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SUPREME COURT  
STATE OF WASHINGTON  
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CLERK

COA# 66268-1  
66268-6

SUPREME COURT OF THE  
STATE OF WASHINGTON

In Re the Marriage of:

AMY BUECKING  
k/n/a Amy Westman,

Respondent,

and

TIM BUECKING,

Petitioner.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JUL 19 PM 2:30

PETITION FOR REVIEW

David G. Porter, #17925  
103 E. Holly, #409  
Bellingham, Washington 98225  
360-714-9821

Attorney for Petitioner

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1. Failure to adhere strictly to the statutory framework governing such actions, including the 90-day waiting period, does not cause the Court to lose its constitutional powers or render the decree void. Nor is such an error a manifest constitutional issue permitting review for the first time in this Court.
2. When a separation petition is amended to seek dissolution, it is unclear whether the statutes contemplate a new waiting period.
3. It is also unclear whether it matters that the amended petition was jointly filed.
4. The decree is not void, the issue was not raised below, and this Court can grant no effective relief.
5. A Court's alleged failure to operate within the statutory framework does not render its judgment void. Here, failure to observe a statutory waiting period may be a legal error, but it does not result in loss of jurisdiction.
6. Considering the relevant factors, we award Westman fees on appeal, subject to her compliance with RAP 18.1, in an amount to be determined by a commissioner of this Court. As regards the award of attorney fees to respondent, the Court declines to change its prior ruling pursuant to RAP 1.2 (c).

The Court of Appeals decision was filed on April 12, 2012. The Order Denying Motion for Reconsideration was filed on June 19, 2012.

A copy of the decision is in the Appendix at pages A-1 through A-10. The decision is published in part. The order Denying Motion for Reconsideration is in the Appendix at page A-11.

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1. The Supreme Court should determine whether the Trial Court has the statutory authority (subject matter jurisdiction) to enter a Decree of Dissolution of Marriage when less than 90 days have passed since the petition seeking dissolution of marriage was filed.
2. The Supreme Court should determine whether a petition for legal separation is independent of a petition for dissolution of marriage and whether the 90 day ~~cooling off period applies to the petition for legal separation.~~
3. The Supreme Court should determine whether the 90 day cooling off period applies when the parties agree to the filing of a Petition for Dissolution of Marriage.
4. The Supreme Court should determine whether the Trial Court's failure to observe the 90 day waiting period renders the Decree void because the Court did not have subject matter jurisdiction in a loss of jurisdiction.
5. The Supreme Court should determine whether the Court of Appeals should follow RAP 18.1 of the Rules of Appellate Procedure before awarding attorney fees on appeal.

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A. Identity of Petitioner

Tim Buecking asks this Court to accept review of the published Court of Appeals decision terminating review as designated in Part B of this petition.

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B. Court of Appeals Decision

Petitioner seeks review of the Court of Appeals' decision as follows:

1. Failure to adhere strictly to the statutory framework governing such actions, including the 90-day waiting period, does not cause the Court to lose its constitutional powers or render the decree void. Nor is such an error a manifest constitutional issue permitting review for the first time in this Court.
2. When a separation petition is amended to seek dissolution, it is unclear whether the statutes contemplate a new waiting period.
3. It is also unclear whether it matters that the amended petition was jointly filed.

4. The decree is not void, the issue was not raised below, and this Court can grant no effective relief.
5. A Court's alleged failure to operate within the statutory framework does not render its judgment void. Here, failure to observe a statutory waiting period may be a legal error, but it does not result in loss of jurisdiction.
6. Considering the relevant factors, we award Westman fees on appeal, subject to her compliance with RAP 18.1, in an amount to be determined by a commissioner of this Court. As regards the award of attorney fees to respondent, the Court declines to change its prior ruling pursuant to RAP 1.2 (c).

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C. Issues Presented for Review

1. The Supreme Court should determine whether the Trial Court has the statutory authority to (subject matter jurisdiction) to enter a Decree of Dissolution of Marriage when less than 90 days have passed since the petition seeking dissolution of marriage was filed.
2. The Supreme Court should determine whether a petition for legal separation is independent of a petition for dissolution of marriage and whether the 90 day cooling off period applies to the petition for legal separation.
3. The Supreme Court should determine whether the 90 day cooling off period applies when the parties agree to the filing of a Petition for Dissolution of Marriage.
4. The Supreme Court should determine whether the Trial Court's failure to observe the 90 day waiting period results in a loss of jurisdiction.

5. The Supreme Court should determine whether the Court of Appeals should follow the Rules of Appellate Procedure before awarding attorney fees on appeal.

