

No. 89825-1

(Court of Appeals No. 69567-3-1)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Marriage of:

MASOOD ABAWI,
Petitioner

And

WALQUIRIA GUTIERREZ,
Respondent

2014 JAN 16 PM 2:19
COURT CLERK
STATE OF WASHINGTON
FILED DIV 1

PETITION FOR REVIEW

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FILED

JAN 27 2014

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CPJ

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I. IDENTITY OF PETITIONER

Masood Abawi moves this Court for discretionary review of the Court of Appeals' (Div. 1) decision in Case No. 69567-3-1.

II. COURT OF APPEALS DECISION

Division One of the Court of Appeals affirmed the orders entered by the trial court in its decision of November 12, 2013. The Court of Appeals also denied the petitioner's August 2013 Motion to Supplement the Record and his timely filed Motion for Reconsideration in its order of December 11, 2013.

Given the public interest in affording low income residents of the State access to appellate review, the petitioner seeks review of the Court of Appeals decision and the order denying the motion to supplement the record and for reconsideration.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in its decision denying Abawi's Motion to Supplement the Record if supplemental transcription would address its concerns re an incomplete record and would effect the intended liberal interpretation of RAP 1.2 to promote justice and facilitate decisions on the merits.

2. Whether, under RAP 9.10 and 1.2 and in light of Abawi's extremely limited financial resources, the Court of Appeals erred in denying his Motion for Reconsideration, seeking to provide supplemental transcription of the trial record, where a more permissive application of the rules would permit broader access to appellate review.
3. Whether the Court of Appeals erred when it affirmed the trial court's exercise of discretion in excluding the petitioner's direct witnesses in granting respondent's motion in limine?
4. Whether the Court of Appeals erred when it affirmed the trial court's exercise of discretion in excluding rebuttal witnesses of petitioner?
5. Whether the Court of Appeals erred when it affirmed the trial court's exercise of discretion in excluding evidence from separate but related Snohomish County case but ultimately relied on testimony regarding that case in its parenting plan?
6. Whether the Court of Appeals erred when it affirmed the trial court's exercise of discretion in considering evidence of petitioner's prolonged period of unemployment and new employment at significantly lower wage in imputing petitioner's income for purposes of determining child support?
7. Whether the Court of Appeals erred when it affirmed the trial court's exercise of discretion in considering evidence of respondent's personal expenditures and petitioner's prolonged period of unemployment and new employment at significantly lower wage in disposition of property, including vehicles?

IV. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The parties were married in April 2006 and have three children together. CP 8. The petitioner Mr. Abawi continues to live together with his extended family, including his sister, brothers, and, until recently, his mother, who passed away December 25, 2012. RP 13:1-7

Allegations were made by the respondent Ms. Gutierrez during the trial concerning purported inappropriate behavior by one of Mr. Abawi's brothers, Shafiq, towards one of their children. RP Vol. 1 53-55, Vol. 2 17:9-24. Petitioner Abawi is also involved in a modification action in Snohomish County with the mother of his oldest child, which involved the same opposing counsel at trial in this matter, and concerning the same allegations, which remains unresolved in the Snohomish County court. RP Vol. 1 53-55, Vol. 2 17:9-24.

Mr. Abawi sought to admit direct testimony from his sister, Mariam Abawi, and a Snohomish County Master Patrol Deputy, Robert Rozzano, concerning these allegations, as well as documents from Snohomish County. RP Vol. 1 53-55, Vol. 2 17:9-24. This testimony was excluded by the trial court in its order on Ms. Gutierrez's motion in limine. CP 40-46. Ms. Gutierrez had also named Mr. Abawi's sister,

Mariam, as a potential witness. CP 70. Ms. Gutierrez also did not even name some of her witnesses, specifically FCS evaluator Nicole Bynum, until after receiving Mr. Abawi's proposed list of witnesses. CP 52-53.

During the trial, Mr. Abawi also sought to call these witnesses to rebut the allegations made by Ms. Gutierrez. RP Vol. 1 53-55, Vol. 2 17:9-24. The court also excluded any rebuttal testimony from these witnesses, as well as other evidence, including a declaration of Dep. Rozzano. RP Vol. 1 53-55, Vol. 2 17:9-24. The court had indicated during the trial that it would not be placing much reliance on the claims relating to Mr. Abawi's brother and related evidence and testimony available from the Snohomish County matter. RP Vol. 1 53-55, Vol. 2 17:9-24.

