No. _____

In The

Supreme Court of the United States

TIM BUECKING,

Petitioner,

v.

AMY BUECKING n/k/a Amy Westman,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether other States will lend full faith and credit to Washington State decrees of dissolution of marriage that are entered before the statutorily mandated ninety-day waiting period has elapsed, as required by RCW 26.09.030.

2. Whether the interpretation of RCW 26.09.030 treats all persons equally under Washington state law, by requiring the entire ninety-day waiting period to elapse before the trial court can obtain the subject matter jurisdiction necessary to enter a valid decree of dissolution of marriage for a member of the armed forces stationed in Washington State, while immediately attaching subject matter jurisdiction upon the filing of a petition by a Washington State resident, including the validity of a decree in a dissolution of marriage proceeding, even though the entire ninety-day waiting period under RCW 26.09.030 had not yet elapsed, when the decree was entered.

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OPINION BELOW

The Washington State Supreme Court decision has not yet been published. The Court of Appeals, Division One, opinion was published at 167 Wn. App. 555, 274 P.3d 390 (2012).

JURISDICTION

The Washington State Supreme Court filed its decision on December 26, 2013, and entered an order denying petitioner's motion for reconsideration on March 13, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Washington State Supreme Court's decision in a writ of certiorari.

STATUTORY PROVISION INVOLVED

RCW 26.09.030

When a party who is a resident of this State or is a member of the armed forces and is stationed in this state or 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 was made upon the respondent and 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.

STATEMENT OF THE CASE

The Washington state trial court entered its decree dissolving the marriage of Amy and Tim Buecking before the statutorily mandated ninety days had elapsed. By statute, RCW 26.09.030, a Washington State Trial Court cannot enter a decree of dissolution of marriage until ninety days after the petition is filed and the summons served.

Amy Westman and Tim Buecking were married on August 14, 1999. On December 12, 2008, Ms. Buecking filed her petition for legal separation. On April 2, 2010, Ms. Buecking filed her amended petition, which became her petition for dissolution of marriage. The trial was held on June 15, 2010. The Trial Court, in chambers and without notice of hearing, entered its decree dissolving the marriage on June 23, 2010. The decree was entered eighty-two days after Ms. Buecking had filed her petition to dissolve their marriage, which is not in compliance with the elapse of ninety days statutorily mandated by RCW 26.09.030. Tim Buecking appealed.

Division One of the Washington State Court of Appeals held that the trial court's failure to observe the statutory waiting period may be a legal error, but

it does not result in loss of jurisdiction. Tim Buecking sought discretionary review.

According to the Washington State Supreme Court, "We hold that the 90-day period commences when the petition for dissolution is filed and not when a petition for legal separation, if any, is filed. App. 1. We further hold that the error of duration here is a legal error but not an error involving subject matter jurisdiction that may be raised at any time." App. 1. In footnote 7 of its opinion, the Washington State Supreme Court stated, "In accord with the rules that govern review of claimed legal errors, we decline to consider the legal error in this case. Exceptions to these rules may, in different circumstances, warrant consideration of errors such as the one that occurred here." App. 20.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER A DIVORCE DECREE GRANTED IN WASHINGTON STATE, THAT IS NOT IN COMPLIANCE WITH THE WASHINGTON STATUTE AUTHORIZING DIVORCE DECREES, MUST BE GIVEN EFFECT IN OTHER STATES UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION.

The statute which authorizes dissolution of marriage cases in the State of Washington is RCW 26.09.030. The Washington State Supreme Court

recognizes the continued existence of pending issues that arise as a result of a decree of dissolution that is entered before the elapse of the full ninety days, statutorily mandated by the above-stated statute. According to footnote 7 of the opinion, the Supreme Court may consider the errors that have occurred in this case, in another case with different circumstances. App. 20.

In *Marriage of Ways*, 85 Wn. 2d 693, 702, 538 P.2d 1225 (1975), the Washington State Supreme Court discussed the reasons why a dissolution of marriage decree that is valid only in the state that granted the decree should not stand. The Court provided examples: will the parties who travel to another state be considered still married under the sister state's law; the uncertainty of the validity and enforcement of final parenting plans and final orders of child support; and the uncertainty of the validity and enforcement of maintenance orders. *Id*.

There is no certainty that other states will lend full faith and credit to Washington State decrees that are entered before the statutorily mandated ninety days have elapsed. A sister state can review RCW 26.09.030 and independently determine that the Washington State decree is not valid because it fails to comply with the statutorily mandated ninety-day rule. A party can argue that the Washington State final parenting plan or final order of child support, which a party in a sister state is seeking to enforce is not valid and hence not enforceable because the trial court had no statutory authority to enter the decree

before the full ninety days had elapsed. The party in the sister state may be left without any form of relief because of the finality of the Washington state decree.

II. THIS COURT SHOULD DETERMINE WHETHER WASHINGTON STATE RESIDENTS ARE TREATED EQUALLY WITH MEMBERS OF THE ARMED FORCES STATIONED IN WASHINGTON STATE, UNDER RCW 26.09.030, AS TO WHETHER THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER THE CASE TO ENTER A DECREE OF DISSOLUTION OF MARRIAGE BEFORE THE STATUTORILY MANDATED NINETY DAYS HAVE ELAPSED.

RCW 26.09.030 requires Washington State trial courts to enter a decree dissolving the marriage of a member of the armed forces who is stationed in Washington State when that member petitions to dissolve their marriage. In *Ways*, supra the service member was stationed in Washington State starting in October of 1973. He subsequently filed a petition to dissolve their marriage on November 30, 1973. The service member apparently, properly filed and served his summons and petition in compliance with RCW 26.09.030. However, the service member's duty station was no longer in Washington State after February 2, 1974, 26 days short of the statutorily required ninety days, under RCW 26.09.030. The Washington State Supreme Court held, in *Ways*, that the trial court never acquired subject matter jurisdiction over

the dissolution case because the service member was not stationed in Washington State throughout the entire ninety-day waiting period. *Id*. 703.

