

66268-6

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No. 66268-6-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

AMY BUECKING, Respondent,

v.

TIM BUECKING, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#08-3-00852-5

BRIEF OF RESPONDENT

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INTRODUCTION

Appellate courts defer to trial courts in dissolution actions for good reason. The trial judge hears the witnesses testify, considers all the evidence, and decides what is just and equitable under the circumstances. Only when a trial court abuses its discretion does an appellate court intervene.

In his appeal, appellant Timothy Buecking reargues his case, but cannot prove the trial court abused its discretion. The court made reasonable judgments -- and had subject matter jurisdiction to make them. Respondent Amy Westman¹ respectfully requests the Court to affirm the trial court, award reasonable attorney's fees on review, and dismiss this appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Mr. Buecking's appeal presents two issues:

A. Under RCW 26.09.030, parties must wait 90 days after filing their petition before obtaining a dissolution decree. More than 500 days passed between Amy Westman's petition for legal separation and the court's dissolution decree. Did expiration of 90 days after the petition for legal separation satisfy the statutory cooling-off period?

¹ Under the dissolution decree, Amy Buecking resumed using her maiden name, Westman.

B. “The spouse who challenges...decisions [in a dissolution action] bears a heavy burden of showing a manifest abuse of discretion on the part of the trial court.” Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Mr. Buecking challenges the trial court’s award of child support, division of assets and entry of a parenting plan. Did the trial court abuse its discretion in reaching these decisions?

II. STATEMENT OF FACTS

Tim Buecking and Amy Westman were married for nine years and have three children. (Findings and Conclusions ¶¶ 2.4-2.5 and 2.17; CP 54, 57). On December 12, 2008, Ms. Westman filed and properly served a petition for legal separation on Mr. Buecking. (Summons and Petition; CP 181). For the next year and a half, the parties disputed child support, a parenting plan, discovery, and the division of property.

On April 2, 2010, Ms. Westman filed an amended petition for dissolution, replacing the petition for legal separation she filed more than a year earlier. (Amended Petition; CP 86-91). Mr. Buecking joined the amended petition, stating,

I, the respondent, agreed to the filing of an Amended Petition for dissolution of the marriage instead of legal separation.

(Amended Petition at 5; CP 90).

On May 19, 2010, the parties had a one-day bench trial before Whatcom County Superior Court Judge Ira Uhrig. (5/19/10 VRP). Only Ms. Westman and Mr. Buecking testified. One month after trial, Judge Uhrig entered four orders: (1) Findings of Fact and Conclusions of Law (CP 53-64); (2) Order of Child Support (CP 27-42); (3) Final Parenting Plan (CP 43-52); and (4) Decree of Dissolution (CP 16-26).

On November 19, 2010, Mr. Buecking appealed the dissolution decree. (Notice of Appeal; Sub # 108 CP __)². Because the trial court did not abuse its discretion in entering the decree, respondent Amy Westman respectfully requests the Court to affirm the trial court, award reasonable attorneys' fees, and dismiss this appeal.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's subject matter jurisdiction *de novo*. Amy v. Kmart of Washington LLC, 153 Wn. App. 846,

² Because respondent filed a Designation of Clerk's Papers for this document, CP cites do not yet exist. The brief uses the sub number to identify the document.

852, 223 P.3d 1247 (2009) (“the question of subject matter jurisdiction is a question of law that we review de novo”).

The Court reviews the trial court’s orders for an abuse of discretion.

[T]rial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court’s decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985).

IV. BECAUSE 90 DAYS PASSED FROM THE ORIGINAL PETITION, THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION.

Under RCW 26.09.030, parties must wait 90 days from filing their petition before receiving a divorce.

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.

RCW 26.09.030; Weber, 20 Washington Practice § 30.1 (“a Washington court has subject matter jurisdiction to dissolve a marriage only when three facts are found to exist: (1) one of the parties is a resident of the State of Washington or a member of the armed forces stationed in Washington; (2) more than 90 days have elapsed since the proceeding to dissolve the marriage was commenced; and (3) the marriage is irretrievably broken”)

This is known as the cooling-off period.

A decree cannot be obtained immediately, once a decision has been made to seek it. As under the previous statutes, there is a “cooling off” period of time for reconsideration.

Little v. Little, 96 Wn.2d 183, 188, 634 P.2d 498 (1981).

The 90-day period began when Ms. Westman filed her original petition for legal separation.

The court may not enter a decree of dissolution of marriage until ninety days have passed since *both* the filing of the summons and petition and the service of these documents upon the respondent. The ninety-day period starts to run when the original proceeding

was commenced by both filing and service, even if the person who commenced the proceeding was not seeking a dissolution of marriage.