In the final parenting plan entered, however, after the conclusion of trial, the court placed various restrictions on Mr. Abawi directly relating to these allegations. CP 130, 135.

Evidence was also presented at trial of Mr. Abawi's extended unemployment for a period of about two years, as well evidence on reconsideration of new employment at significantly lower income. CP 147-174. The court entered a support order imputing to Mr. Abawi his much earlier level of income. CP 100, 108-109.

The award of a money judgment and community property vehicles to the respondent did not adequately consider the respondent's own testimony concerning her personal expenditures and the appellant's extended period of unemployment and new work at significantly reduced wage. RP Vol. 1 30:6-16, 32:20-22. CP 114-115, 147-174.

B. STATEMENT OF PROCEDURE RE APPELLATE COURT'S DECISION AND TRIAL COURT'S RULING

The Court of Appeals affirmed the trial court's orders in its decision of November 12, 2013. It also denied Mr. Abawi's August 2013 Motion to Supplement the Record seeking to admit evidence excluded at trial. It also denied his Motion for Reconsideration, seeking to supplement the trial transcript, which he had not been able to afford previously. Both of the petitioner's motions were denied in the Court's December 11, 2013, order. Appendix.

The trial court, in its initial ruling on exclusion of Mr. Abawi's witnesses, did not clearly indicate that lesser sanctions had been considered. RP Vol. 1 53-55, Vol. 2 17:9-24. The court's exclusion of his witnesses, as well as its later exclusion of

rebuttal witnesses and evidence severely prejudiced his case. RP Vol. 1 53-55, Vol. 2 17:9-23. CP 47.

It is unclear from the record whether the trial court properly considered Mr. Abawi's current income in its support determination. CP 100, 108-109.

It is also unclear from the record whether the trial court properly weighed factors under RCW 26.09.080 in its property distributions at trial. CP 178-179.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Appellate Court's Denial of Abawi's Motion to Supplement the Record Under RAP 9.10 Did Not Adequately Consider His Limited Financial Resources and Serves to Limit Access to Appellate Review and Relief.

That Abawi had been unemployed for an extended period prior to trial and secured low wage employment shortly after trial is evident from the record below. Given his limited financial resources, he sought transcription of only those portions of the record he believed were essential for appellate review. If it became apparent that additional transcription would be necessary to properly review issues raised by the parties, as the Court of Appeals noted in its decision, Abawi should have been given an opportunity to supplement the record as necessary.

In such a circumstance, and in light of the motion to supplement and Abawi's limited financial resources, an order permitting supplementation of the record would seem to more equitably address those concerns rather than precluding further review with a finding that Abawi did not act in good faith. The filing of a motion to supplement the record under RAP 9.10 could perhaps more readily be interpreted as a good faith attempt to provide a record in compliance with RAP 9.2(b) rather than leading to the opposite finding. Furthermore, more readily allowing the record to be supplemented would comport with the intended liberal interpretation of RAP 1.2 to promote justice and facilitate decisions on the merits.

While it is clear from the language in RAP 9.10 and holdings in cases such as *State v. Wade* that supplementation of the record is at the discretion of the Court, a presumption favoring more permissive application of the rule, particularly where evidence of the limited financial resources of a party is apparent, would serve to facilitate broader access to appellate review. *State v. Wade*, 138 Wn.2d 460, 979 P.2d 850 (1999). The Court should therefore find under RAP 13.4 that review of the appellate decision is proper.

B. Appellate Court's Denial of Abawi's Motion to Reconsider Similarly Did Not Adequately Consider His Limited Financial Resources and Serves to Limit Access to Appellate Review and Relief.

In his Motion for Reconsideration, Abawi sought to further explain the reasons for the initially more limited transcript, namely his near minimum wage income. It is well known that transcription fees, particularly for a multi-day trial, can easily run into the thousands of dollars. This presents an undeniable hardship to someone whose paycheck runs into the hundreds and needs to continue supporting himself and his children.

