Living in a Committed Intimate Relationship? Planning for Unmarried Couples

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It is quite common to encounter clients who live together and are not married. Of course, marital status doesn’t affect a person’s right to dispose of his or her estate at death, but the existence of a significant nonmarital relationship can impact a client’s estate planning needs, and can also lead to estate litigation if not properly planned for. This is because, under Washington’s “Committed Intimate Relationship” doctrine, even if no formal legal steps have been taken to solemnize an intimate relationship, such a relationship may still be deemed to have affected each party’s rights in property acquired while they were together. Therefore, if such a relationship existed, it could mean that some assets titled in the decedent’s name are not actually (or not entirely) part of the decedent’s estate.

This article (1) traces the history of how Washington courts have treated committed intimate relationships and the evolution of the current doctrine; (2) discusses how to identify relationships that may be deemed significant enough to change the parties’ equitable rights in property acquired during the relationship; (3) details how parties’ ownership rights are affected when such a relationship is found; (4) examines the application of the doctrine to relationships that terminate upon death; and (5) gives some tips on how (and why) to encourage clients in these kinds of relationships to plan ahead.

1. History of the Committed Intimate Relationship Doctrine

A couple cannot enter a common-law marriage in Washington, and community property rights are derived only through marriage. In the past, intimate relationships existing outside the bounds of marriage were characterized as “meretricious” under Washington law, and historically, the rights of couples living together over a long period were not affected by these nonmarital relationships. The courts’ position until the mid-1980s was that any property acquired during a “meretricious” relationship belonged to the party in whose name legal title stood, and that without any evidence to the contrary, the law would presume that the parties had disposed of their property as they intended to. That is, if parties lived together but were not married, property would be divided according to title, and a court would not presume that the relationship had given rise to any legal rights of the partner not on title.

In 1984, however, in In re Marriage of Lindsey, Washington’s Supreme Court overruled its history of presuming that a long-term committed intimate relationship should have no effect on the couple’s property rights. The Lindsey court held that when such a relationship exists, Washington courts must examine the property accumulations during the relationship, and must make a “just and equitable” disposition of the couple’s property upon termination.

Despite continuing to use the demeaning moniker of “meretricious,” courts did recognize that certain nonmarital relationships could be so significant as to give rise to some equitable rights in each partner. In 2007, Washington’s Supreme Court decided that the term “meretricious” should no longer be used to describe such relationships, and adopted instead the phrase “committed intimate relationship.”

Of course, many couples now live together in committed relationships before marriage, or without ever being married. Whether these couples know it or not, Washington’s laws regarding committed intimate relationships (“CIRs”) may govern the disposition of their property if they break up or when one member of the couple dies.

2. Recognizing a CIR

The most salient feature of a CIR is generally cohabitation. If a client is living with a romantic partner and the two are not married or registered as domestic partners, the estate planner should inquire further about the duration and nature of the relationship, how the couple manages its assets, and what each party’s intent is with regard to ownership of assets acquired during the relationship.

The hallmarks of a CIR were defined by Washington’s Supreme Court in Connell v. Francisco, which involved the separation of a gay couple who could not have been legally married at that time. Although the couple was not (and indeed could not have been) legally married, the Connell court recognized that the relationship was “marital-like” under the court’s reasoning in Lindsey, and found that property acquired by the couple during their relationship should be subject to the same presumption of joint ownership that it would have if the parties had been married.

In its determination that the relationship was significant enough to give rise to a community-like presumption, the Connell court considered five factors:

1. Continuous cohabitation;
2. Duration of relationship;
3. Purpose of relationship;
4. Pooling of resources and services for mutual benefit; and
5. The parties’ intent.

Subsequent cases have clarified that the Connell factors are not exclusive, that they are not meant to be hyper-technical, and that none of them is necessarily more important than any other. It is unclear whether all five Connell factors must be met in order to determine that a CIR exists, though. In an unpublished case, the Court of Appeals ruled that the five Connell factors, while not exclusive, are in fact minimum requirements for finding a CIR; while unpublished, this case suggests that a CIR may not be found when one or more of those five Connell factors is

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not proved. In that case, the court noted that Washington’s Supreme Court “has never held that there was a CIR in the absence of one of the Connell factors.” The Supreme Court has to date still not found a CIR that did not at least meet the five Connell factors, but there is no definitive ruling that the bar set out in Connell must, in fact, be met in order to find the existence of a CIR. At this point, it is fairly clear that if the five Connell factors can be met, a CIR may well exist. Whether a CIR exists when one or more factor cannot be met is still up for debate. The one thing that can be said with certainty is that whether a CIR exists will be determined on the unique facts of each case.

