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COURT OF APPEALS NO. 71295-1-I

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

ZELEKE KASSAHUN,

Appellant,

and

FANAYE ASHAGARI,

Respondent.

REPLY BRIEF OF APPELLANT

C. Nelson Berry III
WSBA No. 8851
Attorney for Appellant

Berry & Beckett, P.L.L.P.
1708 Bellevue Avenue
Seattle, Washington 98122
(206) 441-5444

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Reply to Respondent's Statement of the Case.

In her Statement of Facts, as she does throughout her brief, Ms. Ashagari repeats her disputed and uncorroborated testimony of tale after lurid tale of abuse and domestic violence, in an effort to get this Court to make findings of fact, which the trial court refused to do and which this Court cannot do. *Satomi Owners Ass'n v. Satomi, LLC,* 167 Wn.2d 781, 808, 225 P.3d 213 (2009)("Findings of fact are appropriately made in the trial court.").

As this Court held in *In re Welfare of Woods*, 20 Wash.App. 515, 517, 581 P.2d 587(1978):

> It is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented. Such a practice would place the appellate court in the initial decision making process instead of keeping it to the function of review.

In particular, with the exception of the assault at the birthday party in May of 2011, which will be discussed more fully hereafter, the court below did not find that any of Ms. Ashagari's other accusations of domestic violence were supported by the evidence. Accordingly, it is not necessary to belabor this Court with the many disputes in that evidence. Credibility determinations are solely for

the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis,* 149 Wash.2d 572, 574, 70 P.3d 125(2003); *In re Marriage of Fiorito,* 112 Wn.App. 657, 667, 50 P.3d 298 (2002).

While Ms. Ashagari is correct that the Court's conclusion that Ms. Ashagari had "misrepresented the parties' circumstances to the Court" with her uncorroborated and implausible accusations of domestic violence and abuse against her first husband, and awarded fees and costs against her for doing so, Exhibit 200, CP 848-862, I RP 48; 6 RP 656, does not necessarily mean that domestic violence did not occur in that relationship, or in her subsequent marriage to Mr. Kassahun, it does show a pattern of behavior which bore on her credibility. The similarity between the two events, including her delay in making her accusations long after the parties separated, coupled with the absence of any evidence to corroborate her accusations, is striking.

On the other hand, her accusations that, on the evening of December 30, 2010, Mr. Kassahun assaulted her with a whiskey bottle, choked both her and their oldest son, Nathaniel, 2 RP 162, 3 RP 244-245, and hit her in the face three or four times with his fists-

-- with hands "like steel", bruising her nose and cheek and causing her eyes and face to swell to such an extent that she wanted to seek medical attention, 2 RP 217-219, 4 RP 383-384, 392, and then choked her a few days later on January 3, 2011, 2 RP 212, was irreconcilable and totally discredited by the observations of the police officers who observed her on January 3, 2011. Exhibits 11 and 211; See also, 2 RP 163-166, 4 RP 389-392.

So, it can be no surprise that the court below refused to find Ms. Ashagari's myriad accusations of domestic violence credible, other than the assault at the birthday party, which was acknowledged by Mr. Kassahun, and supported by independent witness testimony.

And, even with this incident, her testimony was highly exaggerated. Ms. Ashagari claimed that Mr. Kassahun held her neck, choked her, and pushed her to the ground. 2 RP 229-230; 5 RP 430; CP 61.

No one corroborated her description of this incident. Mr. Kassahun testified that as he approached Ms. Ashagari, she moved back, tripped and fell. 7 RP 694. Mr. Hassen testified that he saw Mr. Kassahun make physical contact with her, 5 RP 415, 419,

Besset Zenebe, her best friend. In any event, Ms. Ashagari did fall down. 5 RP 415-419; 8 RP 789-790. There was no evidence that she suffered any injury, or feared any injury.