According to the Washington State Supreme Court, "[T]he court either has subject matter jurisdiction or it does not; it cannot hinge a particular order on whether the 90-day requirement was met under the statute." App. 17. In *Ways*, the Washington State Supreme Court held that a trial court does not obtain subject matter jurisdiction over a dissolution of marriage proceeding unless the service member has maintained his/her duty station in Washington State throughout the ninety-day waiting period. In its opinion, the Supreme Court stated that the ninety days in *Ways*, is a residency issue, even though RCW 26.09.030 states nothing about the duration of a service members' duty station during the ninety days.

In our case, the Washington State Supreme Court held that the ninety-day waiting period does not need to elapse before the trial court has subject matter jurisdiction. Washington State residents who petition to dissolve their marriage are treated differently under the law than a member of the armed forces stationed in Washington State.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Washington

State Supreme Court based upon the arguments above.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Marriage of AMY BUECKING, Respondent, v. TIM BUECKING, Petitioner.	No. 87680-1 En Banc Filed DEC 26 2013

MADSEN, C.J. – Amy Westman[1] filed for legal separation from Tim Buecking. Over a year later, she filed an amended petition for dissolution of marriage. By statute, a court cannot enter a decree of dissolution of marriage until 90 days after the petition is filed. Here, the decree was entered 8 days too soon. Mr. Buecking appealed, raising for the first time on appeal his claim that the trial court lacked subject matter jurisdiction because it entered the decree before the 90-day period had elapsed.

We hold that the 90-day period commences when the petition for dissolution is filed and not when a petition for legal separation, if any, is filed. We further hold that the error of duration here is a legal error but not an error involving subject matter jurisdiction that may be raised at any time. We award

[1] Formerly Amy Buecking.

attorney fees to Ms. Westman and affirm the Court of Appeals' award of attorney fees to her.

FACTS AND PROCEDURAL HISTORY

Amy Westman and Tim Buecking were married on August 14, 1999. On December 12, 2008, Ms. Westman filed a petition for legal separation. Over a year later, on April 2, 2010, Westman filed an amended petition for dissolution of marriage. Within the petition, Mr. Buecking signed a statement saying, "I, the respondent, agree to the filing of an Amended Petition for Dissolution of the marriage instead of legal separation." Clerk's Papers at 90. This statement appeared just below a checked box labeled "Joinder." *Id.* (bold omitted).

RCW 26.09.030 provides that a court may enter a decree of dissolution when "ninety days have elapsed since the petition was filed." On June 23, 2010, following a trial that ended on June 15, the trial court entered a decree of dissolution 82 days after the petition for dissolution of marriage was filed.

Mr. Buecking did not object at the time to entry of the decree on the basis that the 90-day period required under the statute had not elapsed. However, he raised this issue on appeal, contending the trial court lacked subject matter jurisdiction to enter the decree before 90 days had elapsed. In an opinion published in part, the Court of Appeals held that if the trial court erred by entering a decree of dissolution before 90 days had passed, it was a legal error

that did not involve the court's subject matter jurisdiction because the court had jurisdiction to hear the controversy. *In re Marriage of Buecking,* 167 Wn. App. 555, 559-60, 274 P.3d 390 (2012).[2] The Court of Appeals awarded Ms. Westman attorney fees under RCW 26.09.140, subject to her compliance with RAP 18.1.[3]

Mr. Buecking moved for reconsideration of several issues, including the award of attorney fees to Westman. Buecking asserted that Westman failed to strictly comply with RAP 18.1 because she filed an affidavit of financial need after oral argument rather than 10 days prior to oral argument as required under RAP 18.1(c). The Court of Appeals denied the

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[2] Buecking also challenged the trial court's determinations of child support, asset distribution, and the parenting plan. In the unpublished portion of its opinion, the Court of Appeals determined the trial court did not abuse its discretion in its property division, calculation of child support, or by making reciprocal a restriction in the parenting plan. *In re Marriage of Buecking,* No. 66268-6-I, slip op. (unpublished portion) at 5-14 (Wash. Ct. App. Apr. 2, 2012).

[3] RAP 18.1(c) states that "[i]n any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits."

motion and upheld the attorney fees under RAP 1.2(c).[4]

ANALYSIS

Mr. Buecking contends that the superior court exceeded its subject matter jurisdiction by entering a dissolution before the statutory 90 days had elapsed from the date the dissolution petition was filed, as required under RCW 26.09.030. Ms. Westman responds that no error occurred, arguing that the 90-day period runs from the time she filed her petition for legal separation and that if the trial court erred in entering the petition on the 82nd day, the error did not result in a loss of subject matter jurisdiction.

Subject matter jurisdiction and questions of statutory construction are reviewed de novo. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n,* 173 Wn.2d 608, 624, 268 P.3d 929 (2012); *In re Custody of Smith,* 137 Wn.2d 1, 8, 969 P.2d 21 (1998).

1. 90-day period

RCW 26.09.030 states that when a party

> petitions for a dissolution of marriage . . . and alleges that the marriage . . . is

[4] "The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c)." RAP 1.2(c).

> 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 . . . is irretrievably broken, the court shall enter a decree of dissolution.

Here, the decree of dissolution was entered in June 2010, more than 90 days from the original petition for legal separation, but less than 90 days from the amended petition for dissolution.

Mr. Buecking points out that RCW 26.09.030 requires that a dissolution petition must contain an allegation that the marriage is irretrievably broken, which is not required in a petition for legal separation. He contends that because a petition for legal separation seeks different relief from that sought by a petition for dissolution of marriage, filing a petition for legal separation does not start the 90-day period. Ms. Westman points out that the purpose of the 90-day period is to give the parties an opportunity to reconsider and reconcile and urges that this purpose is met when 90 days elapses from the time a petition for legal separation is filed.

