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SUPREME COURT
STATE OF WASHINGTON
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87680-1

SUPREME COURT OF THE
STATE OF WASHINGTON

In Re the Marriage of:

AMY BUECKING
k/n/a Amy Westman,

Respondent

and

TIM BUECKING

Petitioner

NO. 87680-1

SUPPLEMENTAL BRIEF OF PETTIONER
TIM BUECKING

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I. INTRODUCTION

Tim filed his Petition for Review to the Washington State Supreme Court on July 18, 2012. The Petition for Review was granted on January 11, 2013. The same order allowed Tim to file a supplement brief. This Supplement Brief of Petitioner – Tim Buecking is intended to supplement ~~the arguments of his Petition for Review.~~

II. ASSIGNMENTS OF ERROR

The Trial Court entered its Findings of Fact and Conclusions of Law, Decree of Dissolution of Marriage, Final Order of Child Support and Final Parenting Plan on June 23, 2010. The Order Denying Tim's Motion for Reconsideration was entered on October 25, 2010. Tim assigns error to the Findings of Fact, Conclusions of Law, Decree of Dissolution of Marriage, Final Order of Child Support, Final Parenting Plan and the Order on Reconsideration.

Tim filed his Notice to Appeal to Division One on November 19, 2010. Division One filed their opinion, which was published in part, on April 2, 2012. Tim filed his Motion for Reconsideration of the above-stated opinion on April 19, 2012. On June 19, 2012, Division One denied Tim's Motion for Reconsideration.

Specifically, the Trial Court and Division One erred:

1. The Trial Court and Division One erred because neither Court had the inherent or subject matter jurisdiction authority to determine that the marriage of the parties is irretrievably broken and enter the decree of dissolution of marriage, when less than ninety days had passed since the date the petition was filed. (All of the Trial Court's Findings, All of the Trial Court's Conclusions of Law, All of the Trial Court's provisions in the Decree of Dissolution and the Trial Court's Order on Reconsideration) (The opinion of the Court of Appeals, Division One, and Division One's denial of the Motion for Reconsideration)

2. The Trial Court erred when it held a trial prior to the passage of the 90 day waiting period because RCW 26.09.030 does not provide the Superior Court with the subject matter jurisdiction to hold a trial prior to the expiration of the 90 day waiting period. (All of the Trial Court's Findings, All of the Trial Court's Conclusions of Law, All of the Trial Court's Provisions in the Decree of Dissolution and the Trial Court's Order on Reconsideration)

Division One erred when it affirmed the Trial Court's Orders and stated that a Superior Court has the authority to hold a trial prior to the passage of the 90 day waiting period because RCW 26.09.030 does not provide the Superior Court with the subject matter jurisdiction to hold a trial prior to the expiration of the 90 day waiting period. (The opinion of

the Court of Appeals, Division One, and Division One's denial of the Motion for Reconsideration)

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

A. Does RCW 26.09.030 limit subject matter jurisdiction in dissolution of marriage cases? (A of E #1)

B. Does the Superior Court have the subject matter jurisdiction or authority to hold a trial in a dissolution of marriage proceedings before the statutorily mandated ninety days have elapsed as prescribed by RCW 26.09.030? (A of E #2)

III. STATEMENT OF THE CASE

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, signed Amy's request to file her petition for dissolution of marriage on March 4, 2010. (CP 90) Tim signed a statement, prepared in the petition, which states: "I, the respondent, agree to the filing of an Amended Petition for Dissolution of the marriage instead of legal separation." (CP 90). The filing of Amy's Amended Petition for Dissolution of Marriage occurred on April 2, 2010. (CP 86) The trial on Amy's petition for dissolution of marriage occurred on May 19, 2010. (CP 80 shows the list of exhibits offered on May 19, 2010) The trial was held less than 90 days from

the filing of Amy's Petition for Dissolution of Marriage. The Decree of Dissolution was entered on June 23, 2010. (CP 16) The Decree of Dissolution was entered less than 90 days, 82 days, from the filing of Amy's Petition for Dissolution of Marriage. (CP 16)

IV. ARGUMENT

Issue #1. Does RCW 26.09.030 limit subject matter jurisdiction in dissolution of marriage cases?