D. Statement of the Case

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Tim and Amy Buecking were married on August 14, 1999, on Lummi Island, Whatcom County, Washington (CP 54) Amy filed for legal separation on December 12, 2008. (CP 183-186) At mediation, Tim who was unrepresented at the time, was convinced to sign Amy's request file her dissolution of marriage petition on March 4, 2010. (CP 90) Tim signed the joinder portion of the petition which states, "I, the respondent, agree to the filing of an Amended Petition for Dissolution of Marriage instead of legal separation." (CP 90). The filing of the Amended Petition for Dissolution of Marriage occurred on April 2, 2010. (CP 86) The Decree of Dissolution of Marriage was entered on June 23, 2010, which was 82 days from the date the Amended Petition for Dissolution of Marriage was filed.

(CP 16)

Amy Buecking was awarded attorney fees on appeal. (A-9)

Amy failed to file her affidavit of financial need ten days before the

oral argument on January 5, 2012. In its Order Denying Motion for Reconsideration, the Court of Appeals waived RAP 18.1 (c) and award Amy her costs and attorney fees on appeal pursuant to RAP 1.2 (c). (A-11)

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E. Argument Why Review Should be Accepted

1. RAP 13.4 (b) (1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court. To begin with, the petitioner agrees with the Court of Appeals statement that, “petitions for marital dissolution are within the broad subject matter jurisdiction of the Superior Court.” (A-1) Petitioner respectfully disagrees with the Court of Appeals decision when it states, “Here, failure to observe a statutory waiting period may be a legal error, but it does not result in loss of jurisdiction.” (A-3) Petitioner agrees that, “subject matter jurisdiction is the authority of the Court to hear and determine the class actions to which the case belongs.” (A-3) Superior Courts do have subject matter jurisdiction to decide dissolution of marriage cases. However, Superior Courts only have the authority/subject matter jurisdiction to act as provided by the governing statutes.

Pursuant to Arneson v. Arneson, 38 Wn. 2d 99, 100, 227 P. 2d 1016 (1951), “Divorce, probate, bankruptcy, receiverships, and assignments for the benefit of creditors are statutory proceedings, and the jurisdiction and authority of the Courts are prescribed by the applicable legislative enactment. In them the Court does not have any power that cannot be inferred from a broad interpretation of the act in question.” RCW 26.09.030 determines subject matter jurisdiction in dissolution of marriage proceedings. (A-12)

Pursuant to RCW 26.09.030, the Trial Court has the authority to proceed in a dissolution of marriage action when the petitioner alleges that the marriage is irretrievably broken and after 90 days have elapsed since the date the petition was filed and served. It is undisputed that less than 90 days passed between the filing of the Petition for Dissolution of Marriage and entry of the Decree of Dissolution of Marriage. (A-1)

The Court of Appeals has taken the position that entry of the Decree of Dissolution prior to the passage of the 90 days is an error of law, that could have been raised in the Trial Court; the Trial Court does not lack subject matter jurisdiction and hence the Decree of Dissolution of Marriage is valid.

It is the petitioner's position that this decision is in conflict with Supreme Court decision in In re Marriage of Ways, 85 Wn. 2d 693, 538 P. 2d 1225 (1975). "Accordingly, under RCW 26.09.030 as far as concerns the granting of the ultimate relief of marriage dissolution, jurisdiction so to do may be acquired after the action is commenced and need only exist by the time the decree is entered. In Ways, @ 703, the Supreme Court analyzed the need of a military person to remain continuously in the State of Washington for 90 days prior to entry of the decree.

[W]e hold the statute means the member of the armed forces must be stationed in this State continuously throughout the 90-day period described in the statute in order to confer jurisdiction upon the appropriate State Court to enter a decree of dissolution. Here, petitioner's station was terminated February 2, 1974, 64 days-not the required 90 days-after the 90-day period commenced to run. The Kitsap County Superior Court never acquired jurisdiction to enter the decree. Reversed.

The Court of Appeals decision is in conflict with the Supreme Court decision in Ways because the Supreme Court has stated that the 90 day waiting period is jurisdictional, i.e. the Trial Court has no

subject matter jurisdiction to enter a decree of dissolution of marriage until after the RCW 26.09.030 prescribed 90 days have passed.

2. RAP.13.4 (b) (2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. Contrary to the decision in this case, Division Three of the Court of Appeals has held that RCW 26.09.030 determines subject matter jurisdiction in dissolution of marriage cases. Marriage of Robinson, 159 Wn. App. 162, 167, 248 3d. 532 (2010). According to Robinson, “A dissolution action is a statutory proceeding. A court has no jurisdiction except that which is conferred by the applicable statutes.” ID. Robinson cites the Supreme Court case of Palmer v. Palmer, 42 Wn. 2d 715, 258 P. 2d 475 (1953) supra and In re Marriage of Ways, supra, as authority for the rule of law that the authority of the Trial Court to act is derived from the applicable statute which confers subject matter jurisdiction upon the Court. Robinson @ 167-168.

According to Robinson, “Because the requirements of RCW 26.09.030 were not met, the Washington Courts lack subject matter jurisdiction over this proceeding. Accordingly, we reverse....and vacate the dissolution decree.” @ 172-73. Division One allowed the decree of dissolution to stand because the error was not raised in the Trial Court. The Division Three Court in Robinson, supra vacated the decree of

dissolution of marriage because the Trial Court lacked the subject matter jurisdiction to enter the decree.