In the Motion, Abawi had indicated that he had nevertheless made arrangements for supplemental transcription of the trial court record. While it is no doubt frustrating for the Court to wish to review portions of the record that have not been made initially available, a presumption in favor of more permissive application of RAP 9.10 and/or 9.11, allowing supplementation of the record, particularly where evidence of the limited financial resources of a party is apparent, would serve to facilitate broader access to appellate review and serve the ends of justice. The Court should therefore find under RAP 13.4 that review of the appellate decision is proper.

C. Basis of Parenting Plan Restrictions Flawed and/or Did Not Properly Consider Evidence Excluded Below.

In reviewing a trial court's ruling dealing with the provisions of a parenting plan, the standard of review is abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

It appears that the requirement for supervision in the parenting plan and restrictions under RCW 26.09.191 are predicated on the presence of Mr. Abawi's brother at the household. CP 130, 135. It is therefore unclear what purpose is served by additionally requiring the brother to remain 500 feet away at all times, particularly as there is no finding or charge regarding the brother. The appellant was not allowed to rebut testimony leading to the 191 restrictions ultimately entered. Additionally, this requirement imposes significant and burdensome logistical difficulties on petitioner and his family, which may have the unintended and undesirable effect of adversely impacting visitation.

These requirements are further troubling given that the trial court may not have considered all relevant evidence concerning any such requirement. Despite comment from the Court that the

Snohomish County matter was not conclusive, the fact that there was no FCS recommendation to that effect, and the lack of any CPS finding in that matter, the final parenting plan appears to incorporate allegations raised in testimony about that case into its final parenting plan. CP 5-29, 130, 135. RP Vol. 1 53-55, Vol. 2 17:9-23.

Mr. Abawi was denied the opportunity to rebut the respondent's allegations despite offering the testimony of three witnesses: Mariam Abawi, Amir Abawi, and Snohomish County Sheriff's Deputy Robert Rozzano. RP Vol. 1 53-55, Vol. 2 17:9-23. Additionally, the Court did not admit either petitioner or respondent's documentary evidence, specifically the declaration of Deputy Rozzano and the court minutes offered by respondent. Given the relatively harsh sanction of denying relevant witness testimony, direct or rebuttal, and the lack of documentary evidence supporting the restrictions, the Court is urged to reconsider these provisions.

Further, as presently written, this provision will effectively prohibit petitioner's daughter and his brother from ever being able to jointly engage with the family until she is an adult. This would appear to be an unduly harsh, perhaps unintended, result that does

not seem reasonably consistent with the relative paucity of evidence considered.

D. Exclusion of Testimony.

“When the trial court ‘chooses one of the harsher remedies allowable under **CR 37(b)**, ... it must be apparent from the record that the trial court explicitly considered whether a **lesser sanction** would probably have sufficed,’ and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989) (citing to due process considerations outlined in *Associated Mortgage*), *rev’d in part*, 114 Wn.2d 153, 786 P.2d 781 (1990).

The Court has also found that ‘it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.’ *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wn. App. 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, *review denied*, 103 Wn.2d 1041 (1985))” *Magana v. Hyundai*

Motor America, 141 Wn. App. 495, 170 P.3d 1165 (2007); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) “[We] hold that the reference in *Burnet* to the ‘harsher remedies allowable under **CR 37(b)**’ applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party’s ability to present its case—but does not encompass monetary compensatory sanctions under CR 26(g) or CR 37(b)(2). *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 690, 132 P.3d 115 (2006).

In fact, in this matter, no order regarding discovery was in fact obtained by the opposing party prior to trial. The court excluded Mr. Abawi’s witnesses at the start of trial and later excluded his calling of any rebuttal witnesses or presentation of rebuttal evidence. Additionally, the respondent Ms. Gutierrez had even named one of the direct and rebuttal witnesses the petitioner sought to call, his sister, Mariam Abawi, so it is difficult to discern what prejudice allowing her testimony would have caused the respondent.

E. Child Support

In reviewing a trial court's ruling concerning child support, the standard of review is manifest abuse of discretion. *In re Marriage of Griffin*, 114 Wn.2d 772, 791 P.2d 519 (1990).

With regard to determination of child support, RCW 26.19.071, referenced in RCW 26.09.100, indicates several factors, including wages, in guiding an appropriate level of support. Evidence of Mr. Abawi's current income levels and period of extended unemployment, does not appear to have been appropriately weighed in the support determination.

F. Property Distribution.


In reviewing a trial court's ruling concerning property distribution, the standard of review is abuse of discretion. *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992), *aff'd*, 119 Wn.2d 438 (1992).