This appears to be an issue of first impression. *See* 21 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 46.23, at 60 (1997 & Supp. 2012) (noting that no case has ruled whether the 90-day period applies to legal

separations, nor has any statute or case addressed whether a new 90-day period must apply when a petition for legal separation is amended to a petition for dissolution).

When construing statutes, the goal is to ascertain and effectuate legislative intent. *Bylsma v. Burger King Corp.,* 176 Wn.2d 555, 558, 293 P.3d 1168 (2013); *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In determining legislative intent, we begin with the language used to determine if the statute's meaning is plain from the words used and if so we give effect to this plain meaning as the expression of legislative intent. *Manary v. Anderson,* 176 Wn.2d 342, 350, 292 P.3d 96 (2013); *Campbell & Gwinn,* 146 Wn.2d at 9. The plain meaning "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Campbell & Gwinn,* 146 Wn.2d at 11.

The relevant language is "[w]hen a party . . . petitions for a dissolution . . . and when ninety days have elapsed since *the* petition was filed. . . ." RCW 26.09.030 (emphasis added). The first use of the word "petitions" describes the action the party takes and obviously refers to filing a petition for dissolution. The second use of "petition" is a reference to the petition for dissolution that is filed to carry out this action. The use of the definite article "the" before the second "petition" refers back to use of the word "petitions" earlier in the sentence and has a specifying or particularizing effect. *E.g., City of Olympia v.*

Drebick, 156 Wn.2d 289, 298, 126 P.3d 802 (2006); *Alforde v. Dep't of Licensing,* 115 Wn. App. 576, 582-83, 63 P.3d 170 (2003). Thus, "the petition" for which 90 days must have elapsed is the same petition that is filed by the party who "petitions for dissolution."

Under the plain language of RCW 26.09.030, the 90-day period runs from the time the petition for dissolution is filed. The trial court therefore erred by entering a decree of dissolution before 90 days had elapsed from the filing of the dissolution petition.

The purpose of the 90-day period is to provide a "cooling off" period. The 90-day period serves to "allow time for reflection and to act as a buffer against 'spur of the moment' arbitrary action." 20 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 43.5, at 567 (1997 & Supp. 2012). The arbitrary action that the 90-day requirement seeks to avoid is a hasty end to the marriage without time for considering whether dissolution is truly what the parties want. In the case of a legal separation, an end to the marriage cannot be presumed to be the parties' goal.

Mr. Buecking urges an additional reason to conclude that the 90-day period runs from the date the petition for dissolution of marriage is filed. Buecking notes that a 90-day period also applies under RCW 26.09.181(7), which provides that "[t]he final order or decree" of a permanent parenting plan "shall be entered not sooner than ninety days after filing and service." He infers that the 90-day period

for parenting plans must be for the same reason that there is a 90-day wait before entry of decrees of dissolution, i.e., to prevent rash actions in parenting plans. Mr. Buecking urges that because RCW 26.08.181(7) expressly "does not apply to decrees of legal separation," the legislature similarly did not intend that the "cooling off" period under RCW 26.09.030 apply for purposes of legal separation. Pet. for Review at 12.

We do not agree with this argument. As the Court of Appeals observed in *In re Marriage of Wilson,* 117 Wn. App. 40, 47, 68 P.3d 1121 (2003), "[w]hile a cooling off period may, for policy reasons, be required before dissolving the marital status, no similar logic dictates a cooling off period barring parents from reaching desirable agreements in parenting plans." Because the policy underpinning of the 90-day period in RCW 26.09.030 is inapplicable to parenting plans under RCW 26.09.181, the latter statute does not provide an analogy for purposes of deciding whether the 90-day period in the former statute runs from a petition for dissolution or for legal separation.

We hold that the 90-day period in RCW 26.09.030 commences when the petition for dissolution of marriage is filed and, as the statute also provides, "from the date when service of summons was made upon the respondent or the first publication of summons was made."

2. Subject matter jurisdiction

Mr. Buecking raised the 90-day issue for the first time on appeal. Under RAP 2.5(a), a party may raise an error for the first time on review if there is a lack of subject matter jurisdiction. Where a court lacks subject matter jurisdiction to issue an order, the order is void. *In re Marriage of Schneider,* 173 Wn.2d 353, 360, 268 P.3d 215 (2011). Buecking contends that the statutory 90-day period reflects a limitation on the court's subject matter jurisdiction. Thus, he argues that because the court erred by entering the decree of dissolution too soon, the order is void and he can raise this error for the first time on appeal.

Generally speaking, jurisdiction is the power of a court to hear and determine a case. 20 AM. JUR. 2D *Courts* § 56, at 446 (2005); *State v. Posey,* 174 Wn.2d 131, 139, 272 P.3d 840 (2012); *State v. Werner,* 129 Wn.2d 485, 493, 918 P.2d 916 (1996); *State v. Superior Court,* 112 Wash. 501, 505, 192 P. 937 (1920). Beyond this basic definition, however, Washington courts have been inconsistent in their understanding and application of jurisdiction.

Much of the confusion surrounding the concept of jurisdiction in Washington appears to stem from an evolving view of the elements of jurisdiction. Some authorities have said that jurisdiction is comprised of three elements: jurisdiction over the person, jurisdiction over the subject matter, and jurisdiction to render the particular judgment sought (sometimes called jurisdiction of the particular case). 20 AM. JUR.

2D *Courts* § 56; 1 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENT § 226 (5th ed. rev. 1925). This court has also referenced these elements. *Werner,* 129 Wn.2d at 493 ("'[t]here are in general three jurisdictional elements in every valid judgment'" (quoting *In re Marriage of Little,* 96 Wn.2d 183, 197, 634 P.2d 498 (1981))).

