

No. 66268-6-1

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

In Re the Marriage of:

AMY BUECKING,

Respondent

And

TIM BUECKING

Appellant.

REPLY BRIEF OF APPELLANT
TIM BUECKING

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I. ARGUMENT

II. Overview

Amy argues in her responsive brief that the Court had the subject matter jurisdiction or statutory authority to enter the decree of dissolution of marriage. Amy's argument ignores the statutory requirements of RCW 26.09.030 which vests the trial court with the authority to enter the decree of dissolution.

Pursuant to RCW 26.09.030, the trial court has the authority to enter a decree of dissolution ninety (90) days after the later of the date the summons was served upon the respondent or the date the Washington state resident filed the petition for dissolution of marriage, wherein it is alleged that the marriage is irretrievably broken, as long as the respondent had joined in the petition to dissolve the marriage or not deny that the marriage is irretrievably broken.

In our case, Amy abandoned her petition for legal separation when she filed her petition for dissolution of marriage on April 2, 2010. Less than ninety days had passed from the date that she filed her petition, wherein she alleged that the marriage was irretrievably broken for the first time, and June 23, 2010, the date the trial court entered its decree of dissolution.

Furthermore, Tim did not join in the petition, nor did Amy serve Tim with a dissolution summons. The ninety days starts from the later of the date the petition was filed or the date the summons was served. Because the dissolution summons was never served, there was no summons service to trigger the 90 day period. As such, the trial court was not vested with the statutory authority to enter the decree of dissolution.

Because the trial court did not have the statutory or subject matter jurisdiction to enter the decree, the decree is void. Void decree must be vacated.

If the court determines that the decree should not be vacated, then this court should remand the case for recalculation of child support. The evidence does not support the trial court's finding that Tim is voluntarily underemployed, nor that Amy is not voluntarily underemployed.

Tim is fully employed because he works the amount of time considered customary or standard in the oil refinery shut downs. Tim has never earned an annual gross income of \$7,000.00 per year, which is the income the trial court imputed to Tim. The trial court used one pay stub from 2008 to calculate Tim's gross income instead of Tim's current income provided to the court at the time of trial.

Amy was voluntarily underemployed at the time of trial. Between

1999 and the time of trial, May 2010, Amy had one pay stub for part-time employment. Amy had quit work in 1999 to raise the parties' children. Because Amy had no history of gainful employment, the trial court should have imputed income to Amy based upon median net monthly income from the U.S. Census Bureau.

In terms of the issues of awarding Amy judgments based upon property that did not exist at trial or was lost to foreclosure, Amy's argument, with the exception of the characterization of one piece of real property, was without legal authority.

Amy's argument in support of the trial court's parenting plan was not based upon any findings or legal authority.

Each party should bear their own attorney fees on appeal.

III. The Decree is Void Because the Trial Court did Not Obtain the Subject Matter Jurisdiction to Enter Its Decree of Dissolution of Marriage

Standard of Review: "Subject matter jurisdiction is the authority of the Court to hear and determine the class of actions to which the case belongs.....The question of subject matter jurisdiction is a question of law that we review denovo." Amy v. Kmart of Wash, LLC, 153 Wn App. 846,

852, 223 P. 3d 1247 (2009).

Background: On March 4, 2010, Tim signed page 5 of Amy's petition under the statement which reads, "I, the respondent, agree to the filing of an Amended Petition for Dissolution of the Marriage instead of legal separation." (CP90) No summons was filed or served in conjunction with Amy's petition for dissolution of the parties' marriage. Tim filed his response to Amy's petition for dissolution of marriage on May 18, 2010. (CP 189-191)

On April 2, 2010, Amy filed her petition for dissolution of marriage, which alleged, for the first time, that the "marriage is irretrievably broken." (CP 87) The dissolution of marriage trial occurred on May 19, 2010. The Decree of Dissolution of the parties' marriage was entered on June 23, 2010, (CP 16-25) or less than the ninety (90) days required by RCW 26.09.030.

Argument: In a dissolution of marriage action, the trial court's authority to enter a decree dissolving the marriage of the parties' is governed by RCW 26.09.030.

When a party who (1) is a resident of this state... petitions for a dissolution of marriage... and alleges that the marriage...is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made from upon the respondent.... the Court shall proceed as follows:
(a) If the other party joins in the petition or does not deny that the marriageis irretrievably broken, the Court shall enter a decree of dissolution.

