisions. (The decision in *Long &*

Fregeau was rendered after a trial on the merits.) Given the fact-intensive nature of committed intimate relationships, Kelly should receive an opportunity to present the totality of her evidence at trial.

2. Kelly’s and Moesslang’s temporary separate living arrangements and their affairs with other people do not foreclose a committed intimate relationship between them after 1999.

The superior court explained its findings regarding the end date of the relationship between Kelly and Moesslang as being based on separation that occurred between 1999-2002, when Moesslang lived in the Coeur d’Alene home and Kelly lived at in the Liberty Lake and Trail Creek homes.²⁰ It is unclear whether the court’s reasoning was also based on the affairs that Moesslang and Kelly had with other people during and after this time. As with marriage, temporary separations and relationships with other people do not preclude the existence of a committed intimate relationship. While they may be relevant, they are not dispositive. *See Long & Fregeau*, 158 Wn.App. at 926-27 (finding substantial evidence to support superior court finding of committed intimate relationship, notwithstanding “three-month separation” and “several instances of infidelity”). They can only be evaluated at trial in the context of all the

²⁰ CP 619 (oral decision, referring to “the time that Mr. Moesslang moved out,” but incorrectly identifying the date as 2002, when Moesslang actually moved back in); *see Baumgartner*, 124 Wn.App. at 742-43; *Hurlbert*, 64 Wn.App. at 396 n.7.

evidence bearing on the existence or absence of a committed intimate relationship.

E. The superior court erred in dismissing Kelly’s claim based on the doctrine of laches, in the absence of any finding of prejudice to Moesslang.

In addition to the statute of limitations, the superior court concluded, sua sponte and as a matter of law, that the doctrine of laches barred Kelly’s claim for just and equitable division of property acquired during her relationship with Moesslang. CP 601.²¹ Preliminarily, the doctrine of laches is no more applicable to tenants in common than the statute of limitations before there is an ouster. *Silver Surprise*, 88 Wn.2d at 67. Since there was no ouster in this case, at least until Moesslang filed his unlawful detainer action, laches is unavailable to him as a defense to Kelly’s claim.

“Laches is an extraordinary remedy to prevent injustice and hardship and should not be employed as a ‘mere artificial excuse for denying to a litigant that which ... he is fairly entitled to receive[.]’” *Marriage of Barber*, 106 Wn.2d 390, 397, 23 P.3d 1106 (2001) (quoting *Brost v. L.A.N.D., Inc.*, 37 Wn.App. 372, 376, 680 P.2d 453 (1984)). “[U]nder ordinary circumstances the doctrine of laches should not be employed to bar an action short of the applicable statute of limitations.”

²¹ Moesslang did not plead laches in his answer to Kelly’s complaint, nor did he raise it in his motion for summary judgment. See CP 11-12 (Answer, listing affirmative defenses).

Brost, 37 Wn.App. at 375. In this case, to the extent that Kelly's claim is timely under the applicable statutes of limitation, she should not be subject to a defense of laches.

Moesslang cannot satisfy his burden of proving that the elements of laches have been satisfied. The elements of laches consist of (1) inexcusable delay coupled with (2) prejudice to the other party from such delay. *See Clark County PUD v. Wilkinson*, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000). In this case, the superior court appeared to find that the timing of Kelly's suit was a result of inexcusable delay, when it stated that "[t]he plaintiff sat on her rights too long" by waiting until October 9, 2009. CP 601. Whether or not this finding is vitiated by the fact that the parties were engaged in amicable settlement negotiations until just a few months before filing suit, there is no finding of prejudice suffered by Moesslang. *See* CP 601; *see also Welfare of A.B.*, 168 Wn.2d 908, 927 & n.42, 232 P.3d 1104 (2010) (stating the "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof").

Prejudice is the "main component" of the doctrine of laches. *See Wilkinson*, 139 Wn.2d at 849. Prejudice cannot be presumed from inexcusable delay, and the burden is on the party asserting laches to come forward with evidence showing whether and to what extent he or she has

been harmed. *See id.* In the absence of such a showing, the superior court erred in dismissing Kelly's claim on the basis of the doctrine of laches.

F. The superior court erred in ejecting Kelly from her home, and in awarding damages for occupancy of the home prior to ejectment.