In terms of counting the 90 days, the opinion in our case states, “It is unclear whether it matters that the amended petition was jointly filed. Petitioner interprets this statement to mean that the parties may have agreed to subject matter jurisdiction to enter the decree of dissolution.

This position is in conflict with the Division Three case of Robinson, supra. “Mr. Robinson asserts that jurisdiction in Washington is proper because Mrs. Robinson signed a joinder for the petition for dissolution in which she agreed that jurisdiction is proper....unlike personal jurisdiction, subject matter jurisdiction is not determined based upon the consent of the parties. “Robinson, @ 170-171. See also Robinson at footnote 1, page 167.

The ramifications for agreeing to subject matter jurisdiction or even creating an error of law, as Division One has stated in its decision (A-1, 3), would ultimately nullify RCW 26.09.030. Parties could simply agree to ignore the 90 day waiting period, create an unchallenged error of law, and we go back to the same situations that occurred prior to enactment of RCW 26.09.030.

The decision states, “A Court’s alleged failure to operate within the statutory framework does not render the judgment void.” (A-3)

This portion of the decision is in conflict with the Division Three decision of Robinson, supra. Robinson states that RCW 26.09.030 determines subject matter jurisdiction in dissolution cases. @ 167.

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Robinson goes on to state, “A judgment entered without subject matter jurisdiction is void.” @ 168

The decision states that the issue of whether or not the Trial Court had the subject matter jurisdiction should have been raised below. (A-1) this portion of the decision is in conflict with the Division Three decision of Robinson, supra. “Courts must have subject matter jurisdiction in order to proceed. There is no presumption that Courts have jurisdiction unless it is proved otherwise.” @ 172. The Robinson case also states that a challenge to a Court’s subject matter jurisdiction may be raised at any time, supra, at 170.

The decision awards costs and attorney fees to Amy on appeal. (A-9) It was pointed out to the Court of Appeals that Amy had failed to comply with the RAP 18.1 requirement that Amy file a financial affidavit no later than ten days before the date the case is set for oral

argument. In its order denying the Motion for Reconsideration, the Court of Appeals waived the require of RAP 18.1 under RAP 1.2 (c).

The decision to award attorney fees is in conflict with Division One's decision in Marriage of Leland, 69 Wn. App. 57, 76, 847 P 2d 932 (1993). In Leland, Division One refused to award the wife her attorney fees on appeal because she failed to comply with RAP 18.1 (c) by filing an affidavit of financial need no later than 10 days prior to oral argument.

Rules of Appellate Procedure let the litigants know what procedures they are to follow in order to obtain the requested relief. Amy did not follow the requirements of RAP 18.1 (c) Amy should not have been awarded her attorney fees.

3. The Petition involves an issue of substantial public interest that should be determined by the Supreme Court. The Supreme Court should determine whether a petition for legal separation is independent of a petition for dissolution of marriage and whither the 90 day cooling off period applies to the petition for legal separation.

The decision states, "The statutes require a 90-day "cooling-off" period before the Court may enter a decree of dissolution. Here, more

than 500 days had passed since the filing of a petition for legal separation, but only 82 days had passed since the petition was amended to seek dissolution. When a separation petition is amended to seek dissolution, it is unclear whether the statutes contemplate a new waiting period.” There are no cases that discuss this issue. The decision goes on to state in footnote 7, that the issue of whether or not the 90 day waiting period applies to petitions for legal separation is the subject of considerable debate.

It is the petitioner’s position that a petition for legal separation, RCW 26.09.030 (d), does not require the 90 day waiting period. When the decree of legal separation is entered, the parties are still married. The statement that the marriage is irretrievably broken is not alleged in a petition for legal separation. Furthermore, subsection 7 of RCW 26.09.181 (procedure for determining permanent parenting plans) states:

ENTRY OF FINAL ORDER.

The final order or decree shall be entered not sooner than ninety days after filing and service. This subsection does not apply to decrees of legal separation.

RCW 26.09.181 (7) makes it clear that it is not statutorily required that a party wait the 90 days before entering a final parenting plan order under a decree of legal separation. RCW 26.09.181 (7) is persuasive authority that the 90 day waiting period does not apply to decree of legal separation.

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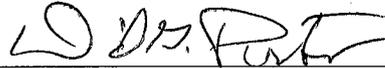
The Court of Appeals confirms that there is no legal authority on this issue and that the issue is the subject of considerable debate. The Supreme Court should accept review of this matter of substantial public interest.

#### F. Conclusion

Based upon the argument above, the Supreme Court should accept review of this case, and determine that the decree is void, based upon a lack of subject matter jurisdiction under RCW 26.09.030. This Court should reverse the decision of the Court of Appeals, including the award of costs and attorney fees to the respondent. This Court should accept review of the issue of whether or not the 90 day rule applies to petitions for legal separation.