Note: CIRs Can Exist Before Marriage or Domestic Partnership
The CIR doctrine does not apply only to couples who never marry or register as domestic partners—it can also apply to the period before a couple legally formalizes the relationship. In In re Domestic Partnership of Walsh, the Court of Appeals dealt with the case of a lesbian couple whose CIR predated the legal recognition of their relationship. The court held that it was error to pin the beginning of the couple’s CIR to the date they registered as domestic partners, and that the trial court should have weighed the length of time the couple lived together without considering their domestic partnership status.

The Walsh decision stands for the proposition that although community property can be created only after parties legally formalize their relationship, equitable community-like rights can begin accruing in property acquired by a couple long before they ever say “I do.” The Walsh decision also affirms that the passage of marriage equality and domestic partnership laws does not affect the status of preexisting CIRs, and does not mean that the doctrine of CIR will be done away with. CIR is a common-law doctrine—an “equity relationship”—and does not depend on the legality or formality of the parties’ relationship.

3. How Does a CIR Affect the Interests of Each Member of the Couple?
When a couple has a significant relationship that rises to the level of a CIR, Washington courts will protect each party’s interest in property acquired and used by the couple during the CIR. This “protection” has sometimes been deemed to be the prevention of the unjust enrichment of one partner when the relationship ends.

Therefore, couples currently living in CIRs should not assume that property acquired during the relationship in the name of only one partner belongs solely to that partner. The historical approach originally taken in Creasman v. Boyle of distributing the property acquired during a nonmarital relationship according to title was overruled by the Lindsey court, which held that when a CIR exists, courts must examine the relationship and the property accumulated during the relationship, and “make a just and equitable disposition of the property.”

Since the Lindsey decision, courts have clarified that the power to compel a “just and equitable” disposition applies only to property that would have been community property had the parties been married. Again, the Connell decision clarified what the new CIR doctrine created under the Lindsey decision would mean:

We hold that income and property acquired during a [CIR] should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a [CIR] is presumed to be owned by both parties. This presumption can be rebutted. All property considered to be owned by both parties is before the court and is subject to a just and equitable distribution. The fact [that] title has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership.

Later cases have reaffirmed the Connell court’s stance that only property accumulated during the CIR was divisible at that CIR’s end—property of one partner that would have been his or her separate property had the couple been married is not subject to distribution by the court at the termination of a CIR.

4. What Happens When One Member of a CIR Dies? (a) Applying the CIR Doctrine When Relationship Ends at Death
The Lindsey court recognized that partners in a CIR may have some rights in property acquired during the relationship, and the Connell court better defined which relationships rise to the level of CIR status and what property may be justly and equitably disposed of. But both of those cases dealt with couples parting ways during life, and the question of what (if any) rights a surviving partner would have after the death of one member of a CIR remained unanswered until 2001, when Washington’s Supreme Court decided Vasquez v. Hawthorne. The Vasquez matter involved a relationship of almost 30 years that ended when one member of the couple died. The trial court held that there had been a CIR, but the Court of Appeals held that since the relationship was between two men who could not legally marry, a CIR could not be found. The case might be most remembered for the Washington Supreme Court’s vacation of that decision and remand for trial, which was a victory for same-sex partners who could not marry at the time. It was also the first time that the CIR doctrine had been interpreted to apply at the death of one member.

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of the couple, although two concurring justices expressed doubt about whether the CIR doctrine should be applied at all to relationships terminated at death.

That doubt was assuaged when the court in Olver v. Fowler finally decided the matter in 2007: Washington’s Supreme Court was again confronted with a CIR that had terminated at death, and this time definitively held that the CIR doctrine applies when a relationship is terminated by the death of one (or even both) partners. 24

(b) Rights of Surviving Partner

When a party to a CIR dies, even if it has been established that the CIR existed, the surviving partner does not stand in the same shoes as a surviving spouse would have in terms of his or her right to inherit from the decedent. 25 In Peffley-Warner v. Bowen, 26 Washington’s Supreme Court answered a question from the Ninth Circuit regarding whether the surviving partner of a CIR should be treated as a widow under Washington’s inheritance statutes, in light of the Lindsey court’s overruling of the traditional Creasman approach.