We have since clarified that jurisdiction is comprised of only two components: jurisdiction over the person and subject matter jurisdiction. *Posey,* 174 Wn.2d at 138 (citing *Werner* and stating that the discussion of the three jurisdictional elements confused the issue and that *Werner*'s distinction between a court's subject matter jurisdiction and the power or authority to render a particular judgment rested on "an antiquated understanding of subject matter jurisdiction"); *see also In re Marriage of Major,* 71 Wn. App. 531, 534, 859 P.2d 1262 (1993) ("[t]he term 'subject matter jurisdiction' is often confused with a court's 'authority' to rule in a particular manner [and t]his has led to improvident and inconsistent use of the term" (footnote omitted)). Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case. *See ZDI Gaming, Inc.,* 173 Wn.2d at 618 ("'[i]f the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction'" (internal quotation marks omitted) (quoting *Marley v. Dep't of Labor & Indus.,* 125 Wn.2d 533, 539, 886 P.2d 189 (1994))); *Schneider,* 173 Wn.2d at 360 (stating the

legislature limited the superior courts' authority, not jurisdiction, to modify another state's child support order by adopting the Uniform Interstate Family Support Act, chapter 26.21A RCW); *see also Williams v. Leone & Keeble, Inc.,* 171 Wn.2d 726, 730, 254 P.3d 818 (2011) ("[e]ither a court has subject matter jurisdiction or it does not").

Thus, our recent cases have narrowed the types of errors that implicate a court's subject matter jurisdiction. Under these cases, if a court can hear a particular class of case, then it has subject matter jurisdiction.

The legislature cannot restrict the court's jurisdiction where the constitution has specifically granted the court jurisdiction. *Posey,* 174 Wn.2d at 135 (citing *Blanchard v. Golden Age Brewing Co.,* 188 Wash. 396, 418, 63 P.2d 397 (1936)). However, generally the legislature can prescribe prerequisites to a court's exercise of constitutionally derived jurisdiction. *Blanchard,* 188 Wash. at 415, 418; *see also James v. Kitsap County,* 154 Wn.2d 574, 579-89, 115 P.3d 286 (2005) (whether statutory 21-day time limitation that barred developers' challenge to imposition of fees for building permits invalidly encroached on superior court's original appellate jurisdiction under article IV, section 6 of the Washington Constitution; although a superior court may be granted the power to hear a case under article IV, section 6, the parties must still substantially comply with procedural requirements before the court can exercise its original jurisdiction); *In re Parentage of*

Ruff, 168 Wn. App. 109, 117, 275 P.3d 1175 (2012) ("[n]othing in our constitution prohibits the legislature from creating procedural prerequisites to a court's exercise of jurisdiction"). Thus, legislation with the purpose or effect of divesting a constitutional court of its powers is void, while on the other hand the legislature may prescribe reasonable regulations that do not divest the court of its jurisdiction. *Blanchard,* 188 Wash. at 414, 418.

Notably, parties have avenues to challenge procedural requirements that affect a superior court's exercise of jurisdiction. In *James,* for example, the parties had several avenues to challenge the legality of fees through statutory provisions but waited almost three years to do so, in violation of the statutes. *James,* 154 Wn.2d at 589. The parties were therefore barred from challenging the legality of the fees. *Id.*

In sum, the legislature can place some limits on the exercise of a superior court's original jurisdiction provided that the limitations do not have the effect of depriving the court of that constitutional jurisdiction. When statutory procedural limits are imposed, they are prerequisites to the court's exercise of its jurisdiction.

To decide whether the decree here was issued without the court having subject matter jurisdiction to enter the decree, we begin with the state constitution. Under article IV, section 6, superior courts are granted

> original jurisdiction . . . of all matters of probate, divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

This language specifically grants superior courts original jurisdiction in divorce matters. At the same time, it provides some flexibility to the legislature to direct which courts may have jurisdiction.

Turning to the statute, RCW 26.09.030 states that when a resident petitions for dissolution and alleges that the marriage is irretrievably broken, and when 90 days have elapsed from the filing of the petition and service of summons, the court shall enter a decree of dissolution. There is no express language stating these are jurisdictional requirements.

This court has addressed how statutes impact the court's jurisdiction over divorce actions on several occasions. *E.g., Arneson v. Arneson,* 38 Wn.2d 99, 100, 227 P.2d 1016 (1951); *Palmer v. Palmer,* 42 Wn.2d 715, 716-17, 258 P.2d 475 (1953) ("[a] divorce action is a statutory proceeding, and the court has no jurisdiction that cannot be inferred from a broad interpretation of the statutes"). In *Arneson,* 38 Wn.2d at 100, this court considered whether the trial court in a divorce suit acted in excess of its jurisdiction when it

compelled a liquidation for the benefit of creditors. We stated that

> [d]ivorce, probate, bankruptcy, receiverships, and assignments for the benefit of creditors are statutory proceedings, and the jurisdiction and authority of the courts are prescribed by the applicable legislative enactment. In them the court does not have any power that can not be inferred from a broad interpretation *of the act in question.* The powers of the court in probate and receiverships can not be imported into the divorce act. Whether or not the court exceeded its jurisdiction, in the case at bar, must be determined from the language of the divorce act of 1949.

Id. We determined that the lower court had no power to compel a liquidation for the benefit of the creditors as incident to a divorce decree because no such provision was provided by the divorce act. *Id.* at 101. In other words, where no relief was contemplated by the statute, the court did not have jurisdiction to grant such relief.

This court and others have also specifically considered whether the residency requirements under RCW 26.09.030 are related to the court's jurisdiction. *In re Marriage of Ways,* 85 Wn.2d 693, 538 P.2d 1225 (1975); *In re Marriage of Robinson,* 159 Wn. App. 162, 168, 248 P.3d 532 (2010). In *Ways,* this court addressed whether a nondomiciled member of the armed forces had a sufficient nexus with the State to

allow the court to have jurisdiction over the divorce proceeding. This court recognized that a nexus may exist where a sufficient time passed from the filing of the petition and the issuance of the dissolution decree and that the 90-day requirement under RCW 26.09.030 was intended for that purpose. *Ways,* 85 Wn.2d at 700. We stated that 90 days was established not only to provide a "cooling off" period, but to allow the court to enter a valid decree of dissolution for otherwise nondomiciled members of the armed forces. *Id.* We determined that because the party in the case was not stationed continuously during the 90 days, the trial court did not have jurisdiction. *Id.* at 703.

