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STATE OF WASHINGTON
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No. 87680-1

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IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

AMY BUECKING (Westman), Respondent,

v.

TIM BUECKING, Petitioner.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

BURI FUNSTON MUMFORD, PLLC

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 ORIGINAL

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INTRODUCTION

"If the type of controversy is within the [Court's] subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." Marley v. Department of Labor and Industries, 125 Wn.2d 533, 539, 886 P.2d 189 (1994).

Article IV section 6 of the Washington Constitution gives superior courts original and general jurisdiction over "all matters of probate, of divorce, and for annulment of marriage..." Const. art. 4, § 6. Superior courts have a constitutional grant of subject matter jurisdiction that statutes cannot abolish. "What the Legislature has not given, it cannot take away." Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 418, 63 P.2d 397 (1936).

This case involves the intersection between the superior court's subject matter jurisdiction and the statutory requirements for a divorce. Under RCW 26.09.030, parties must wait 90 days after filing a petition before they can obtain a divorce decree. On June 23, 2010, Whatcom County Superior Court Judge Ira Uhrig signed a final decree of dissolution, ending Tim Buecking and Amy (Buecking) Westman's marriage. (Decree of Dissolution; CP 16-26). This was 82 days after the parties filed their joint amended petition for dissolution. (Amended Petition; CP 86-91). It was also

558 days after Amy Westman filed and served her petition for legal separation. (Summons and Petition; CP 181-86). Did the trial court err, and if so, did the error void the divorce decree?

In this Supplemental Brief, Ms. Westman makes two arguments for the trial court's dissolution decree and the Court of Appeals' decision affirming it. First, the trial court did not err. The 90-day cooling off period began when Ms. Westman filed her petition for legal separation, not when the parties filed the amended petition for dissolution. Second, if the trial court erred by entering the dissolution decree on the 82nd day, it "may be a legal error, but it does not result in loss of jurisdiction." Marriage of Buecking, 167 Wn. App. 555, 560, 274 P.3d 390 (2012).

The trial court's decree of dissolution is valid; Amy Westman and Tim Buecking are no longer married.

I. RESTATEMENT OF ISSUES PRESENTED

Two issues merit the Supreme Court's review:*

A. Under RCW 26.09.030, parties must wait 90 days after filing their petition before obtaining a dissolution decree. More than 550 days passed between Amy Westman's petition for legal

* Mr. Buecking's Petition for Review lists five issues. Ms. Westman relies on her briefing in the Court of Appeals for the issues not involving jurisdiction.

separation and the court's dissolution decree. Did expiration of 90 days after the petition for legal separation satisfy the statutory cooling-off period?

B. "The existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules."

ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com'n, 173 Wn.2d 608, 617, 268 P.3d 929 (2012). The trial court entered a final dissolution decree 82 days after the parties filed an amended petition for dissolution. If this violated RCW 26.09.030, did the error divest the Superior Court of subject matter jurisdiction and render the divorce decree void?

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 181-86). 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, agree 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). Although he moved for reconsideration, Mr. Buecking did not object to the timing of the orders, nor did he allege a violation of RCW 26.09.030. (Motion for Reconsideration; CP 11-15) (Reconsideration Memorandum; CP 7-10).

On November 19, 2010, Mr. Buecking appealed the dissolution decree, arguing for the first time that the trial court lost subject matter jurisdiction by entering the decree early. The Court of Appeals rejected the argument and affirmed the trial court.

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. Under RAP 2.5(a), Buecking may not raise the issue for the first time on appeal. Accordingly, we decline to consider it.

Marriage of Buecking, 167 Wn. App. 555, 559-560, 274 P.3d 390 (2012).

Because the trial court always maintained subject matter jurisdiction in this matter, Respondent Amy Westman respectfully requests this Court to uphold the dissolution decree, award reasonable attorneys' fees, and dismiss this appeal.

ARGUMENT

III. STANDARD OF REVIEW

This Court construes RCW 26.09.030 *de novo*. In re Custody of Smith, 137 Wn.2d 1, 8, 969 P.2d 21 (1998) ("we review questions of statutory construction *de novo*"). It also reviews the trial court's subject matter jurisdiction *de novo*. Amy v. Kmart of Washington LLC, 153 Wn. App. 846, 852, 223 P.3d 1247 (2009) ("the question of subject matter jurisdiction is a question of law that we review *de novo*").

IV. BECAUSE 90 DAYS PASSED FROM THE ORIGINAL PETITION, THE TRIAL COURT DID NOT VIOLATE RCW 26.09.030.

Under RCW 26.09.030, parties must wait 90 days from filing 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.

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 for legal separation to the final decree, the trial court had statutory authority 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").