After dismissing Kelly's claim for just and equitable division of property acquired during her relationship with Moesslang, the superior court ejected Kelly from the River Run home and awarded damages against her for occupancy of the home prior to ejectment. CP 800-05 (memorandum decision); CP 825-30 (ejectment order); CP 1044-45 (ejectment judgment). These orders are premised on the court's ruling that the statute of limitations and the doctrine of laches prevent Kelly from asserting any claim to the River Run home based on a committed intimate relationship with Moesslang. CP 826 (ejectment order Finding #1, incorporating prior order granting summary judgment as predicate for ejectment); CP 801-02 (describing pre-ejectment procedural history). Although the ejectment proceedings addressed the statute of frauds and the amount of damages, Kelly's assignments of error do not relate to these issues. Instead, Kelly assigns error to Moesslang's entitlement to the remedies of ejectment or damages based on the absence of an enforceable claim for just and equitable division of the property arising from a committed intimate relationship. To the extent that the superior court erred

in dismissing Kelly's claim on grounds of the statute of limitations or the doctrine of laches, then the court's ejectment orders are necessarily erroneous as well.

G. The superior court erred in awarding attorney fees and costs against Kelly.

The superior court ordered Kelly to pay \$5,000 in attorney fees and \$5,619.48 in costs to Moesslang on grounds of "intransigence." CP 1048-49. Such fee awards are subject to review for abuse of discretion. *See Bay v. Jensen*, 147 Wn.App. 641, 659, 196 P.3d 753 (2008). However, "[w]here a trial court fails to provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of the fee award, we will vacate the judgment and remand for a new hearing to gather adequate information and for entry of findings of fact and conclusions of law regarding the fee award." *Id.*

In this case, the court did not identify the specific factual basis for the conclusion of "intransigence." The court simply indicates that the record supports an award of attorney's fees to Moesslang. CP 1048. It appears from reviewing the relevant memorandum that the conclusion of intransigence is based on the fact that the court simply did not believe the allegations of Kelly's complaint or her declaration:

Plaintiff has alleged facts regarding her relationship with the Defendant that are false, or in the least, contradicted by

her own writings (the quality, nature and duration of the relationship; her superseding romantic relationships and engagement to another man during the time she claims to have had a meretricious relationship with Defendant).

CP 1407 & n.5; *compare* CP 3-7 (complaint); CP 366-421 (declaration).

This type of conclusory “finding” does not permit meaningful review because the “alleged facts” that are ostensibly “false” or “contradicted” are not identified. The only thing that can be contradicted by reviewing the record is the suggestion that Kelly was “engage[d] to another man during the time she claims to have had a meretricious relationship with [Moesslang].” While this suggestion appears repeatedly in the briefing of Moesslang’s counsel submitted to the superior court, there is no competent evidence in the record to support it. Because this aspect of the court’s finding is not supported by substantial evidence, and because the remainder of the finding too vague to permit meaningful review, the fee and cost award should be vacated.

VII. CONCLUSION

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

1. Reverse the superior court;
2. Vacate the summary judgment orders and judgments against Kelly (CP 600-02, 800-05, 825-30, 1044-49);

3. Remand this case for trial on the merits; and
4. Grant any further relief that is warranted under the circumstances.

Respectfully submitted this 7th day of November, 2011.

AHREND LAW FIRM PLLC

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CERTIFICATE OF SERVICE

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

On November 7, 2011, I served the Respondent with the document to which this is annexed as follows:

By facsimile transmission to (509) 838-0007, email to jane.brown@painehamblen.com, First Class Mail, postage prepaid, and/or hand delivery, to:

Jane E. Brown
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Spokane WA 99201

By facsimile transmission to (509) 623-1234, email to bev@ssglaw.com, First Class Mail, postage prepaid, and/or hand delivery, to:

Allen M. Gauper
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Signed at Spokane, Washington this 7th day of November, 2011.


Matthew C. Albrecht

APPENDIX

Cohabitation Timeline with Record Citations

Approximate Date Range	Approximate Duration	Kelly Residence	Moesslang Residence	Record Citations
Aug. 1984 to Summer 1985	~ 1 year	Friend's house	Same	CP 3*, 369 & 379
Summer 1985 to Sept./Oct. 1987	> 2 years	Friend's apartment	Same	CP 3, 369 & 379
Sept./Oct. 1987 to 1999	~ 12 years	Liberty Lake home	Same	CP 3-4, 369-70 & 379
1999 to 2001	~ 2 years	Liberty Lake home	Coeur d'Alene home	CP 4 & 373
2002	< 1 year	Trail Creek home	Liberty Lake home	CP 4 & 373
2002 to Nov. 2006	~ 4 years	Liberty Lake home	Same	CP 4 & 373
Nov. 2006 to Oct. 2010	< 4 years	River Run home	Liberty Lake home	CP 376, 397 & 399

* CP 3-7 is Kelly's complaint, which was attested under oath, CP 376.