The couple in question had been living together for 22 years before one party died, and the United States District Court for the Eastern District of Washington concluded that a CIR existed. The surviving partner sought both intestate inheritance rights and rights as a widow under the Social Security Act. The trial court found that the surviving partner was not the “spouse” of the decedent, and therefore was not entitled to the legal rights afforded a surviving spouse. The surviving partner appealed to the Ninth Circuit, arguing that the new rules under Lindsey meant that she should be treated as a surviving spouse.

The Ninth Circuit certified the question of the surviving partner’s status under Washington law to the Washington Supreme Court. That court concluded that because the surviving partner was not a legal spouse during life, she should not be treated as a legal spouse following the death of the other member of the CIR. The Peffley-Warner court did not overrule Lindsey’s recognition of the rights of partners in a CIR, but held that these rights are based on equity, not inheritance. 27

The Peffley-Warner court clarified that the surviving member of a CIR is not a “surviving spouse” under Washington law. Therefore, CIR partners are not entitled to receive an intestate share of the decedent’s estate under RCW 11.04.015, 28 may not petition for awards under RCW 11.54, 29 and cannot recover for the wrongful death of the other partner or loss of consortium. 30

(c) A Note on Real Property

There is no reason to believe that Washington’s tradi-
a CIR could be enough to rebut the presumption that all property acquired during the relationship should be community-like. In order to rebut the presumption, though, the agreement must (like a prenuptial agreement) be both procedurally and substantively fair, and the parties must have actually performed the agreement. The In re G.W.-F. decision also clarified that the Connell five-part test requires that both parties intend to be in a CIR in order for the courts to find that one existed. Thus, a CIR may be terminated by one party alone who communicates unequivocally that he or she intends to end the relationship. As of yet, no case law clarifies that a person could, by expressing his or her intent not to be in a CIR, continue to be in an intimate relationship without creating any equitable property rights in the partner. But since the intent of both parties is required to form a CIR, it seems that a court would not find that a CIR existed if one party had clearly and unequivocally expressed that he or she did not intend to form a CIR.

(b) Plan to Protect a Partner

Couples who are pleased to find that the law may give some rights to their partners—or who already assumed that living together for a long period of time would give rights to their partners—should also be cautioned to make their intentions clear. Although the CIR doctrine is now well established, each case will be decided on its own facts. And as with any other element of a person’s estate plan, lack of clarity can lead to disputes. If a decedent leaves a surviving partner to the CIR doctrine, the decedent has also left the burden of proving the CIR, tracing the property, and hiring lawyers to pitch a fight with other parties interested in the estate. Although a couple in a CIR may not want to take any steps to make their relationship more formal, they should be cautioned that failing to leave behind any evidence of their intentions could result in a fight between the survivor of them and the deceased partner’s estate or heirs at law. To avoid the potential for such fights, the members of a couple should make clear their intentions about the relationship and their partner’s rights in assets acquired during the relationship.

(c) Plan Because it is the Most Efficient Course

It is important to note that determining a party’s intent after that party has died can be extremely difficult. Unlike relationships that end during life, for which each party has their own version of the facts, in estate cases, not only is the deceased member of the couple unable to testify, but the “Deadman’s Statute” could prevent anyone with an interest in the estate from testifying about the decedent’s intent. Parties trying to prove the existence of a CIR (or the opposite) must necessarily embark on a fact-intensive search through old records; this is time-consuming and expensive, and there is no guarantee that the decedent’s true intent with regard to his or her property will be discerned from old e-mails, valentines, and the ephemera of a shared life. Sorting through the collection of written evidence on the topic of the decedent’s intimate relationships is certainly less efficient than reviewing a document that one or both members of the CIR prepared during life, and then giving effect to its terms.

The best way to ensure that a client’s wishes with regard to his or her property are carried out is to document some expression of those wishes. Litigation is an expensive way to try to sort out what belonged to the decedent and how assets should be divided, can be painful for family and loved ones, and does not necessarily yield accurate results. In In re Estate of Langeland v. Drown, the decedent and his partner engaged in a years-long legal battle to answer these simple questions. The decedent and his partner had lived together in a CIR for almost 20 years, from 1991 until the decedent died in 2009. The couple shared household duties and expenses, maintained separate bank accounts, tracked expenses, and repaid one another to “settle their accounts” at the end of every month. The surviving partner and the decedent’s daughter went to trial to determine what property belonged to the decedent, and what the surviving partner’s rights were. After trial, the matter was appealed. The Court of Appeals remanded, and the case went to trial again. And then the trial court’s findings were again challenged at the Court of Appeals. Most clients would wish to avoid such a fight, whether to protect the daughter or the partner, or just to avoid the sheer waste of time, energy, and assets spent in attorneys’ fees.