Mr. Kassahun called the next day to apologize to Mr. Hassen for his behavior. 5 RP 420, 428; 7 RP 695.

He also apologized to Ms. Ashagari. 7 RP 695-696.

Nonetheless, some of the Petitioner's other misleading representations need to be corrected.

While the person Mr. Kassahun killed in 1991 may have been a teenager, he was a teenager who was assaulting Mr. Kassahun during the course of a robbery when he was shot. *State v. Kassahun,* 78 Wash.App. 938, 900 P.2d 1109 (1995).

While Mr. Kassahun concedes that he developed a drinking problem after discovering his wife's infidelities, contrary to the statement on p. 6 of the Respondent's Brief, Ms. Ashagari's brother, Yagil, who lived with the parties for a year and a half, testified that he only saw Mr. Kassahun drink one time. 5 RP 440.

Contrary to the Petitioner's contention that Ms. Kassahun maintained strict control over the parties' finances, Ms. Ashagari

maintained strict control over the parties' finances, Ms. Ashagari testified that if she needed money during the marriage, she would ask him for it, and he would give it to her. 2 RP 209, 269. Even after the parties separated, Mr. Kassahun continued to pay all of the household bills and to provide whatever support the children needed *voluntarily*. 3 RP 267-268; 6 RP 539; 7 RP 709.

Argument.

A. The Lower Court's Finding Does Not Support Imposing Restrictions On The Appellant, Pursuant To RCW 26.09.191.

To support restrictions in the Parenting Plan, pursuant to RCW 26.09.091(1)(c), the court must include findings to support its conclusion, under Section 2.1 of the Parenting Plan Final Order, CP 478,[1] that there has been:

> A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily injury or the fear of such harm.

In this case, CP 472, after concluding that:

> There is a history of domestic violence and a basis for 26.09.191 restrictions,

[1] Ms. Ashagari agrees that the written findings on a preprinted standardized form which simply recites the statutory grounds and requisite findings is inadequate, *In re LaBelle*, 107 Wash.2d 196, 218, 728 P.2d 138 (1986).

conclusion:

> The father had the mother followed, and monitored her phone records. The court finds that the father assaulted the mother at the birthday party in 2011, and that this was not an isolated incident. The evidence presented at trial satisfies the statutory definition of domestic violence.

Contrary to Ms. Ashargari's representation, the trial court did **not** find Mr. Kassahun engaged in stalking or domestic violence by either "monitoring" the mother's phone records which were in his name, or by having the mother followed by a private investigator for two days to determine whether she was being unfaithful. Nor would the evidence support such a finding. See also, 2 RP 153-156; Appendix.

While it may be true, as Ms. Ashagari argues, that there may be times when a trial court's findings may be supplemented by the lower court's oral ruling, *In re LaBelle*, 107 Wash.2d at 219-220, Ms. Ashagari has not identified any portion of the court's oral ruling where the lower court found any other act of domestic violence, or that this one incident of "assault" caused "grievous bodily injury or the fear of such harm". This is not sufficient to meet the statutory

requirements of RCW 26.09.091.

The Supreme Court held in *Caven v. Caven*, 136 Wash.2d 800, 809, 966 P.2d 1247(1998):

> Actually, RCW 26.09.191(1)(c) requires a finding by the court that there is "a history of acts of domestic violence." Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute.

The lower court's oral ruling finding that the birthday party incident caused the "infliction of fear of imminent physical harm or bodily injury or assault", 10 RP 952, is no more than the definition of "assault". *Coleman v. Employment Sec. Dept.,* 25 Wash. App. 405, 409, 607 P.2d 1231(1980). But a mere "assault" is not sufficient to meet the statutory requirements of RCW 26.09.091.