The Court of Appeals similarly addressed the residency requirements in *Robinson,* 159 Wn. App. at 168. There, the Court of Appeals considered whether the trial court had subject matter jurisdiction to enter a dissolution decree where the residency requirement of RCW 26.09.030 was potentially unmet. *Id.* 166-67. The court determined that this requirement was jurisdictional and that because neither spouse had reestablished a Washington residency during the pendency of the action, the trial court lacked subject matter jurisdiction. *Id.* at 172.

This court also considered the residency requirement of an Idaho divorce statute in *Hammond v. Hammond,* 45 Wn.2d 855, 278 P.2d 387 (1955). The statute required a party to establish a domicile in Idaho for six weeks preceding the commencement of an action, under Idaho Code § 32-701. We determined that while the requirement to establish a domicile

was a jurisdictional necessity for establishing a court's subject matter jurisdiction over the marital status, the duration of the residency was not and in no way limited the court's jurisdiction. *Id.* at 859. We said that the duration was "analogous to a fact necessary to establish the grounds for divorce. If there is a failure of proof of such fact, the court has no authority to enter a decree, but its jurisdiction is not affected." *Id.*

Collectively, these cases support the conclusion that the divorce act imposes some prerequisites to the court's exercise of jurisdiction. Specifically, the superior court is limited to granting the relief contemplated by the statute and the residency requirement must be met for the court to exercise its jurisdiction over the proceeding.

Mr. Buecking argues that the 90 day "cooling off" period is akin to the residency requirement and represents a limitation upon the court's exercise of its subject matter jurisdiction. We disagree. As discussed, while residency itself is a prerequisite to the exercise of jurisdiction, the duration of such residency is not. *Id.* Similarly, the durational requirement for entry of a decree of dissolution does not affect the court's subject matter jurisdiction, only its legal authority to enter the decree. To conclude a court has the subject matter jurisdiction to hear a case, but then can lose it based upon the timing of its decree, would conflict with the meaning of subject matter jurisdiction and our prior decisions. *Schneider,* 173 Wn.2d at 360 ("subject matter jurisdiction refers to

the court's authority to entertain a type of controversy, not simply lack of authority to enter a particular order"). The court either has subject matter jurisdiction or it does not; it cannot hinge a particular order on whether the 90-day requirement was met under the statute. *Williams,* 171 Wn.2d at 730; *Posey,* 174 Wn.2d at 139. While we recognize that courts are obligated to follow statutory requirements, the failure to comply with the 90 day "cooling off" period is only a legal error, not a prerequisite for the court's exercise of jurisdiction.

Our decision is in keeping with decisions in other contexts where we have held durational requirements do not affect a court's subject matter jurisdiction. For example, in *State v. Moen,* 129 Wn.2d 535, 919 P.2d 69 (1996), we held that a court has subject matter jurisdiction where the court has authority to hear the type of controversy and that an erroneous interpretation of the law does not divest it of that jurisdiction. *Id.* at 545 (citing *Marley,* 125 Wn.2d at 539). There, we determined that because the trial court had authority to impose restitution, its violation of a statutory 60-day time limit was not a jurisdictional defect. *Id.*

Similarly, in *Little,* we considered whether a decree of dissolution was void where various ancillary matters were not ruled upon at the time the decree was entered. 96 Wn.2d at 197. As an analogy, we discussed several cases that had addressed a constitutional requirement that the superior court render its decision within three months after the matter was

submitted, under article IV, section 20. *Id.* at 196 (citing *Phillips v. Phillips,* 52 Wn.2d 879, 329 P.2d 833 (1958) and quoting *In re Cress,* 13 Wn.2d 7, 11, 123 P.2d 767 (1942) for the precept that "[n]othing in the constitutional provision requiring a decision within ninety days forbids a decision at any other time or lessens the jurisdiction of the judge of the superior court"). We stated that if a constitutional provision requiring a decision within a specified time does not invalidate a decision rendered later, then a statute requiring a decision at a specified time does not do so either. *Id.*

Other examples demonstrate procedural limitations imposed by the legislature that do not affect the court's jurisdiction. For example, we determined that RCW 4.12.020(3), a statute limiting the county in which a plaintiff could bring a motor vehicle suit, was a limitation on the court's subject matter jurisdiction. *Young v. Clark,* 149 Wn.2d 130, 65 P.3d 1192 (2003). We had previously interpreted the statute to dictate which courts have original subject matter jurisdiction over actions governed by the statute. *Id.* at 133. In a footnote, we also noted that other courts had construed such statutes as limiting subject matter jurisdiction. *Id.* at 134 n.5. However, validity of these constructions had not been determined in light of article IV, section 6. *Id.* When we reconsidered the issue under the constitutional mandate and our obligation to construe statutes consistently with the constitution, we concluded that our previous interpretation violated the constitution. *Id.* at 134. We held

that the statute's limitations relate only to venue, not to the court's subject matter jurisdiction. *Id.*

Accordingly, we hold that the 90-day "cooling off" requirement under RCW 26.09.030 is not a jurisdictional limitation upon the court. Passage of the statute's 90-day period is not a necessary component of the superior court's subject matter jurisdiction. The 90-day requirement is a permissible procedural limitation upon the court's exercise of its jurisdiction. If the court's entry of a dissolution decree occurs before the 90-day period elapses, the court is not thereby stripped of its subject matter jurisdiction.[5]

Here, the trial court's issuance of the dissolution decree before 90 days had elapsed was a legal error which did not affect its jurisdiction. Because Mr. Buecking failed to raise this error at trial, we deny him relief. RAP 2.5 (allowing an appellate court to refuse to review a claim that was not raised in the trial court, except where the error alleges a lack of trial court jurisdiction, failure to establish facts upon which relief can be granted, or a manifest error affecting a constitutional right); *State v. Robinson,*

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[5] The New York Court of Appeals has noted that the "clear distinction between a court's competence to entertain an action," its subject matter jurisdiction, and "its power to render a judgment on the merits" and stated that "[a]bsence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not." *Lacks v. Lacks,* 41 N.Y.2d 71, 75, 359 N.E.2d 384, 390 N.Y.S.2d 875 (1976).