RCW 26.09.080 also requires to Court to consider the economic circumstances of the parties prior to a distribution. The award of a money judgment and community property vehicles to the respondent did not adequately consider the respondent's own testimony concerning her personal expenditures and the appellant's

extended period of unemployment and new work at significantly reduced wage.

VI. CONCLUSION

On the basis of the foregoing, the petitioner respectfully requests that this matter be remanded to the Court of Appeals to allow for supplementation of the record under RAP 9.10 and/or 9.11 and reconsideration of the issues on appeal or, in the alternative, that this matter be remanded for a new trial to determine a parenting plan which properly factors in all relevant testimony and evidence, child support obligations recalculated to more accurately reflect the petitioner's actual financial situation, and reconsideration of property distributions, allowing for consideration of all relevant testimony.



Masood Abawi

Petitioner *pro se*

APPENDIX

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
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December 11, 2013

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CASE #: 69567-3-1

In re the marriage of: Masood Abawi, Appellant v. Walquiria Gutierrez, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion To Supplement The Record And For Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

Enclosure

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

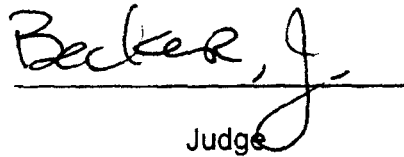
In the Matter of the Marriage of:)	
)	No. 69567-3-1
MASOOD ABAWI,)	
)	ORDER DENYING MOTION
Appellant,)	TO SUPPLEMENT THE RECORD
)	AND FOR RECONSIDERATION
and)	
)	
WALQUIRIA GUTIERREZ,)	
)	
Respondent.)	
)	
)	

Appellant, Masood Abawi, has filed a motion to supplement the record and for reconsideration of the opinion filed November 12, 2013. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion to supplement the record and for reconsideration of the opinion is denied.

DONE this 11th day of December, 2013.

FOR THE COURT:



Judge

FILED
COURT OF APPEALS
DIVISION ONE
DEC 11 2013

No. 69567-3-1/9

Affirmed.

Becker, J.

WE CONCUR:

Jan, J.

Leach, C.J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
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November 12, 2013

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CASE #: 69567-3-1

In re the marriage of: Masood Abawi, Appellant v. Walquiria Gutierrez, Respondent
King County, Cause No. 11-3-06209-4 KNT

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

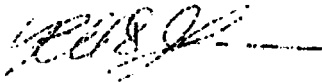
"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of \$200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e)

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

Enclosure

c: The Honorable James A. Doerty

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:)	
MASOOD ABAWI,)	No. 69567-3-1
)	
Appellant,)	DIVISION ONE
)	
and)	
)	
WALQUIRIA GUTIERREZ,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: November 12, 2013
)	

BECKER, J. — In Masood Abawi's dissolution proceeding, the trial court ordered him to pay child support on the basis of imputed income and awarded property and money to his wife. Abawi appeals these orders, and he also appeals the rulings that excluded some of the evidence he wanted to present. Because the limited record provided by Abawi fails to establish an abuse of discretion as to any issue on appeal, we affirm.

FACTS

According to the decree of dissolution, Masood Abawi and Walquiria Gutierrez were married in April 2006. During the marriage, the parties had three children. The parties separated in September 2011. The decree shows that child

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support, property distribution, and the terms of the parenting plan were at issue in their dissolution.

Included in the record on appeal are three final orders—a decree of dissolution, a child support order, and a parenting plan—along with the associated findings of fact and conclusions of law. In the dissolution decree, the trial court awarded each spouse the property in that spouse's possession at the time of separation, except that the Honda vehicle in Abawi's possession was awarded to Gutierrez. The court also found that Abawi was liable for one-half of the payments made and outstanding on Gutierrez's loan from her 401-K account. In the child support order, the court found that Abawi was "voluntarily unemployed" and imputed his income at \$3,448 per month, based on previous employment history. The parenting plan required that Abawi's brother Faquier remain 500 feet away from the children at all times and that, for as long as Faquier continued to live in the home, all visitations be supervised.