According to this Court, "Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power. It is the authority of the Court to hear and determine the class of action to which the case belongs." In re Adoption of Buehl, 87 Wn 2d 649, 655, 555 P. 2d 1334 (1976). (A-3)

A. Analysis of Court of Appeals' Opinion

In answer to the above-stated question, Division One, in its published opinion, appears to be stating that RCW 26.09.030 in no way limits subject matter jurisdiction in dissolution of marriage cases. To begin its analysis of subject matter jurisdiction, as it applies to this case, Division One cites to Article IV section 6 of the Washington State Constitution. "Under the Washington Constitution, Superior Courts have original jurisdiction in all cases involving dissolution or annulment of marriage." (A-3) From this Constitutional grant of subject matter jurisdiction, Division One states,

“Petitions for marital dissolution are within the broad subject matter jurisdiction of the superior court.” (A-1)

Turning our case, the entry of the decree of dissolution of marriage, prior to passage of the 90 day waiting period, constitutes a “controversy”. In its opinion, Division One states, “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.” Cole v. Harveyland, L.L.C., 163 Wn. App. 199, 209, 258 P. 3d 70 (2011). (A-3) Therefore, according to Division One, because superior courts have the subject matter jurisdiction to enter decrees dissolving marriages, no controversy concerning the decree of dissolution of marriage will disattach subject matter jurisdiction from the dissolution case.

Because superior courts have subject matter jurisdiction throughout the dissolution of marriage case, no matter the controversy, superior courts have the subject matter jurisdiction to enter decrees dissolving marriages, at any time, including entry of decrees prior to the expiration of the 90 day waiting period. In its opinion, Division One 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) “A Court’s alleged failure to operate within the statutory framework does not render its judgment void.” (A-3)

As understood by Tim, Division One’s analysis of the attachment of subject matter jurisdiction to the decree of dissolution is as follows: Because

the Washington State Constitution has given the Superior Court a broad grant of subject matter jurisdiction in all cases involving dissolution of marriages, subject matter jurisdiction attaches to all superior court actions in a dissolution of marriage case and at all times, during the litigation of the dissolution of marriage case. While the entry of a decree of dissolution of marriage prior to ~~the passage of the 90-day waiting period may be an error of law, which must~~ be challenged below, (A-3) the superior court has the subject matter jurisdiction to enter the decree. Therefore, RCW 26.09.030 in no way limits the subject matter jurisdiction of the Superior Courts in dissolution of marriage cases.

B. Public Policy Concerns

The published opinion of In re Marriage of Buecking and Buecking, 167 Wn App. 555, 274 P. 3d 390 (2012) is now a precedent as to the entry of a dissolution of marriage decree. The opinion essentially invalidates RCW 26.09.030, or, at least, renders the statute ineffective. Tim suggests the following hypothetical.

Hypothetical parties can enter into an oral stipulation that no one will timely object that their decree of dissolution of marriage is being entered before the passage of the 90 day waiting period. As long as the superior court does not prevent this action, the parties can enter their decree of dissolution of marriage before the passage of the 90-day waiting period. This entry of the decree would constitute an error of law for the violation of RCW 26.09.030.

However, the decree of dissolution will probably become binding upon the parties because the claim of error was not timely raised in the superior court.

An action for the dissolution of marriage is often fraught with high emotions. The parties' intent to dissolve their marriage may blind them to other issues, which also need to be resolved in their dissolution of marriage action. For example, failure to divide the parties' pension may result in an additional partition lawsuit. The 90 day cooling off period of RCW 26.09.030 was enacted into law in Washington, to allow emotions to subside to facilitate the atmosphere for reconciliation. The precedent in Buecking, supra, runs counter to this stated policy.

C. RCW 26.09.030 does limit the subject matter jurisdiction of the superior court in dissolution of marriage cases.

Returning to Buehl, supra, subject matter jurisdiction ".....is the authority of the Court to hear and determine the class of actions to which the case belongs." @ 655. The key words from Buehl for our case is ".....the authority of the court....." To reach the conclusion that RCW 26.09.030 in no way limits the superior court's subject matter jurisdiction in dissolution of marriage cases, Division One appears to ignore the fact that, "A dissolution action is a statutory proceeding." Marriage of Robinson, 159 Wn. App. 162, 167, 248 P. 3d 532 (2010).

Contrary to the analysis of Division One, in our case, it is a well established rule of law that the subject matter jurisdiction and authority of the courts to act in a particular case is prescribed by the applicable legislative enactment. “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.”