Pursuant to the RCW 26.09.030, the trial court obtains the authority to enter a decree dissolving the parties' marriage only after several preconditions have been satisfied. Ninety (90) days after the later of the date the summons was served upon the respondent, or the date the Washington State resident filed the petition for dissolution of marriage, wherein it is alleged that the marriage is irretrievably broken, the trial court is vested with the authority to enter a decree dissolving the marriage, as long as the respondent had joined in the petition to dissolve the marriage or did not deny that the marriage is irretrievably broken. The record clearly shows that the trial court did not have the authority to enter the decree dissolving the marriage.

Pursuant to RCW 26.09.030, the trial court did not obtain the statutory authority, in our case, to enter the dissolution of marriage decree because less than ninety (90) days had passed from the date Amy filed her petition for dissolution, which contained the allegation that the marriage is

irretrievably broken, April 2, 2010, and the date the decree was entered, June 23, 2010.

Amy includes a passage from Washington Practice on page 7 of her responsive brief wherein the contributor argues that the 90 day “cooling-off” period applies to both petitions for legal separation and petitions for dissolution of marriage. From this contributor’s position, Amy argues on page 6 of her responsive brief that the filing of her petition for legal separation triggered the ninety-day “cooling off” period. Amy’s argument is not based upon a statute or case law. Rather, her argument relies on the position of a publication contributor. Amy’s argument ignores the plain language of RCW 26.09.030.

The first paragraph of RCW 26.09.030, which requires the 90 day “cooling-off” period, refers only to petitions for dissolution of marriage and petitions for domestic partnerships, not petitions for legal separation. Decrees of legal separation are referenced in RCW 26.09.030 (d).

If the petitioner request 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.

This subsection makes no requirement for a ninety (90) day “cooling-off” period before entry of a decree of legal separation. A trial

court may enter a decree of legal separation without regard to any “cooling-off period. Therefore, the procedural requirements concerning the petition for legal separation and the petition for dissolution of marriage are not the same.

Furthermore, Amy abandoned her petition for legal separation and petitioned for a decree dissolving her marriage. Amy cannot use her abandoned petition for legal separation to trigger the ninety-day “cooling-off” period, because the petition for legal separation is not a petition for dissolution which contains an allegation that the marriage is irretrievably broken. RCW 26.09.030 specifically requires Amy to file a petition for dissolution of marriage containing an allegation that the marriage is irretrievably broken, comply with the filing and notice requirements and wait ninety days before the Court has the authority to enter the decree.

Amy filed her petition for dissolution of marriage, which alleged the marriage is irretrievably broken, on April 2, 2010. Had Amy complied with the service requirements, which she did not, the 90 days could have started on April 2, 2010.

In addition to the statutory requirements that Amy file a petition for dissolution which alleges that the marriage is irretrievably broken, RCW 26.09.030 also triggers the ninety-day “cooling-off” period from the later

of the service of the summons or the filing of the petition for dissolution.

RCW 26.09.030 requires the petitioner to give notice of the action to

dissolve the marriage in a summons to be served upon the respondent.

Amy does not dispute her failure to file or serve a summons providing

notice to Tim that she intended to seek a decree dissolving their marriage.

On page 8 of Amy's responsive brief, she argues that her original

summons in the legal separation action satisfied the RCW 26.09.030

requirement of a summons in the dissolution of marriage action.

However, a petition for dissolution of marriage dissolves the marriage

while a legal separation does not. Amy abandoned her requests for legal

separation when she filed her petition for dissolution. The dissolution

summons informs the respondent that a default can be taken in the

dissolution action unless a response is received before a certain date. The

dissolution summons is not only required by RCW 26.09.030, but it is also

a starting point for the 90 day "cooling-off" period. As such, the trial

court did not obtain the statutory authority to enter a decree dissolving the

parties' marriage because Amy did not fulfill the RCW 26.09.030

requirement that ninety days must pass from the later of the date of the

filing of the petition for dissolution of marriage or the date when service of

the summons was made upon Tim.

On page 8 of her responsive brief, Amy argues that Tim joined in her petition for dissolution of marriage. Tim disputes this claim. Tim filed his response to Amy's petition to dissolve their marriage on May 18, 2010. (CP 189-191) On March 4, 2010, Tim simply agreed to the filing of the petition for dissolution of marriage instead of legal separation (CP 90) Had Tim joined in Amy's petition for dissolution, the joinder would have stated something to the effect of, "I, the respondent, join in the petition." The ninety (90) days never started to run because Amy failed to serve a summons upon Tim as required by RCW 26.09.030.