Abawi filed a notice of appeal. His brief challenges the trial court's decisions (1) excluding his direct witnesses, (2) excluding those same witnesses from testifying in rebuttal, (3) declining to consider further evidence of a pending Snohomish County case regarding his daughter Sabrina's child molestation allegations against his brother Shafiq, (4) denying his motion for reconsideration in which he sought to present evidence of a job he acquired after trial which pays lower wages than those imputed to him at trial, and (5) awarding Gutierrez both vehicles and holding Abawi liable for half of a loan from Gutierrez's 401-K taken out during the marriage.

Abawi designated an incomplete record on appeal. According to the verbatim reports submitted, Abawi instructed the court reporter to omit 19 different sections of the three volumes of proceedings provided.¹ For example, on page 54 of volume 1 of the verbatim report of proceedings, there is a break in the reporting signified by the following:

(End requested proceedings 2:49:00.)

(Begin request proceedings 3:04:05.)

The omitted sections are between 3 and 75 minutes long, for a total of approximately 7.7 hours of missing proceedings. It appears likely from the context surrounding these omissions that the sections omitted include the trial court's discussions of the merits of the issues on appeal as well as the oral rulings on those issues. For example, in volume 1 at page 3, a parenthetical indicates that the court reporter was requested to begin transcribing the proceedings beginning at 9:15 a.m. The first line of reported proceedings indicates both that the report picks up in the middle of a colloquy between the court and Gutierrez's counsel and that the colloquy omitted from the

¹ See 1 Report of Proceedings at 7 (25 minutes), 26 (25 minutes), 34 (4 minutes), 37 (5 minutes), 47 (30 minutes), 49 (40 minutes), 52 (15 minutes), 53 (15 minutes), 54 (75 minutes), 55 (10 minutes), 56 (40 minutes); 2 Report of Proceedings at 8 (30 minutes), 9 (4 minutes), 14 (9 minutes), 15 (25 minutes), 3 Report of Proceedings at 4 (17 minutes), 5 (6 minutes), 6 (3 minutes), 12 (30 minutes).

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record dealt with another motion

BEGIN PROCEEDINGS OF 9/6/2012

(Begin requested proceedings 9:15:00.)

MS. BENDER [to the court]: Okay Thank-you. And so --
and with respect to the *other* motion?

VRP Vol. 1 at 3 (emphasis added). The court then discusses the "second motion in limine"—thus, it is possible the omitted section contains the court's rationale for granting a motion in limine by Gutierrez concerning one of the issues Abawi raises in this appeal. The clerk's papers also omit several important documents, including Gutierrez's response to Abawi's motion for reconsideration and the trial court's case scheduling order.

Gutierrez argues in her brief of respondent that the record provided by Abawi is insufficient to enable review of the issues raised by Abawi. Abawi replies that the report of proceedings he filed was sufficient under the rules of appellate procedure:

Regarding respondent's objection to the partial report of proceedings, RAP 9.2 clearly allows for a partial report of proceedings to be filed. The petitioner has provided all relevant portions of the trial transcript and pleadings he believed addressed the issues on review and does not believe it is the one-sided depiction that the respondent seeks to characterize it as.

Further, RAP 9.10 provides that the record may be supplemented as necessary in the determination of any part or the court. Therefore, if the respondent believes factual or procedural portions of the record require supplementation, she may do so without prejudice.

Appellant's Reply Br. at 5-6.

DISCUSSION

The decision of a trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). To make an affirmative showing of error as to each of the issues raised on appeal, Abawi must demonstrate that the court's ruling constitutes an abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (excluding witness testimony); River House Dev. Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (denial of motion for reconsideration); In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) (terms of parenting plan); In re Marriage of Kraft, 119 Wn.2d 438, 832 P.2d 871 (1992) (property distribution).

The party presenting an issue for review has the burden of providing a record adequate to establish the errors claimed. Wade, 138 Wn.2d at 464; In re Marriage of Haugh, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990); see RAP 9.2, 9.9, 9.10. An "insufficient record on appeal precludes review of the alleged errors." Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994). If an incomplete record fails to affirmatively establish an abuse of discretion, we may affirm the challenged decision. State v. Sisouvanh, 175 Wn.2d 607, 619-20, 290 P.3d 942 (2012); Lau v. Nelson, 92 Wn.2d 823, 829, 601 P.2d 527 (1979). However, where the appellant makes a good faith attempt to provide a record in compliance with RAP 9.2(b), an appellate court ordinarily will not dismiss, affirm, reverse, or modify but rather will order supplementation of the record. RAP 9.10. "A litigant appearing pro se is bound by the same rules of procedure and

substantive law as his or her attorney would have been had the litigant chosen to be represented by counsel.” Patterson v. Superintendent of Pub. Instruction, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), review denied, 126 Wn.2d 1018 (1995).