Dated this 17<sup>th</sup> day of July 2012.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "D.G. Porter", written over a horizontal line.

David G. Porter, #17925  
Attorney for the Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In the Matter of the Marriage of	)	No. 66268-6-I
	)	
AMY BUECKING,	)	
n/k/a AMY WESTMAN,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
TIM BUECKING,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: April 2, 2012
	)	

Ellington, J. -- Petitions for marital dissolution are within the broad subject ~~matter jurisdiction of the superior court. Failure to adhere strictly to the statutory~~ framework governing such actions, including the 90-day waiting period, does not cause the court to lose its constitutional powers or render its decree void. Nor is such an error a manifest constitutional issue permitting review for the first time in this court.

The statutes require a 90-day "cooling off" period before the court may enter a decree of dissolution. Here, more than 500 days had passed since the filing of a petition for legal separation, but only 82 days had passed since the petition was amended to seek dissolution. When a separation petition is amended to seek dissolution, it is unclear whether the statutes contemplate a new waiting period. It is No. 66268-6-I/2 also unclear whether it matters that the amended petition was jointly filed.

In any case, the alleged error could easily have been avoided had the issue been timely raised below. The decree is not void, the issue was not raised below, and this court can grant no effective relief.

BACKGROUND

Tim Buecking and Amy Westman (formerly Buecking) were married for nine years and have three minor children.

On December 12, 2008, Westman filed and properly served a petition for legal separation. The court entered a temporary parenting plan and other orders in January 2009. On April 2, 2010, Westman filed an amended petition for dissolution, replacing the October 2008 petition for legal separation. Buecking signed the petition and marked the "joinder" box, stating, "I, the respondent, agree to the filing of an Amended Petition for Dissolution of the marriage instead of legal separation."<sup>1</sup>

On May 19, 2010, the parties had a one-day bench trial. Only Westman and Buecking testified. On June 23, 2010, the court entered findings of fact and conclusions of law, an order of child support, a final parenting plan, and a decree of

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dissolution.

Disappointed in the results, Buecking appealed. He now contends the court lacked authority to enter the decree.

DISCUSSION

Whether a court has subject matter jurisdiction is a question of law. Absent 1 Clerk's Papers at 90.

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such jurisdiction, the court's judgment is void.<sup>2</sup> A void judgment may be challenged at any time.<sup>3</sup> Review is de novo.<sup>4</sup>

By statute, the court is empowered to act on a petition for dissolution only when certain requirements have been met. One of those is a cooling off period:

When a party who (1) is a resident of this state, or (2) is a member of the armed forces and is stationed in this state, or (3) is married or in a domestic partnership to a party who is a resident of this state or who is a member of the armed forces and is stationed in this state, petitions for a dissolution of marriage or dissolution of domestic partnership, and alleges that the marriage or domestic partnership is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows.<sup>[5]</sup>

At issue here is the meaning of the language requiring that "ninety days have elapsed since the petition was filed"<sup>6</sup> where there were actually two petitions. If the time runs from the filing of the first petition, the statute is satisfied.<sup>7</sup> If the time must

<sup>2</sup> Cole v. Harveyland LLC, 163 Wn. App. 199, 205, 258 P.3d 70 (2011).

<sup>3</sup> Id.; RAP 2.5(a)(1).

<sup>4</sup> Cole, 163 Wn. App. at 205.

<sup>5</sup> RCW 26.09.030.

<sup>6</sup> Id. (emphasis added).

<sup>7</sup> Whether the statutory waiting period applies to a petition for legal separation appears to be an issue of first impression. The parties cite no cases addressing the issue. Although the authors of Washington Practice and the Family Law Deskbook now agree that the waiting period applies to separations, neither cites authority for that proposition, and both note that the issue has been the subject of considerable debate. See 20 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 30.3, at 14 (1997); 21 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 46.23, at 60 (1997); 1 Wash. State Bar Ass'n, Washington Family Law Deskbook § 11.5(1) cmt. at 11-28 (2d ed. & 2006 Supp.) ("There has been considerable debate in the profession as to whether the 90-day waiting period applicable to dissolution actions is also applicable to an action for legal separation. In fact, in the first edition of this deskbook, the authors of the chapters on Divisible Divorce and on Legal Separations, both of whom discussed this issue,

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begin to run again when the petition is amended to seek dissolution, the statute was

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not satisfied. Buecking points out that the 90-day requirement is triggered by the allegation that the marriage is irretrievably broken, which is the required allegation for a petition for dissolution. He contends that because 90 days had not elapsed from the petition containing that allegation and seeking dissolution, the court lacked subject matter jurisdiction and the decree is void.

"Subject matter jurisdiction' is 'the authority of the court to hear and determine the class of actions to which the case belongs.'"<sup>8</sup> The classes of action over which the superior court has jurisdiction are defined by the state constitution.<sup>9</sup> Under the Washington Constitution, superior courts have original jurisdiction in all cases involving dissolution or annulment of marriage.<sup>10</sup> The petition for dissolution was within the subject matter jurisdiction of the superior court.