Arneson v. Arneson, 38 Wn. 2d 99, 100, 227 P. 2nd 1016 (1951). In Arneson, the superior court acted “in excess of its jurisdiction” @ 103, when the decree ordered that the parties’ assets be liquidated to pay creditors, leaving nothing to be divided between the parties. @ 100.

Citing Arneson, this Court held that the superior court acted outside of the subject matter jurisdictional grant of authority derived from the divorce act of 1949 when the decree made a custody provision for a child who had not been born to both parties. Palmer v. Palmer, 42 Wn. 2d 715, 716-18, 258 P. 2d 475 (1953). Citing Palmer, Division Three in Robinson, supra, stated, “RCW 26.09.030 determines subject matter jurisdiction in dissolution cases....” @ 167. Applying the facts of the Robinson case to RCW 26.09.030, Division Three held that the superior court lacked subject matter jurisdiction to enter the decree of dissolution because neither party resided, nor intended to reside, in the state of Washington at the time the petition was filed or during the pendency of the dissolution of marriage proceedings @ 164. Consequently, Division three vacated the decree in Robinson @164. See also Hargreaves v.

Hargreaves, 55 Wn. 2d 856, 350 P. 2d 867 (1960), wherein this court vacated the decree of dissolution and dismissed the case due to a lack of subject matter jurisdiction because the dissolution of marriage action was commenced by a non resident of the State of Washington. “A judgment entered without subject matter jurisdiction is void.” Robinson, supra, 167.

It is Tim’s position that because a dissolution of marriage action is a statutory proceeding, “A Court has no jurisdiction except that which is conferred by the applicable statutes.” Robinson, supra, 167. RCW 26.09.030 determines the procedure the superior courts must follow before these courts have the authority to enter a decree of dissolution. Absent the procedure mandated by RCW 26.09.030, the superior court has no subject matter jurisdiction, or authority to enter a decree of dissolution of marriage.

The portion of RCW 26.09.030 that is applicable to our case states:

When a party who 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 service of the summons was made upon the respondent, the Court shall proceed as follows: (a).... enter a decree of dissolution....

The statutory language of RCW 26.09.030 is clear. As the statute applies to our case, before the superior court has the subject matter jurisdiction to enter a decree of dissolution, ninety days must have elapsed since the date the petition was filed. In our case, it is undisputed that less than 90 days, or 82 days, had elapsed between the date the petition was filed, April 2, 2010, (CP

86) and June 23, 2010, the date the superior court entered its decree of dissolution (CP 16) “Because the requirements of RCW 26.09.030 were not met, the Washington Courts lack subject matter jurisdiction over this proceeding.” Robinson, supra, 172. The decree of dissolution of marriage entered in our case on June 23, 2010 is void for a lack of subject matter jurisdiction. ~~“A judgment entered without subject matter jurisdiction is void.”~~ Robinson, supra, 168. “A void judgment must be vacated.” Summers v. Dept. of Revenue, 104 Wn. App. 87, 90, 14 P. 3d 902 (2001).

RCW 26.09.030 does limit the subject matter jurisdiction of the superior courts in dissolution of marriage cases. In our case, the decree of dissolution of marriage, entered on June 23, 2010, is void because the 90 day waiting period had not elapsed from the date of the filing of the petition for dissolution of the parties’ marriage. The Whatcom County Superior Court did not have the subject matter jurisdiction to enter the decree. The void decree must be vacated.

Issue #II. Does the superior court have the subject matter jurisdiction or authority to hold a trial in a dissolution of marriage proceeding before the statutorily mandated 90 days have elapsed, as prescribed in RCW 26.09.030?

A. Analysis of Court of Appeals Opinion

Division One, in its published opinion, appears to be stating that a superior court can determine the rights and responsibilities of the parties in a

trial before the statutorily mandated ninety days have elapsed. (A-4) In footnote 12, Division One states:

.....Further, even if we were to agree with Buecking that the 90-day waiting period applies in the circumstances 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 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 was entered. (A-4)

According to Division One, because RCW 26.09.030 applies only to entry of the decree, the parties' dissolution of marriage trial can take place at any time after the filing of the petition for dissolution of marriage. RCW 26.09.030 does not specifically allow for a trial during the ninety-day waiting period. Division One has cited no authority for its decision that the parties in a dissolution of marriage action can have their trial during the 90 day waiting period. Tim knows of no court rule or statute which allows the superior court to reduce the ninety day waiting period of RCW 26.09.030 to hold a trial. Conversely, CR 6 (a) enlarges the ninety day waiting period of RCW 26.09.030 by not including the date of filing. CR 6 (a) could also enlarge the ninety day waiting period if the 91st day falls upon a Saturday, Sunday or holiday.