Indeed, although, it is not being challenged here, it is debatable whether this assault---where Mr. Kassahun lunged at his wife after discovering her infidelities--- should even be regarded as "domestic violence" for purposes of RCW 26.09.091. As this Court explained in *In re Marriage of C.M.C.*, 87 Wash. App. 84, 88, 940 P.2d 669 (1997):

> The commentary to the proposed Parenting Act states that the term "history of domestic violence"

> states that the term "history of domestic violence" was intended to exclude "isolated, de minimus incidents which could technically be defined as domestic violence." *1987 Proposed Parenting Act, Replacing the concept of child custody, Commentary and Text* 29 (1987).

In any event, in *Caven v. Caven*, *supra,* the Washington Supreme Court affirmed this Court's holding in *In re Marriage of C.M.C.*, *supra*, that for an assault to qualify as a basis for restrictions, pursuant to RCW 26.09.091, there must be a finding that it was an "assault ... which causes *grievous* bodily injury or the fear of such harm." There was no such finding about this assault, and no evidence presented which would support such a finding.

In fact, there is no evidence Ms. Ashagari suffered *any* injury from this incident.

Nor was there any evidence---much less, a finding--- that this incident created any fear of such harm. Although Ms. Ashagari spent the night at her mother's that evening, 2 RP 231, the parties continued to live with each other for the next several months, until Mr. Kasahun voluntarily chose to leave the home on September 16, 2011. The "elders", who were all disinterested witnesses, denied that Ms. Ashagari even mentioned this incident during their

mediation which occurred a few days later. 5 RP 480, 484, 490-491; 7 RP 700, 759. She never expressed any fear of Mr. Kassahun to anyone prior to commencing these proceedings on July 5, 2012, more than a year later.

And, while it may also be true, as Ms. Ashagari contends, that a trial court "is not required to under *LaBelle* or *Booth* [114 Wn.2d 772, 791 P.2d 519 (1990),] to exhaustively catalogue each and every instance of domestic violence when making RCW 26.09.191 findings", the lower court must still make findings which meet the statutory requirements of RCW 26.09.191 before it can impose restrictions in a Parenting Plan. In *Weyerhauser v. Pierce County,* 124 Wash.2d 26, 36, 873 P.2d 498(1994), the Supreme Court held, quoting *In re LaBelle,* 107 Wash.2d at 219:

> Findings must be made on matters "which establish the existence or nonexistence of determinative factual matters ...".

The court below did not make those required findings.

This is not a case which involves inadequate findings, but rather a case where the finding which was made by the court below is insufficient to meet the statutory requirements necessary to impose RCW 26.09.191restrictions in a Parenting Plan.

Ms. Ashagari tries to get around this statutory deficiency, by pointing out that the trial court was "particularly impressed [and] persuaded [by] Nathaniel's [hearsay] comment about his father's drinking and anger", as described in the Family Court Services report, 10 RP 952, CP 1047-1048. But drinking and anger are not acts of domestic violence. RCW 26.50.010(1).

None of the parties' children ever corroborated any of Ms. Ashagari's accusations of domestic violence, even though she reported that they had witnessed and had even been victims of numerous acts of domestic violence. Nor have the children ever been fearful of their father. 2 RP 157-159; 7 RP 756; 8 RP 805, 809-810.

In fact, the trial court specifically found no history of acts of domestic violence against the children, 10 RP 952, increased Mr. Kassahun's residential time, and eliminated the requirement that his residential time be surpervised. 10 RP 952-953, CP 477-488.

Thus, Ms. Ashagari's assertion that "the limitations imposed by the court are 'reasonably calculated to protect the child from the physical...emotional abuse or harm that could result if the child has

contact with the parent requesting residential time RCW 26.09.191(m)(i)" is not supported by the evidence, was not a finding made by the court below, and indeed is contrary to the lower court's finding that there was no history of acts of domestic violence against the children. 10 RP 952.

Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis,* 149 Wash.2d at 574. In this case, the lower court did not believe Ms. Ashagari's uncorroborated and implausible testimony. Ms. Ashagari is now asking this Court to make findings which the lower court was unwilling and unable to make. That would be improper. *Satomi Owners Ass'n v. Satomi, LLC,* 167 Wn.2d at 808; *In re Welfare of Woods*, *supra*.