If an amended pleading is filed by either party during the pendency of the proceeding, a new ninety-day waiting period is not commenced. This is because the purpose of the ninety-day period is to give the spouses an opportunity to reconsider and reconcile. Since the commencement of the marital proceeding gives notice to both parties that it is time to give consideration to whether the marriage has value, the ninety-day period starts at that time. The filing of a counterpetition or amended pleadings does not add anything to the core decision on whether the marriage can be saved.

Weber, 20 Washington Practice § 30.3. Because more than 90 days elapsed from Westman's original petition to the final decree, the trial court had subject matter jurisdiction to dissolve the marriage. Little, 96 Wn.2d at 189 ("at the end of the prescribed period, the party or parties become entitled to a decree").

Mr. Buecking contends the trial court's orders are void, asserting that the amended petition started the 90-day period. (Opening Brief at 11) (citing Marriage of Markowski, 50 Wn. App. 633, 749 P.2d 754 (1988)). This argument is unpersuasive for three reasons.

First, filing a petition for legal separation triggers the 90-day period.

The ninety-day waiting or “cooling off” period applicable to proceedings for dissolution of marriage also applies to proceedings for a legal separation. Although the point has been the subject of debate within the profession, the statute specifying the ninety-day waiting period applies to both kinds of petitions, and in context, it is reasonable to conclude that the waiting period is necessary in both kinds of proceedings.

The conclusion that the ninety day waiting period applies is also reinforced by the fact that the statute allows a decree of legal separation to be converted to a decree of dissolution. If the ninety-day period were inapplicable, the waiting period could be avoided by a dissolution petitioner by first obtaining a decree of legal separation, then converting it to a decree of dissolution—a result the legislature is not likely to have intended.

The legislative history of the Dissolution Act of 1972 likewise supports the conclusion that the ninety-day waiting period applies.

Further, the public policy considerations are the same as in the two proceedings. As a matter of public policy, a person filing for dissolution of marriage must wait ninety days to obtain a decree so that the seriousness of this action may be considered. Since the decree of legal separation has the same effect as a decree of dissolution, except that the legal status of marriage remains, the same time for reflection is required.

Weber, 21 Washington Practice § 46.23.

Second, this Court has distinguished Markowski in cases, like this, where personal jurisdiction exists.

Kong contends that as in Markowski, personal jurisdiction was lacking. But here, the relief sought by the original petition was obtained and a decree of legal separation was entered, whereas in Markowski, the relief sought in the original petition was not the relief obtained. We reject Kong's invitation to extend Markowski to require a summons for a motion to convert a decree of legal separation to a decree of dissolution.

Chai v. Kong, 122 Wn. App. 247, 257, 93 P.3d 936 (2004). Here, the trial court had personal jurisdiction, both because Ms. Westman properly served the original summons and because Mr. Buecking joined in the Petition for Dissolution.

Third, it makes no sense to require a new 90-day period in an action that had been pending for over a year. Long before Ms. Westman filed her amended petition, the parties' marriage had ended. Adding a new "cooling-off" period would unnecessarily delay resolving this case.

"To declare an order void, a reviewing court must find the issuing tribunal lacked either personal jurisdiction over the parties or subject matter jurisdiction over the claim." Marley v. Department of Labor and Industries of State, 125 Wn.2d 533, 544, 886 P.2d 189 (1994). Because the trial court here had both personal and subject matter jurisdiction, its orders are valid and fully enforceable.

V. THE TRIAL COURT'S ORDERS ARE REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

Mr. Buecking challenges the trial court's calculation of child support, division of property, and requirements in its parenting plan, arguing they are unsupported by the evidence. (Opening Brief at 3-4). Substantial evidence supports the trial court's rulings, and they are well within the court's discretion.

A. The Court's Child Support Order is Reasonable

The court ordered Mr. Buecking to pay Ms. Westman a monthly transfer amount of \$1,280.37 in child support. (Order of Child Support ¶ 3.5; CP 31). The court premised this amount on four findings. First, Ms. Westman has had primary responsibility to care for the couple's three children. (Findings and Conclusions ¶ 2.19; CP 58) ("wife has been the full-time caretaker for the children's entire lives").

Second, Mr. Buecking's average monthly earning capacity is \$7,000.

By Husband's own admission he has not reported all of his income to DCS and his record keeping is unreliable. Taking into consideration his proven ability to earn \$6,853 per 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.

(Findings and Conclusions ¶ 2.12; CP 55-56). Third, Ms.

Westman's average monthly earnings are \$588.

Based upon Wife's testimony and her paystub marked as Exhibit No. 14, the Court finds that her current rate of pay is \$8.55 per hour and her actual gross income is \$588 per month (based on a 16 hour week). Wife's current income is to be used in calculations for maintenance and child support.