V. IF THE TRIAL COURT VIOLATED RCW 26.09.030, IT DID NOT LOSE SUBJECT MATTER JURISDICTION.

If Judge Uhrig violated RCW 26.09.030 by entering a final decree eight days early, it was a legal error, not a jurisdictional flaw. Washington Courts recognize two forms of jurisdiction — subject matter and personal. State v. Posey, 174 Wn.2d 131, 138, 272 P.3d 840 (2012). Throughout this case, the Superior Court had

personal and subject matter jurisdiction. And that is the only jurisdiction the trial court needed.

In Posey, this Court clarified that a nebulous third kind of jurisdiction – “the power or authority to render the particular judgment” – misinterprets subject matter jurisdiction.

[State v. Werner [129 Wn.2d 485, 918 P.2d 916 (1996)] distinguished between “three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.” Id. (quoting Little, 96 Wn.2d at 197, 634 P.2d 498 (citing 1 A.C. Freeman, A Treatise of the Law of Judgments § 226 (5th ed. rev.1925))). The opinion's distinction between “jurisdiction of the subject matter” and “the power or authority to render the particular judgment” rests on an antiquated understanding of subject matter jurisdiction. Compare 1 Freeman, supra, § 226, with Restatement (Second) of Judgments § 11 (1982).

Posey, 174 Wn.2d at 138-139.

Although Posey dealt with subject matter jurisdiction for felony offenses, the Court's opinion has persuasive authority here. “Where the constitution specifically grants jurisdiction to the superior courts, the legislature cannot restrict the jurisdiction of the superior courts.” Posey, 174 Wn.2d at 135. Simply put, an alleged violation of RCW 26.09.030 cannot divest a superior court of subject matter jurisdiction. The trial court may have lacked

authority to enter the dissolution decree, but it did not lack jurisdiction.

Mr. Buecking argues repeatedly that the trial court did not have jurisdiction to enter the divorce decree, but he confuses jurisdiction with authority. In a quartet of recent cases, this Court has defined the term "jurisdiction" carefully, distinguishing it from the more general notion of authority. First, in Williams v. Leone & Keeble, 171 Wn.2d 726, 254 P.3d 818 (2011), the Court ruled that superior courts either have subject matter jurisdiction or not. They do not lose it midway through a case.

Washington superior courts have jurisdiction by grant of authority from the Washington State Constitution. Const. art. IV, § 6. The critical concept in determining whether a court has subject matter jurisdiction is the type of controversy. Subject matter jurisdiction does not turn on agreement, stipulation, or estoppel. Either a court has subject matter jurisdiction or it does not.

Williams, 171 Wn.2d 726, 730, 254 P.3d 818 (2011) (citations omitted).

Second, in In re Schneider, 173 Wn.2d 353, 268 P.3d 215 (2011), the Court distinguished between subject matter jurisdiction and the authority to make a particular ruling. "[S]ubject matter jurisdiction refers to the court's authority to entertain a type of controversy, not simply lack of authority to enter a particular order."

Schneider, 173 Wn.2d at 360. The Court construed the Uniform Interstate Family Support Act, RCW Ch. 26.21A, concluding that a violation of the Act did not divest the superior court of subject matter jurisdiction.

More properly read, RCW 26.21A.550(1) deprives the trial courts of the authority to issue a particular form of relief—here, an order modifying child support—when its conditions are not met. A court that grants relief beyond the scope of its authority commits an error of law but does not exceed its subject matter jurisdiction.

Schneider, 173 Wn.2d at 362.

Third, in ZDI Gaming v. State ex rel. Washington State Gambling Commission, 173 Wn.2d 608, 268 P.3d 929 (2012), the Court confirmed that a procedural violation cannot divest a superior court of its subject matter jurisdiction.

Our state constitution uses the term “jurisdiction” to describe the fundamental power of courts to act. Our constitution defines the irreducible jurisdiction of the supreme and superior courts. It also defines and confines the power of the legislature to either create or limit jurisdiction. See Wash. Const. art. IV, § 4 (defining the power of the supreme court), § 6 (defining the power of the superior courts), § 30(2) (explicitly giving the legislature the power to provide for jurisdiction of the court of appeals). Our constitution recognizes and vests jurisdiction over many types of cases in the various courts of this State. Wash. Const. art. IV, §§ 1, 4, 6, 30. Superior courts have original jurisdiction in the categories of cases listed in the constitution, which the legislature cannot take away.

ZDI Gaming, 173 Wn.2d at 616-617. Although statutes may “expand and shape jurisdiction”, they cannot “divest, in whole or in part, a constitutional court of its constitutional powers...” ZDI Gaming, 173 Wn.2d at 617.

Finally, in State v. Posey, 174 Wn.2d 131, 272 P.3d 840 (2012), the Court stated that subject matter jurisdiction does not depend on a trial court's rulings.