171 Wn.2d 292, 304, 253 P.3d 84 (2011) ("[t]he general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right'" (internal quotation marks omitted) (quoting *State v. Kirwin,* 165 Wn.2d 818, 823, 203 P.3d 1044 (2009))).[6, 7]

3. Attorney fees

The Court of Appeals awarded Ms. Westman attorney fees on appeal under RCW 26.09.140, subject to her compliance with RAP 18.1. RAP 18.1(c) requires a financial affidavit to be filed no later than 10 days before the date the case is set for oral argument or consideration. Westman filed her affidavit following the court's decision. Subsequently, Mr. Buecking filed a motion for reconsideration and argued that Westman failed to comply with RAP 18.1. The court denied the motion and waived the requirements of RAP 18.1(c) to serve the ends of justice under RAP 1.2(c).

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[6] In Buecking's supplemental brief, he alleges that the court lacked subject matter jurisdiction to hold the trial before the 90-day time period had elapsed. Because Buecking did not raise this issue in his petition for review, we decline to address it. RAP 13.7(b).

[7] In accord with the rules that govern review of claimed legal errors, we decline to consider the legal error in this case. Exceptions to these rules may, in different circumstances, warrant consideration of errors such as the one that occurred here.

The Court of Appeals did not abuse its discretion in awarding Ms. Westman attorney fees. As she argues, Buecking's appeal "raises an interesting jurisdictional question, but serves no purpose for the parties." Suppl. Br. of Resp't at 15. Even if Mr. Buecking were successful in his appeal, 90 days have now since elapsed from the filing of the dissolution petition and it is a virtual certainty that a new decree would simply be entered. Further, Westman notes that the appeal has delayed payments from Buecking to Westman and their children and that the award is appropriate given the disparity in income. We find no abuse of the Court of Appeals' discretion in awarding attorney fees, despite the belated compliance with RAP 18.1(c). We similarly award Ms. Westman attorney fees on discretionary review by this court.

CONCLUSION

We hold that the 90-day period under RCW 26.09.030 commences with the date that the petition for dissolution of marriage is filed and not from the date a petition for legal separation is filed. We affirm the Court of Appeals' holding that the-90 day cooling off period does not affect the superior court's subject matter jurisdiction but instead is a permissible legislatively imposed limitation on jurisdiction. We also award Ms. Westman attorney fees in this court and affirm the Court of Appeals' award of attorney fees.

/s/ Madsen, C.J.

WE CONCUR:

/s/ C. Johnson, J. /s/ Stephens, J.

/s/ Owens, J. /s/ Wiggins, J.

/s/ Fairhurst, J. /s/ González, J.

/s/ J.M. Johnson, J. /s/ Geds McCloud, J.

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

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

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[1] Clerk's Papers at 90.

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 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

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[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.

> 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

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[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 K § 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, 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)").

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

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[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.

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.[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

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[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.

2604 Lummi View Drive; a house at 2618 Michigan Street; 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 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

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[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).

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]

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 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

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[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.

[19] Clerk's Papers at 54-55.

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]

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

[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,

[21] Clerk's Papers at 61.

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

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[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.

Tim's 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

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[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).

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 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 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]

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[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,

(Continued on following page)

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 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

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894 P.2d 1346 (1995) (assignments of error unsupported by argument and citation to authority).

[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).

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, 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

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[35] *Id.*

[36] Clerk's Papers at 56.

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 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

[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.

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. 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.

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[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.

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 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

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[42] Clerk's Papers at 51.

[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 Wm.2d 795, 807, 108 P.3d 779 (2005).

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:

THE SUPREME COURT OF WASHINGTON

In the Matter of the Marriage of AMY BUECKING, Respondent, v. TIM BUECKING, Petitioner.	**ORDER DENYING MOTION FOR RECONSIDERATION** (Filed Mar. 13, 2014) No. 87680-1

The Court having considered the Petitioner's "MOTION FOR RECONSIDERATION";

Now, therefore, it is hereby

ORDERED:

That the motion for reconsideration is denied.

DATED at Olympia, Washington this 13th day of March, 2014.

For the Court

/s/ Madsen, C.J.
CHIEF JUSTICE

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

In the Matter of the Marriage of AMY BUECKING n/k/a Amy Westman, Respondent, and TIM BUECKING, Appellant.	No. 66268-6-I ORDER DENYING MOTION FOR RECONSIDERATION (Filed Jun. 19, 2012)

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

ORDERED that appellant's motion for reconsideration is denied.

Done this 19th day of June, 2012.

FOR THE PANEL:

/s/ [Illegible] J

Superior Court of Washington
County of WHATCOM

In re the Marriage of:	**No. 08-3-00852-5**
AMY BUECKING	**Decree of Dissolution (DCD)**
Petitioner	(Filed Jun 23, 2010)
and	**Clerk's Action Required**
TIM BUECKING	**Law Enforcement Notification ¶ 3.8**
Respondent.	

I. Judgment/Order Summaries

1.1 Restraining Order Summary:

[X] Restraining Order Summary is set forth below:

Name of person(s) restrained: TIM BUECKING
Name of person(s) protected: AMY BUECKING
See paragraph 3.8.

Violation of a Restraining Oder in Paragraph 3.8 Below With Actual Knowledge of its Terms is a Criminal Offense Under Chapter 26.50 RCW and Will Subject the Violator to Arrest. RCW 26.09.050.