"If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction."<sup>11</sup> A court's alleged failure to operate within the statutory framework does not render its disagreed. . . . This author believes that the 90-day waiting period does apply to legal separations."); see also 1 Wash. State Bar Ass'n, supra, § 15.3(4)(a) at 15-13 (noting that "[i]t is also not clear that 90 days must elapse between the filing of a petition for legal separation and the entry of the decree, because only the decree of dissolution is specifically mentioned in RCW 26.09.030(1)-(3)").

<sup>8</sup> In re Guardianship of Wells, 150 Wn. App. 491, 499, 208 P.3d 1126 (2009) (quoting In re Adoption of Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976)).

<sup>9</sup> Cole, 163 Wn. App. at 206.

<sup>10</sup> Wash. Const. art. IV, § 6 ("superior court shall have original jurisdiction in all cases at law which involve . . . all matters of probate, of divorce, and for annulment of marriage").

<sup>11</sup> Cole, 163 Wn. App. at 209.

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judgment void. Here, failure to observe a statutory waiting period may be a legal error, but it does not result in loss of jurisdiction. Under RAP 2.5(a), Buecking may not raise the issue for the first time on appeal. Accordingly, we decline to consider it.<sup>12</sup>

Affirmed.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

Buecking contends the court abused its discretion in its property division, calculation of child support, and by making reciprocal a restriction in the parenting plan.

#### DIVISION OF PROPERTY

The couple owned four properties in Whatcom County: a house at 3090 Mt. Vista Drive; a house at 2604 Lummi View Drive; a house at 2618 Michigan Street;

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and undeveloped property located at 3980 Pipeline Road. They lived with their children in the Michigan Street home and rented out the houses on Mt. Vista Drive and Lummi View Drive. The pretrial orders required Buecking to pay the first and second mortgages on the Michigan Street property as maintenance and to "make sure that the mortgages on the home are current."<sup>13</sup> The court also ordered

<sup>12</sup> We note that any error easily could have been avoided had Buecking raised this issue with the trial court. Further, even if we were to agree with Buecking that the 90-day waiting period applies in the circumstances here presented, we can provide no effective relief. The statute requires the time to elapse prior to entry of the decree, not prior to trial. Remand on the waiting period issue would not permit relitigation of the property division and parenting plan; it would result merely in entry of a new decree, presumably nunc pro tunc to the 91st day, nine days after the divorce here was entered.

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Buecking to pay child support.

Buecking raises several issues with respect to the court's distribution of the equity and lost rents in the couple's property on Mt. Vista Drive. He argues the court erred by characterizing it as community property, awarding an offset of \$25,000 to Westman for her share of the equity, and awarding Westman \$2,250 in lost rent. We review these claims for abuse of discretion.<sup>14</sup>

#### Character of the Property

The character of property as separate or community is determined at its date of acquisition.<sup>15</sup> Once the separate character of property is established, there is a presumption that it remains separate absent clear and convincing evidence to the contrary.<sup>16</sup> But the characterization of property as separate or community does not dictate the division of assets.<sup>17</sup> The court must make a "just and equitable" disposition of both separate and community property.<sup>18</sup>

<sup>13</sup> Clerk's Papers at 126.

<sup>14</sup> In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

<sup>15</sup> In re Estate of Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009).

<sup>16</sup> Id. at 484-85 & n.4 ("[T]he evidence must show the intent of the spouse owning the separate property to change its character from separate to community property. Where, as here, real property is at issue, an acknowledged writing is generally required [such as] a quit claim deed or other real property transfer, [or] a properly executed community property agreement." (citations omitted)).

<sup>17</sup> Brewer, 137 Wn.2d at 766.

<sup>18</sup> RCW 26.09.080.

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Although Buecking purchased the property with his brother before the marriage, the record indicates that the equity in the property belonged to the community. The evidence is that Buecking's brother gifted his interest to Buecking

EXHIBIT A-4

and Westman after they married. Though her name did not originally appear on the deed, Westman testified that she was present at closing and contributed to the mortgage payments before marriage. The parties later added her name to the deed and mortgage. The parties both testified they considered the property "our house," and Westman signed rental agreements as "lessor."<sup>19</sup> Additionally, there was evidence that adjacent neighbors gifted their property to the couple jointly, and that Buecking did not know the character of the property when he responded to an interrogatory about it.

Thus, even if the court was technically incorrect in this characterization, it properly determined that the equity in the property belonged to the community.<sup>20</sup>

The court did not abuse its discretion in dividing this equity equally.

#### Lost Rents

Buecking's failure to collect rent and pay the mortgage violated the pretrial orders and caused the property to fall into foreclosure. The court awarded Westman \$2,250 "as Wife's community property share of lost rents on the 3090 Mt. Vista Drive property from December 2009 to May 2010 based on Husband's admission that the home sat empty and was not rented during this period of time."<sup>21</sup>

<sup>19</sup> Clerk's Papers at 54-55.