[A] court's jurisdiction *cannot* hinge on the result it reaches. Jurisdiction means the power to hear and determine. It is conceptually incoherent to suppose that a court's power to determine a case depends on its determination in the case.

Posey, 174 Wn.2d at 139. It is also incoherent to conclude Judge Uhrig did not have subject matter jurisdiction to enter a divorce decree on June 23, 2010, but did have it eight days later on July 1, 2010.

These four cases logically imply that entering a divorce decree early, in violation of RCW 26.09.030, does not deprive a superior court of subject matter jurisdiction. Instead, the superior court has committed a legal error, which the appellate courts routinely correct.

VI. MR. BUECKING FAILED TO PRESERVE ANY ERROR FOR APPEAL

Mr. Buecking challenges the trial court's subject matter jurisdiction to belatedly raise his claim of error. As the Court of Appeals observed under similar circumstances,

[b]ecause the consequences of a court acting without subject matter jurisdiction are draconian and absolute, appellate courts must use caution when asked to characterize an issue as "jurisdictional" or a judgment as "void." Judicial opinions sometimes misleadingly state that the court is dismissing for lack of jurisdiction when some threshold fact has not been established. Arbaugh v. Y & H Corp., 546 U.S. 500, 511, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). Litigants who have failed to preserve a claim of error in the trial court will then seize upon such casual references to "jurisdiction" in appellate opinions as a basis to argue that an issue may be raised for the first time on appeal. That is what has happened here.

Cole v. Harveyland, LLC, 163 Wn. App. 199, 205-206, 258 P.3d 70 (2011);

The divisions of the Court of Appeals do not agree on this, however. Compare Cole, 163 Wn. App. 206 ("the very broad subject matter jurisdiction of the superior court is defined by the state constitution, not by statutes") with In re Ruff, 168 Wn. App. 109, 118, 275 P.3d 1175 (2012) ("UCCJEA's procedural requirements are jurisdictional") and Marriage of Robinson, 159 Wn. App. 162, 167-168, 248 P.3d 532 (2010) ("a court has no

jurisdiction except that which is conferred by the applicable statutes").

The Court should take the opportunity to overrule the published decisions in Ruff and Robinson. By labeling statutory violations "jurisdictional", the Court of Appeals furthers the imprecision this Court has tried to correct. State v. Posey, 174 Wn.2d 131, 137-138, 272 P.3d 840 (2012) ("admittedly, our prior jurisprudence discussing juvenile court jurisdiction is not a model of clarity"); MHM & F, LLC v. Pryor, 168 Wn. App. 451, 459, 277 P.3d 62 (2012) ("in recent cases where our appellate courts have considered the constitutional grant of subject matter jurisdiction to the superior courts, they have accorded it the centrality that it deserves").

Here, Mr. Buecking had the obligation to raise any alleged error with the trial court.

If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.

Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). Twice – on entry of the final orders and then on reconsideration – Mr.

Buecking failed to raise the alleged violation of RCW 26.09.030. He waived his argument by failing to raise it with the trial court.

Had Mr. Buecking raised the alleged error, the trial court could have easily remedied it by reentering the final decree a week later.

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.

Marriage of Buecking, 167 Wn. App. 555, 560, 274 P.3d 390 (2012).

The Court of Appeals exercised its discretion under RAP 2.5(a) and refused to consider a claim of error not raised in the trial court. Although Mr. Buecking could assert that the error concerned "failure to establish facts upon which relief can be granted", that argument expired on July 1, 2010, 90 days after the amended petition for dissolution. RAP 2.5(a)(2). The time has passed to claim any error in the decree. It is now valid and fully enforceable.

VII. 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 raises an interesting jurisdictional question, but serves no purpose for the parties. 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. Both the trial court and Court of Appeals have awarded reasonable attorneys' fees.

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 8th day of February, 2013.

BURI FUNSTON MUMFORD, PLLC

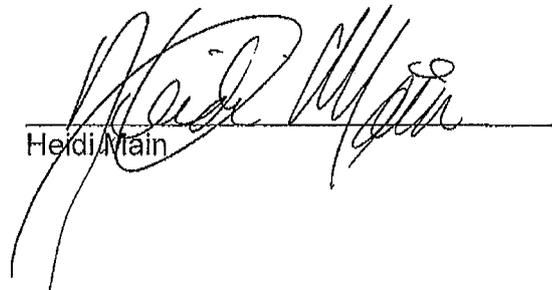
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DECLARATION OF SERVICE

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DATED this 8th day of February, 2013.


Heidi Main

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Attached for filing is an electronic copy of Respondent's Supplemental Brief in Marriage of Buecking, No. 87680-1.

Thank you,

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