(Findings and Conclusions ¶ 2.12; CP 55-56).

Fourth, Mr. Buecking did not overpay child support, but rather was in arrears.

The Court denies Husband's claim that the \$6,968 in Child Support Arrears amounts to an overpayment of child support. Husband was represented by counsel at the time the January 29, 2009 child support order was entered...If Husband believed that the January 29, 2009 Child Support Order was in error he could have moved for modification but he did not.

The Court further considered that Husband's Financial Declaration filed with the Court on December 31, 2008 shows a \$1,000 housing expense yet Husband testified that he lived with friends and family until September 2009 when he moved into the 2604 Lummi View Drive home. Husband's mortgage payment on Lummi View Drive was initially \$523/month as shown on the Wells Fargo Mortgage statement introduced as Exhibit 11 and remained so until it was increased to \$742. He did not, and does not, have a \$1000 mortgage or rent payment as stated in his Financial Declaration.

Accordingly, the Court finds that Husband's claim of overpayment is disingenuous and that he has waived his claim of overpayment of child support.

(Findings and Conclusions ¶¶ 2.20; CP 59) (emphasis added).

Mr. Buecking challenges the trial court's finding that he can earn \$7,000 a month.

Tim is not voluntarily underemployed because it is customary or standard for him to work for periods of time for more than 40 hours per week followed by periods of unemployment.

(Opening Brief at 16). But the trial court found Mr. Buecking's testimony not credible.

[A]fter hearing Wife's testimony that Husband told her he is refusing work out of state and that he is going to let the assets go to foreclosure so she will have nothing, Husband's admission that he did take out of state jobs in California and Wyoming and his further admission under oath that he told Wife he would no longer take work out of state, this Court finds that Husband's representation of his income and earning capacity is not credible.

(Findings and Conclusions ¶¶ 2.12; CP 56). The trial court did not abuse its discretion in finding Mr. Buecking's monthly income to be \$7,000.

The trial court also did not abuse its discretion in finding Ms. Westman's monthly income to be \$588. Mr. Buecking argues the trial court erred by not imputing income to Ms. Westman. (Opening Brief at 16). Substantial evidence supports the trial court's finding that Ms. Westman is not voluntarily underemployed.

Given Wife's testimony regarding her efforts to find full-time work and copies of some of the rejections of her employment applications entered into evidence as Exhibit No. 23 and that she has been out of the work force for over ten years, since October 1999, and in consideration of her testimony and evidence that she is currently working two days each week at an entry level job as shown in Exhibit No. 14, and that she desires to return to school to gain training as a tax preparer, this Court finds that Wife is not voluntarily unemployed or underemployed and therefore denies Husband's request that income be imputed to Wife.

(Findings and Conclusions ¶¶ 2.12; CP 55).

Although he disagrees with the trial court's findings, Mr. Buecking provides no compelling evidence that the court abused its discretion. Instead, he argues points the court considered and found unpersuasive. Those are insufficient grounds to reverse the trial court's decision.

B. The Trial Court's Division of Property Was Sound

Under RCW 26.09.080, "the trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion." Marriage of Rockwell, 141 Wn. App. 235, 243, 170 P.3d 572 (2007). During their marriage, the couple owned four properties in Whatcom County. (Findings and Conclusions at 9, Exhibit A; CP 61) Mr. Buecking challenges the trial court's division of rents and equity in

the couple's properties. (Opening Brief at 20-21). Because substantial evidence supports the trial court's division, no reason exists to modify the court's decision.

First, the Court appropriately characterized the house at 3090 Mt. Vista Drive, Lummi Island as community property. Even though Mr. Buecking bought the house before marriage, the couple treated the property as a community asset.

Evidence of joint title was admitted in Exhibit No. 22, the Whatcom County Assessor's information showing both parties as owners of said property. Admitted into evidence was Exhibit No. 7, a rental agreement on said property signed by Wife as "Lessor".

Additional evidence was Wife's testimony that she always believed she was co-owner of the property, Husband's testimony that it was "our" house, Wife's testimony that the adjoining property owners, the Bowmans, had given one of the three lots on which the home is situated to both Husband and Wife jointly, and Exhibit No. 8, the SLS Mortgage statement, confirming that Wife's name is on the mortgage. In addition, Husband testified and confirmed his answer to Interrogatory No. 5 on March 15, 2010 which specifically asked if he had any separate property interest in 3090 Mt. Vista Drive. Husband's interrogatory answer, under oath, was "I don't know this either".

Accordingly, the Court finds that the real property located at 3090 Mt. Vista Drive is community property.

(Findings and Conclusions ¶ 2.9; CP 54-55).