1.2 Real Property Judgment Summary:

[X] Does not apply.

[ ] Real Property Judgment Summary is set forth below:

_____

Assessor's property tax parcel or account number:

or

_____

Legal Description of the property awarded (including lot, block, plat, or section, township, range, county and state):

See Page for full legal description.

_____

1.3 Money Judgment Summary:

[X] Judgment Summary is set forth below:

A.	Judgment Creditor	Amy Buecking
B.	Judgment Debtor	Tim Buecking
C.	Principal judgment amount	$ 47,847.00
D.	Interest to date of Judgment	$ -
E.	Attorney fees	$ TBD
F.	Costs	$ TBD
G.	Other recovery amount	$ -

End of Summaries

II. Basis

Findings of Fact and Conclusions of Law have been entered in this case.

III. Decree

It is Decreed that:

3.1 Status of the Marriage

[X] The marriage of the parties is dissolved.

3.2 Property to be Awarded the Husband

[X] The husband is awarded as his separate property the property set forth in Exhibit A. This exhibit is attached or filed and incorporated by reference as part of this decree.

3.3 Property to be Awarded to the Wife

[X] The wife is awarded as her separate property the property set forth in Exhibit B. This exhibit is attached or filed and incorporated by reference as part of this decree.

3.4 Liabilities to be Paid by the Husband

[X] The husband shall pay the community or separate liabilities set forth in Exhibit A. This exhibit is attached or filed and incorporated by reference as part of this decree.

Unless otherwise provided herein, the husband shall pay all liabilities incurred by him since the date of separation.

3.5 Liabilities to be Paid by the Wife

[X] The wife shall pay the community or separate liabilities set forth in Exhibit B. This exhibit is attached or filed and incorporated by reference part of this decree.

Unless otherwise provided herein, the wife shall pay all liabilities incurred by her since the date of separation.

3.6 Hold Harmless Provision

[X] Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party.

3.7 Maintenance

[X] Husband shall pay maintenance in the amount of $800.00 per month, effective June 1, 2010. Said payment is due on the 15th day of each month. The first maintenance payment shall be due on June 15, 2010.

The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or in three years, on June 15, 2013, whichever comes first. The amount of maintenance may be modified when Wife obtains full time work.

Payments shall be made:

[X] to the Washington State Child Support Registry (only available if child support is ordered).

3.8 Continuing Restraining Order

[X] A continuing restraining order is entered as follows:

[X] The husband is is restrained and enjoined from knowingly coming within or knowingly remaining within (distance) 150 feet of the home, or work place of the other party.

Violation of a Restraining Order in Paragraph 3.8 With Actual Knowledge of its Terms Is a Criminal Offense Under Chapter 26.50 RCW and Will Subject the Violator to Arrest. RCW 26.09.060.

[X] **Clerk's Action.** The clerk of the court shall forward a cop of this order, on or before the next judicial day, to WHATCOM SHERIFF law enforcement agency which shall enter this order into any computer-based criminal intelligence system available in this state used by law enforcement agencies to list outstanding warrants. (**A law enforcement information sheet must be completed by the party or the party's attorney and provided with this order before this order will be entered into the law enforcement computer system.**)

Service

[ ] The restrained party or attorney appeared in court or signed this order; service of this order is not required.

[ ] The restrained party or attorney did not appear in court; service of this order is required.
The protected party must arrange for service of this order on the restrained party. File the original Return of Service with the clerk and provide a copy to the law enforcement agency listed above.

Expiration

This restraining order expires : upon further court order.

This restraining order supersedes all previous temporary restraining orders in this cause number.

[ ] Any temporary restraining order signed by the court in this cause number is terminated. ***Clerk's Action.*** The clerk of the court shall forward a copy of this order, on or before the next judicial day, to: law enforcement agency where Petitioner resides which shall enter this order into any computer-based criminal intelligence system available in this state used by law enforcement agencies to list outstanding warrants.

Full Faith and Credit

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

3.9 Protection Order

[X] The parties shall comply with the domestic violence order for Protection signed by the court on this date or dated, in this cause number. The Order for Protection signed by the court is approved and incorporated as part of this decree.

3.10 Jurisdiction Over the Children

[X] The court has jurisdiction over the children as set forth in the Findings of Fact and Conclusions of Law.

3.11 Parenting Plan

[X] The parties shall comply with the Parenting Plan signed by the court on this date or dated . The Parenting Plan signed by the court is approved and incorporated as part of this decree.

3.12 Child Support

[X] Child support shall be paid in accordance with the order of child support signed by the court on this date or dated . This order is incorporated as part of this decree.

3.13 Attorney Fees, Other Professional Fees and Costs

[X] Attorney fees, other professional fees and costs shall be paid as follows:

Wife is awarded judgment in the amount of $5,677.00 against Husband as one-half of the attorney fees she has incurred in this matter. Husband is to pay the sum of $5,677 at the rate

of $300 per month until paid in full. If said fees are not paid in full at the time of sale of those real properties located at 2604 Lummi View Drive or 3980 Pipeline Road then the balance due on this judgment is to be paid from Husband's share of the net sales proceeds from either or both of those escrows. If escrow funds are insufficient then Wife shall have judgment for the remaining balance which shall be enforceable against any other property or source of funds available to Husband.

3.14 Name Changes

[X] The wife's name shall be changed to Amy Irene Westman.

3.15 Other

1. The parties shall cooperate in signing listing agreements or any other documents necessary to continue efforts to sell 2604 Lummi View Drive and 3980 Pipeline Road. The Court reserves jurisdiction over the sale of these properties.

2. Within 15 days of the date of this Order Husband shall deliver the 1986 GMC and the 1970 GMC vehicles to Wife at her residence. Delivery of these vehicles shall not constitute a violation of any protection orders or restraining orders.

3. Both parties shall immediately sign all forms necessary to transfer ownership of the vehicles listed in Exhibits A and B to the receiving party.