<sup>20</sup> For the same reason, we reject Buecking's argument that the court erred in awarding Westman \$2,250 in lost rents for the property because "[a] spouse who owns separate property is entitled to the rents therefrom." Br. of Appellant at 18-19,

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Buecking also failed to pay the mortgages on the Michigan Street property in lieu of maintenance as required by pretrial orders, and this property also fell into foreclosure. Buecking's conduct jeopardized Westman's ability to reside with the children in the family home, or any of the marital properties.<sup>22</sup> The court did not abuse its discretion by recognizing Buecking's responsibility for this predicament in providing an offset to compensate Westman.

Buecking contends the court should not have awarded Westman lost rents on the Mt. Vista and Lummi View Drive homes because none were collected. He relies on *In re Marriage of White* for the proposition that the court may not distribute an asset that does not exist at the time of trial.<sup>23</sup> But Buecking's failure to collect the rent is the express reason for the award. Courts may properly consider a party's responsibility for wasting marital assets in the equitable distribution of property.<sup>24</sup> Buecking shows no abuse of discretion.

#### Foreclosure

Buecking next argues the court erred in awarding Westman her share of the equity in the Mt. Vista Drive property because the home was in foreclosure at the time of trial. He asserts that "[t]he property went into foreclosure in large part

EXHIBIT

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because Amy had no employment income and because of the cut back in Tim's

21 Clerk's Papers at 61.

22 See RCW 26.09.080(4) (one factor for the court to consider in making an equitable distribution is "the desirability of awarding the family home or the right to live therein . . . to a spouse . . . with whom the children reside").

23 105 Wn. App. 545, 20 P.3d 481 (2001).

24 Id. at 551.

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employment after the economy soured in 2008."25 He also contends the property was lost because Westman refused to participate in a loan modification that would have saved the property. The evidence does not support these assertions.

First, the couple had been able to pay their mortgages during the marriage, even though Westman had no income. Second, there was no evidence that Buecking's employment suffered for any reason other than his own refusal to work to capacity. Third, Buecking admitted he had not completed his own portion of the loan modification paperwork, and had last communicated with Westman about a modification in early summer of 2009. Further, Westman testified Buecking "made several statements to me saying that he would rather let everything go to foreclosure, rather than let me have anything of his."26

Buecking also suggests Westman waived her interest in the now-foreclosed properties. He cites *In re Marriage of Kaseburg*, which held that the trial court abused its discretion by awarding the wife her interest in foreclosed property when it no longer belonged to the community at the time of trial.27 But unlike *Kaseburg*, where the property was lost to foreclosure before the dissolution trial, none of the properties in this case had yet been lost. Indeed, Buecking testified that he still intended to stop the foreclosure on the family home. Further, in *Kaseburg*, it was undisputed that the wife knew about the foreclosure proceeding and chose not to contest it. Here, Westman testified that mortgage statements were mailed to

25 Br. of Appellant at 19-20.

26 Report of Proceedings (May 19, 2010) at 39.

27 126 Wn. App. 546, 559, 108 P.3d 1278 (2005).

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Buecking and she had been unaware the properties were headed into foreclosure.

*Kaseburg* is inapposite.

Finally, Buecking asks this court to "strike the maintenance arrears because

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Amy had the benefit of living in the Michigan Street property and the bank refused to accept partial payments during the foreclosure for Tim."28 The court awarded

Westman \$6,162 in past due spousal maintenance, an amount equal to the

mortgage payments Buecking was ordered to but failed to make in lieu of maintenance.29 Buecking's suggestion that the court should not have made this

award because Westman was permitted to stay in the home while he secretly

defaulted on the mortgage, ultimately leading to foreclosure, is unsupported by argument, citation to the record, or citation to authority. We decline to address it.30

#### CHILD SUPPORT

For the purposes of calculating child support, the court found Buecking was voluntarily underemployed and imputed income to him. Though Westman worked ~~only part-time, the court found she was not voluntarily underemployed.~~ Buecking challenges each decision.

We defer to the trial court's discretion in child support decisions unless that

28 Brief of Appellant at 20-21.

29 The court had previously held Buecking in contempt for failing to pay the mortgages on the Michigan Street family home.

30 Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority); In re Marriage of Arvey, 77 Wn. App. 817, 819 n.1, 894 P.2d 1346 (1995) (assignments of error unsupported by argument and citation to authority).

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discretion is exercised in an untenable or unreasonable way.31 "This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances."32 A court abuses its discretion if its decision is "based on an incorrect standard or the facts do not meet the requirements of the correct standard."33

A court will impute income to a parent for purposes of child support when the parent is voluntarily unemployed or underemployed.34 "The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors."35

Buecking contends it is standard in the refinery industry to work long hours for relatively short periods of time, followed by periods of unemployment. He argues the court therefore should not have found him voluntarily underemployed. But the court did not base its ruling on periodic unemployment. Rather, the evidence was that following their separation, Buecking declined to work at the same capacity as during the marriage. Before, he regularly traveled for work; thereafter, he refused to take jobs out of state. Before, he supplemented his refinery income with side businesses,

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31 In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); In re Marriage of Pollard, 99 Wn. App. 48, 52, 991 P.2d 1201 (2000).