The Decree Should be Vacated: The trial court did not obtain subject matter jurisdiction over the dissolution action because Amy failed to comply with the requirements of RCW 26.09.030. A decree entered by a Court which lacks jurisdiction is void. See Dike v. Dike, 75 Wn. 2d 1, 7, 448 P. 2d 490 (1968). "A void judgment must be vacated." Summers v. Dept. of Revenue, 104 Wn. App. 87, 90, 14 P. 3d 902 (2001).

IV. The Trial Court Erred by Determining that Tim was Voluntarily Underemployed and by Using One 2008 Pay Stub to Impute Income to Tim Instead of Using Tim's Current Rate of Pay at the Time of Trial

Standard of Review: The determination of child support is based upon the schedule and standards set for the in chapter 26.19 RCW. “The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court’s decision is manifestly unreasonable, based upon untenable grounds, or granted for untenable reasons. In re Peterson, 80 Wn. App. 148, 152, 906 P. 2d 1009 (1995)

Background: The trial court imputed gross income to Tim at \$7,000.00 per month on the basis that he was voluntarily underemployed. (CP 29) Tim works at various oil refineries, especially during their shut-downs (RP 100-102) Amy admitted that Tim has periods of unemployment every year. (RP 69) “That’s part of his job.” (RP 69)

Amy provided Tim’s September 26, 2008 pay stub at trial. (EX 16, RP 49) Based upon this one pay stub from September of 2008, Amy testified that Tim is capable of earning \$7,000.00 gross per month (RP 47) \$7,000.00 gross per month is an annual income of \$84,000.00. Amy admitted that they had never filed a tax return during their marriage with a gross income of \$84,000.00. (RP 81) Tim testified that his 2009 income

was \$54,563.27, Tim testified that his 2010 income, prior to trial, was \$15,157.52 (EX 29, RP 142)

Argument: A trial court abuses its discretion when its decision is based upon untenable grounds. Peterson, Id. The trial court abused its discretion by imputing income of \$7,000.00 per month gross to Tim because he was underemployed. Amy does not dispute that Tim was working full-time under the standard for his industry as stated by Division One. “According to the dictionary, full-time means employed for working the amount of time considered customary or standard.” Marriage of Schumacker, 100 Wn. App. 208, 214, 997 P. 2d 399 (2000). When the industry standard for full-time employment in Tim’s industry is employment followed by periods of unemployment, it is untenable to impute income to Tim during periods of time when there are no shut-downs, i.e. periods of unemployment for Tim. Furthermore, it is untenable to base Tim’s 2010 income, for child support purposes, on one 2008 pay stub. The trial court should have based Tim’s income for child support purposes on his 2010 income.

If this court determines that income should be imputed to Tim, the trial court’s decision was based upon untenable grounds because the trial

court did not follow the statutory criteria of RCW 26.19.071(6).

In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority.

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based upon reliable information, such as employment security data
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic.
- (d) Full-time earnings at minimum wage in a jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, disability life line benefits, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

Tim provided earnings based upon his current rate of pay. Any income imputed to Tim should have been based on RCW 26.19.071 (6)

(a), Tim's current rate of pay. The trial court abused its discretion by basing the imputed income on one pay stub from 2008.

V. The Trial Court Erred by Determining that Amy was not Voluntarily Underemployed and by Not Imputing Income to Amy Based upon the Median Net Monthly Income from the U.S. Census Bureau

Background: The Temporary Order of Child Support ordered Amy to provide a medical update and/or employment information by the end of February 2009 (CP 134) Amy never provided this information. (RP 70) Amy provided one pay stub for part-time work that she had done from April 17, 2010 to April 30, 2010 (EX 14, RP 47), which was a few days before trial. Amy had worked about 30 hours during the two week period, earning \$8.55 per hour. (EX, RP 44) Amy's last job prior to April of 2010, ended on October 1, 1999 (RP 44)

Argument: On page 11 of her responsive brief, Amy argues that income for child support purposes should not have been imputed to her. On page 9 of her responsive brief, Amy states that she has been the full-time caretaker for the parties' children since birth. In Marriage of Pollard, 99 Wn. App. 48, 53-54, 991 P. 2nd 1201 (2000), the appellate court held that the mother was voluntarily underemployed and child support must be imputed to her when she left her job to raise her children. Amy testified that she had last worked in October of 1999. (RP 44) Amy left work to raise the parties' children (RP 44). Like the mother in Pollard, Amy was voluntarily unemployed.