B. Public Policy Concerns

Allowing the superior courts to hold trials on the marriage dissolution petition prior to the passage of the ninety day waiting period counters the very

purpose for which the legislature enacted RCW 26.09.030 in the first place - reconciliation. The purpose of the ninety day waiting period is to give the spouses the time to consider whether they should dissolve their marriage or dismiss the action and reconcile. See Marriage of Little, 96 Wn. 2d 183, 188, 634 P. 2d 498 (1981).

A trial runs counter to the conditions that could facilitate reconciliation of the spouses because the very purpose of a trial is to fix the circumstances of the parties for their future lives, when they will live separate and apart from one another. Once the trial occurs, there is probably little chance of reconciliation. Trials tend to change the mindset of the litigants. Statements which may facilitate reconciliation will probably not be made at trial because the goals at trial run counter to reconciliation. The dissolution litigants will probably feel bound by the superior court's oral ruling. The litigation process of memorializing the oral ruling would be completed to ensure that the decree of dissolution of marriage can be entered after the ninety day waiting period has elapsed.

C. Because RCW 26.09.030, which provides subject matter jurisdiction, does not specifically allow trials to occur prior to the passage of the ninety day waiting period, the superior court does not have the subject matter jurisdiction to hold a trial on the petition for dissolution until after the ninety day waiting period has elapsed.

Just as a superior court has no subject matter jurisdiction to enter a decree of dissolution of marriage until after the ninety day waiting period has elapsed, it should also be implied from RCW 26.09.030 that the superior court has no subject matter jurisdiction to hold a trial on the petition for dissolution of marriage until after the ninety day waiting period has elapsed.

The ninety day waiting period, mandated by RCW 26.09.030, is in the statute to allow the spouses the time to consider Reconciliation. This will be undermined by a trial during the ninety day waiting period. In order that the spirit and the intent of the statutory mandate of RCW 26.09.030 is preserved, this Court should hold that there is no subject matter jurisdiction provided under RCW 26.09.030 to allow a superior court to hold a trial on a petition for dissolution of marriage until after the ninety day waiting period has elapsed.

V. Conclusion

This Court should determine that the Decree is void and vacate the same because the courts have no subject matter jurisdiction to enter the decree when less than 90 days elapsed from the filing of Amy's petition for dissolution, April 2, 2010, and the date the trial was held, May 19, 2010, and the date the decree of dissolution was entered, June 23, 2010.

Respectfully Submitted the 1st day of February 2013.



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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."1

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

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.² A void judgment may be challenged
at any time.³ Review is de novo.⁴

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.^[5]

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

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

³ Id.; RAP 2.5(a)(1).

⁴ Cole, 163 Wn. App. at 205.

⁵ RCW 26.09.030.

⁶ Id. (emphasis added).

⁷ 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.'"⁸ The classes of action over which the superior court has jurisdiction are defined by the state constitution.⁹ Under the Washington Constitution, superior courts have original jurisdiction in all cases involving dissolution or annulment of marriage.¹⁰ 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."¹¹ 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)").

⁸ 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)).

⁹ Cole, 163 Wn. App. at 206.

¹⁰ 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").

¹¹ 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.¹²

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;

EXHIBIT A-3

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."¹³ The court also ordered

¹² 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.¹⁴

Character of the Property

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

¹³ Clerk's Papers at 126.

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

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

¹⁶ 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)).

¹⁷ Brewer, 137 Wn.2d at 766.

¹⁸ 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

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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."¹⁹ 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.²⁰

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."²¹

¹⁹ Clerk's Papers at 54-55.

²⁰ 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.²² 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.²³ 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.²⁴ 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

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,

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 Fiorito, 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."³⁶

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.³⁷ 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

³⁶ Clerk's Papers at 56.

³⁷ 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."³⁸ 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,³⁹ 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,"⁴⁰ 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.⁴¹ 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]."⁴²

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."⁴³ We review parenting plan decisions for abuse of discretion.⁴⁴

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.⁴⁵ 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

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.]