32 In re Marriage of Florito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002).

33 Id.

34 RCW 26.19.071(6).

35 Id.

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including landscaping and commercial fishing. Thereafter, although he still owned the necessary equipment, Buecking testified he no longer took side jobs. Based on this evidence, the court reasonably found Buecking was "not working to capacity."<sup>36</sup>

The court imputed to Buecking an income of \$7,000 per month. Buecking contends that was too much. The evidence amply supports the court's decision. First, Buecking failed to provide the court with complete income information.<sup>37</sup> Second, his sworn declaration claimed \$5,363 per month in wages and salaries; \$1,500 per month in business income; and \$900 per month in "other income," for a total monthly income of \$7,763. Although Buecking testified he was unaware of the contents of the declaration when he signed it, the court was well within its discretion to consider that evidence. Third, Westman produced one of Buecking's pay stubs from September 2008 showing a year-to-date income of \$60,204, for an average monthly income of just under \$7,000. Fourth, at the time of trial, Buecking's most recent pay stubs indicated he earned more than \$8,400 in March 2010.

The court found that Buecking's representation of his income at trial was not credible, especially given that he does not keep accurate records, he failed to file tax returns, and he failed to produce financial information in discovery. Accordingly, the court concluded: "Taking into consideration his proven ability to earn \$6,853 per

<sup>36</sup> Clerk's Papers at 56.

<sup>37</sup> Buecking had not filed a tax return for 2008 or 2009, despite a temporary order requiring him to use the anticipated 2008 refund to pay community debts. Buecking ignored Westman's counsel's several requests for his financial records, even after the court ordered him to produce them. At trial, Buecking variously claimed he did not have the records, that he had given them to his tax professional who could not be contacted, or that he did not know where they were.

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month and \$8,422 per month, it is reasonable to assess an earning capacity of \$7,000 per month to Husband for purposes of calculating maintenance and child support."<sup>38</sup> The evidence fully supports the court's conclusion. There was no abuse of discretion.

Buecking next argues the court should have imputed income to Westman.

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Westman stopped working in October 1999 because the couple agreed she should stay home to raise their children. By the time they separated, Westman had been out of the work force for over 10 years. Though she had applied for several full-time jobs,<sup>39</sup> she was able to obtain only a part-time job earning \$8.55 per hour. Her monthly income is less than \$500. Taking into consideration Westman's "work history, education, health and age, or any other relevant factors,"<sup>40</sup> the court reasonably found Westman was not voluntarily underemployed.

#### Parenting Plan

During the separation, Westman dated a man who had once been charged with child molestation and child rape.<sup>41</sup> Buecking obtained a restraining order prohibiting Westman from allowing the children to have contact with the man.

Buecking requested a similar provision in the parenting plan. Westman testified she had terminated her relationship with the man and did not intend to see him again. The court ordered that "[n]either parent shall allow the children to have

38 Clerk's Papers at 56.

39 Buecking asserts Westman applied for jobs for which she was not qualified. She testified the job postings did not specify minimum qualifications.

40 RCW 26.19.071(6).

41 He was ultimately convicted of fourth degree assault.

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any contact whatsoever with [the former boyfriend]."<sup>42</sup>

Buecking argues the court erred by making this provision reciprocal "because there is no evidence that Tim wanted to allow any contact between [the former boyfriend] and the children."<sup>43</sup> We review parenting plan decisions for abuse of discretion.<sup>44</sup>

Neither parent wished the children to have contact with this man. Based on its understanding of the facts, the court entered an order restricting all parties from doing so. Buecking fails to show the court abused its discretion.

#### ATTORNEY FEES

Westman requests attorney fees under RCW 26.09.140. In exercising our discretion in making such an award, we consider the parties' relative ability to pay and the arguable merit of the issues raised on appeal.<sup>45</sup> Considering the relevant factors, we award Westman fees on appeal, subject to her compliance with RAP 18.1, in an amount to be determined by a commissioner of this court.

Affirmed.

WE CONCUR:

42 Clerk's Papers at 51.

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43 Br. of Appellant at 22.

44 In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

45 In re Marriage of Muhammad, 153 Wn.2d 795, 807, 108 P.3d 779 (2005).

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EXHIBIT A-10

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In the Matter of the Marriage of )

No. 66268-6-1

AMY BUECKING,  
n/k/a Amy Westman,

Respondent,

and

TIM BUECKING,

Appellant.