This is ample evidence to overcome any presumption that the property was separate.

The 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. While this could be accomplished through a quit claim deed or other real property transfer, a properly executed community property agreement may also effectuate a transfer of real property.

Estate of Borghi, 167 Wn.2d 480, 485, 219 P.3d 932 (2009). Mr. Buecking intended the couple to own the property, both to pay taxes on it and to finance a mortgage.

Next, the trial court appropriately credited Ms. Westman with rental income from the Michigan Street and Lummi View Drive houses. Mr. Buecking failed to save the homes from foreclosure.

The Court having heard testimony regarding Husband being found in contempt of court for violating the January 29, 2009 Temporary Order requiring him to pay the mortgages on the Michigan Street family home and having accepted into evidence the Notice of Trustee's Sale on said home, and having heard Wife's testimony that she and the children will be homeless when the Michigan Street home is foreclosed upon it is ordered that Wife shall be awarded the home at 2604 Lummi View Drive.

(Findings and Conclusions at 9, Exhibit A; CP 61). Because Mr. Buecking allowed the properties to fall into foreclosure despite a

court order, the trial court appropriately compensated Ms. Westman with lost rents and equity.

Once again, Mr. Buecking seeks to overturn the trial court's decision with arguments that the court rejected. Because the court did not abuse its discretion in reaching a just and equitable division of property, this Court should affirm.

C. The Court's Parenting Plan Is Appropriate

Mr. Buecking takes issue with one provision of the court's parenting plan. Under paragraph VI(8) of the plan, "neither parent shall allow the children to have any contact whatsoever with Orvel William Ball, dob 8/6/70." (Parenting Plan at 9; CP 51) Judge Uhrig hand wrote this additional provision on the parenting plan.

Mr. Buecking argues that this provision implies a reciprocal no contact order against Mr. Ball.

The reciprocal provision should be stricken because there is no evidence that Tim wanted to allow any contact between Mr. Ball and the children. The provision should state that Amy shall not allow the children to have any contact whatsoever with Orvel William Ball.

(Opening Brief at 22).

The trial court determined that the couple's children should not have contact with Mr. Ball, Ms. Westman's former boyfriend.

The provision assures this by instructing both parents to prohibit contact. Much like any other provision for the children's well-being, both parents have an obligation to take this precaution. The trial court did not abuse its discretion by placing this requirement on both parents.

VI. MS. WESTMAN DESERVES REASONABLE ATTORNEYS' FEES ON APPEAL

Under RCW 26.09.140, "upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." This Court awards reasonable attorneys' fees after examining "the arguable merit of the issues on appeal and the financial resources of the respective parties." Marriage of Booth, 114 Wn.2d 772, 780, 791 P.2d 519 (1990).

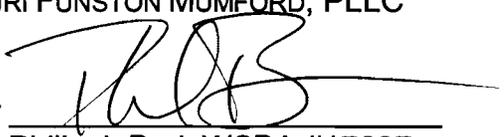
An award is appropriate here for two reasons. First, Mr. Buecking's appeal merely restates arguments the trial court rejected. The appeal does not provide compelling arguments that the trial court abused its discretion. Second, the appeal has further delayed transfer payments from Mr. Buecking to Ms. Westman and the children. Given the disparity in the spouse's relative incomes, an award of fees is appropriate.

CONCLUSION

After reviewing all relevant evidence, Judge Ira Uhrig entered reasonable orders in this dissolution action. Because the court had subject matter jurisdiction to reach these discretionary decisions, respondent Amy Westman respectfully requests the Court to affirm the trial court, award reasonable attorneys' fees, and dismiss this appeal.

DATED this 17 day of August, 2011.

BURI FUNSTON MUMFORD, PLLC

By 

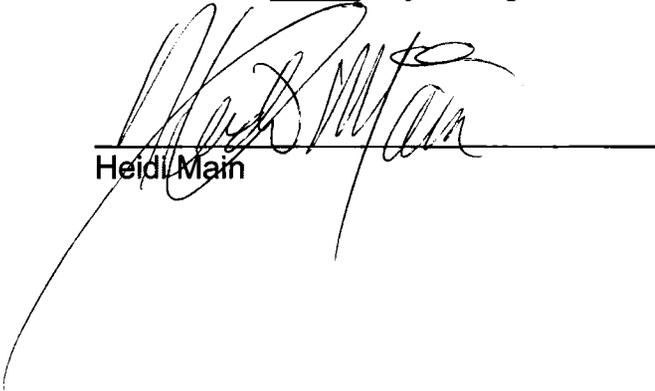
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Respondent to:

David G. Porter
103 E. Holly, #409
Bellingham, WA 98225

DATED this 17th day of August, 2011.



Heidi Main