In this case, the record is incomplete. The omissions are so numerous and significant in the context of Abawi's arguments that we conclude Abawi did not act in good faith to provide a record in compliance with RAP 9.2(b). We therefore decline to order Abawi to supplement the record under RAP 9.10.

A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. Wade, 138 Wn.2d at 464. Because the incomplete record fails to affirmatively establish an abuse of discretion occurred as to any of the five issues on appeal, we affirm the decision of the trial court under Lau and Sisouvanh. See Lau, 92 Wn.2d at 829; Sisouvanh, 175 Wn.2d at 619-20. Because we affirm the decision of the trial court, we need not reach Gutierrez's motion to dismiss for failure to perfect the record.

As part of her motion to dismiss, Gutierrez asks, in the alternative, for sanctions. Under RAP 9.2, appellants "should" arrange for transcription and provide a copy of all portions of the verbatim report of proceedings necessary to present the issues raised on review. RAP 9.2(a). "Should" is used in the rules "when referring to an act a party or counsel for a party is under an obligation to perform. The court will ordinarily impose sanctions if the act is not done within the time or in the manner specified." RAP 1.2(b). We exercise our discretion and decline to impose sanctions in this case.

Abawi filed a motion to supplement the record under RAP 9.10 and 9.11.

Gutierrez has filed a motion to strike Abawi's motion

RAP 9.10 and 9.11 are methods by which the parties may provide the appellate court with additional evidence from the trial record (RAP 9.10) and new evidence (RAP 9.11):

Rule 9.10 Correcting or Supplementing Record After Transmittal to Appellate Court

If a party has made a good faith effort to provide those portions of the record required by rule 9.2(b), the appellate court will not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court decision or administrative adjudicative order certified for direct review by the superior court because of the failure of the party to provide the appellate court with a complete record of the proceedings below. If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk's papers and exhibits or administrative records and exhibits certified by the administrative agency, or (2) correct, or direct the supplementation or correction of, the report of proceedings. The appellate court may impose sanctions as provided in rule 18.9(a) as a condition to correcting or supplementing the record on review. The party directed or permitted to supplement the record on review must file either a designation of clerk's papers as provided in rule 9.6 or a statement of arrangements as provided in rule 9.2 within the time set by the appellate court.

Rule 9.11 Additional Evidence on Review

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it

would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) *Where Taken*. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

In his motion, Abawi seeks to introduce his financial declaration which was in the trial record but excluded at trial. He also asks this court to consider evidence which was not in the trial record: his 2012 federal tax return and documentation of the income he receives at the new job he got after trial. All three documents go to the merits of his argument that the trial court erred in denying his motion for reconsideration. However, they are insufficient to satisfy Abawi's burden to perfect the record because, even with the documents, the record is still incomplete. They do not help us understand why the motion for reconsideration was denied but only explain, from Abawi's self-serving point of view, why it should have been granted. Also, Abawi does not establish that the six criteria necessary to grant a RAP 9.11 motion are present.

To the extent Abawi's motion to supplement the record is intended as an effort to modify the child support order, he chose the wrong procedure. The law permits Abawi to petition the trial court to modify the child support order at any time based upon a showing of substantially changed circumstances. See RCW 26.09.170(5)(a). Abawi's motion to supplement the record is denied. We need not consider Gutierrez's motion to strike it.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR DIVISION I

In re the Marriage of:
MASOOD ABAWI,
Appellant/Petitioner,
and
WALQUIRIA GUTIERREZ,
Respondent/Respondent.

Case No. 69567-3-1
DECLARATION OF SERVICE

I, Masood Abawi, hereby declare that on the 10th day of January, 2014, I caused a true and correct copy of the following:

- 1. Petition for Review;
- to be personally served on the following:

Lindy Hanson
Attorney at Law
Northwest Justice Project
401 2d Ave. Ste. 407
Seattle, WA 98104

DATED this 10th day of January, 2014.

/s/ Masood Abawi

Masood Abawi, Petitioner