6. Conclusion

Couples in CIRs have obviously chosen not to take the steps necessary to formalize their relationship under law, and will likely not get married just because their estate planners tell them that doing so would make for an easier administration of their estates. That said, partners who live together but are not married can and should be advised about the five Connell factors and should be further advised that they should be clear about whether they intend for their relationship to affect their property rights, either in their basic estate planning documents or in an agreement regarding the character of property.
Real Property

By Brian L. Lewis – Ryan Swanson & Cleveland PLLC

Title Insurer’s Duty of Care to Third Parties, In

In Centurion Properties III v. Chicago Title Insurance Company, 186 Wn.2d 58 (2016), the Washington State Supreme Court answered a certified question from the Ninth Circuit Court of Appeals regarding the existence and scope of a title insurer’s duties to third parties when recording legal instruments. The court held that title insurers in Washington do not owe a duty of care to non-client third parties when recording facially valid legal instruments.

Plaintiff Centurion Properties III (“CP III”) owned commercial property in Richland, Washington. CP III purchased the property with a mortgage loan from General Electric Capital Corporation (“GECC”). Chicago Title served as the title and escrow agent for the closing. GECC’s loan documents and CP III’s operating agreement prohibited further encumbrances on the Richland property.

After closing the GECC loan, CP III granted three junior deeds of trust against the property: two in favor of Centurion Financial Services (“Centurion”) and one in favor of Trident Investments, Inc. Chicago Title recorded all three deeds of trust, each of which was facially valid.

When GECC later learned of the unpermitted junior liens, it accelerated its loan and commenced foreclosure proceedings. In response, CP III filed bankruptcy. CP III and an affiliate then filed civil actions against various parties, including a claim for negligence against Chicago Title alleging damages arising from its recording of the unpermitted liens. The District Court dismissed that claim on summary judgment and CP III appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit then certified the following question to the Washington State Supreme Court:

“Does a title company owe a duty of care to third parties in the recording of legal instruments?”

The court first defined a duty of care as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” Affiliated FM Ins. Co. v. LTK Consult Services, Inc., 170 Wn.2d 442, 449 (2010). The court will consider logic, common sense, justice, policy and precedent, as applied to the facts of the case, when determining whether a duty of care exists.

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9 The effect of the termination of a CIR while both members of the couple are alive is not examined here.
10 127 Wn.2d 339.
11 Id. at 351.
12 In re Marriage of Pennington, 142 Wn.2d 592, 601, 14 P.3d 764 (2000).
13 Seven v. Stool Rives, LLP, 159 Wn. App. 1003, 2010 WL 5477191 (Dec. 20, 2010) (unpublished), review denied, 171 Wn.2d 1022 (2011). Interestingly, in Seven, one issue in dispute is whether an attorney for the estate (acting as co-personal representative) had a duty to advise Ms. Seven of her rights as a surviving partner of a CIR after the decedent’s death. The trial court held (and the Court of Appeals affirmed) that because Ms. Seven could not prove that all five Cornell factors were met, no CIR existed.
14 Id. at 6.
15 Pennington, 142 Wn.2d 592.
17 Id. at 849; Vasquez v. Hawthorne, 145 Wn.2d 103, 107, 33 P.3d 735 (2001).
19 Id.
20 Lindsey, 101 Wn.2d at 304.
21 Connell, 127 Wn.2d at 351 (internal quotation marks and citation omitted).
23 145 Wn.2d 103.
24 161 Wn.2d 655.
26 113 Wn.2d 243.
27 Peffley-Warner, 113 Wn.2d at 253.
28 Id.
29 Id.
31 For a detailed discussion of Washington’s presumptions regarding community and separate property, see In re Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009).
33 In re Marriage of Miracle, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984); see also In re Marriage of Johnson, 28 Wn. App., 574, 625 P.2d 720 (1981); Merkel, 39 Wn.2d 102; In re Woodburn’s Estate, 190 Wash. 141, 66 P.2d 1138 (1937).
36 Id. at 634.
37 Id.
38 Id.
39 RCW 5.60.030 prohibits a party in interest from testifying about transactions with a decedent or statements made by a decedent.