Amy provided the court with one pay stub for part-time work.

(EX 14, RP 44) Pursuant to RCW 26.19.071 (6), Amy's one pay stub is "the absence of records of a parents' actual earning." It is Tim's position that the trial court abused its discretion when it failed to impute income to Amy. Because one pay stub does not create a "history of minimum wage earnings", median net income, RCW 26.19.071 (6) (e), should be imputed to Amy.

If this court does not determine that the Decree, along with the Final Child Support Order should be vacated, then this case should be remanded for recalculation of child support, based upon the above-stated argument.

VI. The Trial Court Erred by Awarding Amy Judgments Based Upon Property That Did Not Exist at Trial or Was Lost to Foreclosure

Argument: In section VIII on page 17 Tim's opening brief, he argues that "The Trial Court Erred By Awarding Judgments to Amy for Property and for Maintenance That Did Not Exist at Trial or Was Lost to Foreclosure."

With the exception of the characterization of the Lummi Island real property, Amy provided no legal authority to dispute the specific claims Tim made in section VIII, pages 17-21. As such, Tim stands upon the

arguments contained therein.

Concerning the Lummi Island real property, Amy admitted on page 13 of her responsive brief that Tim purchased the Lummi Island property prior to marriage. Because the character of property is determined as of its date of acquisition, the Lummi Island property is Tim's separate property. See Estate of Borghi, 167 Wn. 2d 480, 484, 219 P. 3d 932 (2009). While citing Borghi on page 14 of her responsive brief, Amy argues on page 13 that the parties treated the Lummi Island property as a community asset. Amy's argument does not satisfy the requirements of Borghi to overcome the presumption that the character of the property is changed to community.

The evidence must show the intent of the spouse owing 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.

It is undisputed that Tim never changed the character of the Lummi Island real property by a community property agreement, quit claim deed or other real property transfer. The Lummi Island property was Tim's separate property.

Even though the property should have been characterized as Tim's separate property, Amy provides no legal authority as to why she is entitled to \$25,000.00 of equity in the property that was lost to foreclosure. Furthermore, Tim was not court ordered to pay the Lummi Island mortgage.

VII. Number 8 of Paragraph VI of the Final Parenting Plan is Not Supported by the Evidence.

Argument: In section IX on page 21 of Tim's opening brief, he argues that "Number 8 of Paragraph VI of the Final Parenting Plan is Not Supported by the Evidence." Amy provided no legal authority to dispute the specific claims Tim made in section IX, pages 21-22. As such, Tim stands upon the arguments contained therein.

VIII. Tim objects to the Award of Attorney Fees to Amy on Appeal

Tim believes that his appeal has merit. Amy's argument that the trial court has the authority to enter the decree of dissolution is based upon a publication contributor while Tim's argument is based upon the statute

that can vest the trial court with the authority to enter the decree of dissolution. Amy bases her arguments on the issues of child support solely upon the disputed findings. Amy's parenting plan argument is not based upon any findings or legal authority. In terms of the issues awarding Amy judgments based upon property that did not exist at trial or was lost to foreclosure, Amy's argument, with the exception of characterization, was without legal authority.

Furthermore, while Amy makes the claim, she has not provided any evidence that the appeal has further delayed transfer payments from Tim to Amy and the children.

Finally, the disparity in the parties' relative incomes is based upon Amy's reluctance to become employed. This Court should not award Amy attorney fees on this appeal.

IX. Conclusion

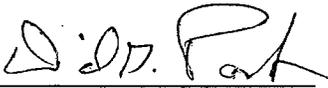
This Court should vacate the Decree of Dissolution of marriage and the Final Order of Child Support and the Final Parenting Plan upon which these orders are based. The Decree should be vacated because, as argued by Tim, the trial court did not obtain the authority under RCW

26.09.030 to enter the Decree.

If this Court determines that the trial court had the statutory authority to enter its Decree, then the case should be remanded for recalculation of child support, remanded for a property and debt distribution based on assets that are in existence at the time of trial, and remanded for a parenting plan that is based upon the evidence.

Each party should pay their own costs and attorney fees on appeal.

Respectfully Submitted this 17th day of September 2011.

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