4. Within 15 days of the date of this Order Husband shall sign a deed quitclaiming his ownership of the Michigan Street property and the Lummi View Drive property and any other documents required for recordation of said deeds. Wife shall sign a deed quitclaiming her ownership of the Mt. Vista Drive property to Husband any any other documents required for recordation of said deed.

5. Within 30 days of the date of this Order Husband shall vacate the 2604 Lummi View Drive property and shall leave it in habitable condition.

Dated: 6/23/10 /s/ [Illegible]
Judge/Commissioner

Petitioner or petitioner's lawyer: A signature below is actual notice of this order.	Respondent or respondent's lawyer: A signature below is actual notice of this order.
[X] Presented by:	[ ] Presented by:
[X] Approved for entry:	[X] Approved for entry:
[ ] Notice for presentation waived:	[X] Notice for presentation waived:

/s/ Jean Kingsley 6/16/10
Jean Kingsley Date
#39158
Attorney for
Petitioner

/s/ _____
David Porter Date
#17925
Attorney for
Respondent

EXHIBIT "A"

The following assets are awarded to Husband:

1) That real property located at 3090 Mt. Vista Drive, Lummi Island and the loans and mortgages thereon.

2) Husband is to make an equalizing payment to Wife of $25,000 for her share of the community property equity in Mt. Vista Drive. Husband's payment of $25,000 is to paid to Wife from escrow from his share of the net sales proceeds of 2604 Lummi View Drive and/or 3980 Pipeline Road, whichever comes first. Any balance remaining shall be paid from the next escrow. If escrow funds are insufficient to pay this debt then the balance will be due and payable from any other property or source of funds available to Husband and Wife shall have judgment for $25,000 against Husband.

3) Husband is confirmed as ½ owner of that real property located at 3980 Pipeline Road, Blaine. The parties shall cooperate in keeping the property listed for sale. From Husband's share of the net sales proceeds of Pipeline Road he shall pay to Wife any remaining balance on reimbursements to her as hereinafter set forth.

4) The 1993 Mercury Villager, the 1977 Jeep, the 1968 Chevrolet, the 1989 Toyota, the 1985 Thunderbirdand the 1977 Dump truck

5) All furniture and personal property currently in his possession.

The following liabilities are assigned to Husband to pay to Wife:

6) $6,958,00.00 in child support arrears as of May 2010 to be paid to Wife from escrow of Husband's share of the net sales proceeds of 2604 Lummi View Drive and/or 3980 Pipeline Road, whichever comes first Any balance remaining shall be paid from the next escrow. At close of escrow of either property DCS shall provide an updated accounting of support arrears and that sum shall be the sum paid to Wife. If escrow funds are insufficient to pay this debt then the balance will be due and payable from any other source of funds available to Husband and Wife shall judgment against Husband for that amount.

7) $1,800.00 representing Wife's one-half community property interest in rents on the 2604 Lummi View Drive home. Said amount to be paid to Wife from escrow of Husband's share of the net sales proceeds of 2604 Lummi View Drive and/or 3980 Pipeline Road, whichever comes first. Any balance remaining shall be paid from the next escrow. If escrow funds are insufficient to pay this debt then the balance will be due and payable from any property or source of funds available to Husband and Wife shall have judgment against Husband in that amount.

8) $2,250.00 representing Wife's community property interest in lost rents on the Mt. Vista Drive home. Said amount to be paid to Wife from escrow of Husband's share of the net sales proceeds of 2604 Lummi View Drive and/or 3980 Pipeline Road, whichever comes first. Any

balance remaining shall be paid from the next escrow. If escrow funds are insufficient to pay this debt then the balance will be due and payable from any other property or source of funds available to Husband and Wife shall have judgment against Husband in that amount.

9) $6,162.00 representing spousal maintenance arrears which were to be paid as mortgage payments on the Michigan Street home and were not paid by Husband. Said amount to be paid to Wife from escrow of Husband's share of the net sales proceeds of 2604 Lummi View Drive and/or 3980 Pipeline Road, whichever comes first. Any balance remaining shall be paid from the next escrow. If escrow funds are insufficient to pay thisdebt then the balance will be due and payable from any other property or source of funds available to Husband and Wife shall have judgment against Husband in that amount.

10) $5,677.00 representing one-half of Wife's attorney fees. Said fees are to be paid by Husband to Wife at the rate of $300 per month as set forth above in Paragraph No. 3.13 and from other sources of property or funds as set forth in that paragraph and Wife shall have judgment against Husband in that amount.

Total of above liabilities is $47,847.00.

The following other liabilities are assigned to Husband:

11) The mortgages and any outstanding arrearages and property taxes on Mt. Vista Drive

12) One-half the outstanding debt and property taxes on the Pipeline Road property.

13) Chase Card #2351 – $10,316.00

14) WAMU – $7,019.00

15) A T & T – $1,760.00

16) Jeff Solomon – $6,125.00

EXHIBIT "B"

The following assets are awarded to Wife:

1. That real property located at 2618 Michigan Street, Bellingham, Washington and the mortgages thereon.

2. That real property located at 2604 Lummi View Drive, Bellingham, Washington and the mortgages thereon.

3. Wife is confirmed as ½ owner of that real property located at 3980 Pipeline Road, Blaine.

4. $25,000 as her share of the equity in the 3090 Mt. Vista Drive home which will be paid to Wife as set forth in Exhibit "A".

5. The 2001 Kia Optima, the 1986 GMC, the 1970 GMC vehicles.

6. All furniture and personal property currently in her possession.

The following liabilities are assigned to Wife:

7. The mortgages and outstanding arrears on 2618 Michigan Street.

8. The mortgages and outstanding arrears on 2604 Lummi View Drive.
9. One-half the outstanding debt and property taxes on Pipeline Road.
10. Bank of America account #2692 – $4,697.00
11. Citibank #7050 – $3,848.00
12. Discover Card #4070 – $8,702
13. Jeff Solomon – $7,972.00