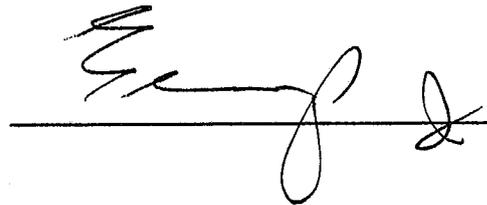
ORDER DENYING MOTION  
FOR RECONSIDERATION

After consideration of appellant's motion for reconsideration of the court's April 2, 2012 opinion and respondent's answer thereto, the court has determined that the motion should be denied. As regards the award of attorney fees to respondent, the court declines to change its prior ruling pursuant to RAP 1.2(c). Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 19<sup>th</sup> day of June, 2012.

FOR THE PANEL:



**FILED**  
COURT OF APPEALS  
DIVISION ONE  
JUN 19 2012

EXHIBIT A-11

**26.09.030. Petition for dissolution of marriage or domestic partnership—Court proceedings, findings—  
Transfer to family court—Legal separation in lieu of dissolution**

When a party who (1) is a resident of this state, or (2) is a member of the armed forces and is stationed in this state, or (3) is married or in a domestic partnership to a party who is a resident of this state or who is a member of the armed forces and is stationed in this state, ~~petitions for a dissolution of marriage or dissolution of domestic partnership,~~ and alleges that the marriage or domestic partnership is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows:

(a) If the other party joins in the petition or does not deny that the marriage or domestic partnership is irretrievably broken, the court shall enter a decree of dissolution.

(b) If the other party alleges that the petitioner was induced to file the petition by fraud, or coercion, the court shall make a finding as to that allegation and, if it so finds shall dismiss the petition.

(c) If the other party denies that the marriage or domestic partnership is irretrievably broken the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation and shall:

(i) Make a finding that the marriage or domestic partnership is irretrievably broken and enter a decree of dissolution of the marriage or domestic partnership; or

(ii) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing. If the cause is returned from the family court or at the adjourned hearing, the court shall:

(A) Find that the parties have agreed to reconciliation and dismiss the petition; or

(B) Find that the parties have not been reconciled, and that either party continues to allege that the marriage or domestic partnership is irretrievably broken. When such facts are found, the court shall enter a decree of dissolution of the marriage or domestic partnership.

(d) If the petitioner requests the court to decree legal separation in lieu of dissolution, the court shall enter the decree in that form unless the other party objects and petitions for a decree of dissolution or declaration of invalidity.

(e) In considering a petition for dissolution of marriage or domestic partnership, a court shall not use a party's pregnancy as the sole basis for denying or delaying the entry of a decree of dissolution of marriage or domestic partnership. Granting a decree of dissolution of marriage or domestic partnership when a party is pregnant does not affect further proceedings under the uniform parentage act, chapter 26.26 RCW.

[2008 c 6 § 1006, eff. June 12, 2008; 2005 c 55 § 1, eff. July 24, 2005; 1996 c 23 § 1; 1973 1st ex.s. c 157 § 3.]

**26.09.181. Procedure for determining permanent parenting plan**

(1) SUBMISSION OF PROPOSED PLANS. (a) In any proceeding under this chapter, except a modification, each party shall file and serve a proposed permanent parenting plan on or before the earliest date of:

(i) Thirty days after filing and service by either party of a notice for trial; or

(ii) One hundred eighty days after commencement of the action which one hundred eighty day period may be extended by stipulation of the parties.

(b) In proceedings for a modification of custody or a parenting plan, a proposed parenting plan shall be filed and served with the motion for modification and with the response to the motion for modification.

(c) No proposed permanent parenting plan shall be required after filing of an agreed permanent parenting plan, after entry of a final decree, or after dismissal of the cause of action.

(d) A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section.

(2) AMENDING PROPOSED PARENTING PLANS. Either party may file and serve an amended proposed permanent parenting plan according to the rules for amending pleadings.

(3) GOOD FAITH PROPOSAL. The parent submitting a proposed parenting plan shall attach a verified statement that the plan is proposed by that parent in good faith.

(4) AGREED PERMANENT PARENTING PLANS. The parents may make an agreed permanent parenting plan.

(5) MANDATORY SETTLEMENT CONFERENCE. Where mandatory settlement conferences are provided under court rule, the parents shall attend a mandatory settlement conference. The mandatory settlement conference shall be presided over by a judge or a court commissioner, who shall apply the criteria in RCW 26.09.187 and 26.09.191. The parents shall in good faith review the proposed terms of the parenting plans and any other issues relevant to the cause of action with the presiding judge or court commissioner. Facts and legal issues that are not then in dispute shall be entered as stipulations for purposes of final hearing or trial in the matter.

(6) TRIAL SETTING. Trial dates for actions involving minor children brought under this chapter shall receive priority.

(7) ENTRY OF FINAL ORDER. The final order or decree shall be entered not sooner than ninety days after filing and service.

This subsection does not apply to decrees of legal separation.  
[1989 2nd ex.s. c 2 § 1; 1989 c 375 § 8; 1987 c 460 § 7.]

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