The law is well-settled. The absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue. *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wash.App. 541, 562, 222 P.3d 1217(2009); *Ellerman v. Centerpoint Prepress, Inc.,*143 Wash.2d 514, 524, 22 P.3d 795 (2001); *City of Spokane v.*

Dep't of Labor and Indus., 34 Wash.App. 581, 589, 663 P.2d 843 (1983).

The finding made by the court below is not sufficient to meet the statutory requirements of RCW 26.09.091, which must be met before restrictions can be imposed in the parties' Parenting Plan.

Those restrictions should and must be removed.

B. The Court's Finding That Mr. Kassahun Is Likely To Resume Acts of Domestic Violence If A Permanent Protection Order Was Not Entered Is Not Supported By Substantial Evidence.

Ms. Ashagari's arguments about whether Mr. Kassahun was afforded due process is puzzling, since Mr. Kassahun has never asserted that he was denied due process.

Rather, Mr. Kassahun maintains that while the lower court did find that "acts of domestic violence are likely to resume", 10 Rp 954, there is no substantial evidence to support that finding. A trial court's findings of fact must be supported by substantial evidence. *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.,* 152 Wash.2d 387, 391, 97 P.3d 745 (2004); *In Re Marriage of Schumacher,* 100 Wn.App. 208, 211, 997 P.2d 399 (2000), *review denied*, 129 Wash.2d 1014 (1996).

In *Freeman v. Freeman*, 169 Wash.2d 664, 674, 239 P.3d 557(2010), the Washington Supreme Court held:

> The facts supporting a protection order must reasonably relate to physical harm, bodily injury, assault, or the fear of *imminent* harm. It is not enough that the facts may have justified the order in the past. Reasonable likelihood of imminent harm must be in the present. [emphasis in original].

The court found only one act of domestic violence in May of 2011, and that this was not an isolated incident. CP 472. Although Ms. Ashagari spent the night at her mother's house the night of this incident, 2 RP 231, she returned home and the parties continued to live with each other for the next several months, until Mr. Kasahun chose to leave the home on September 16, 2011.

After the parties separated, Mr. Kassahun continued to pay the community bills and to provide whatever support the children needed *voluntarily*. 3 RP 267-268; 6 RP 539; 7 RP 709.

Mr. Kassahun continued to see his children at least 3 or 4 times each month. Ms. Ashagari testified it was twice each month. 2 RP 175; 3 RP 267-269; 4 RP 402. They would meet at Sam's Club, and Ms. Ashagari would drive them to restaurants and other places in her car. 7 RP 676. ; 8 RP 821-822; 863-865.

Once again the parties sought out the help of the "elders" to help mediate their dispute. 3 RP 270-273. Ms. Ashagari wanted to reconcile. Mr. Kassahun did not. 2 RP 175; 8 RP 782, 795-796. These mediations continued until April or May of 2012. 3 RP 273.

Dr. Lulu Gizaw, one of the post-separation mediators, testified, 8 RP 782:

> Q. You said that Fanaye said she would stay in the relationship if they would resolve their issues. I'm wondering, what issues did Fanaye want to resolve?
>
> A. The thing they say -- I don't know. My understanding was the main issue was about trust, and that he said, you know, he lost his trust, and he doesn't want to go back to that relationship. And we were saying, you know, "You need to save this marriage, regardless of what problem you have." And that she was saying, you know, "As long as he's willing, you know, to come back, I'm happy, you know, to raise my kids with him." So that didn't happen. And then we finally gave up.

Nearly ten months after the parties separated, Ms. Ashagari commenced these dissolution proceedings, on July 5, 2012, and did so *only* after she became convinced that Mr. Kassahun would not reconcile with her and return home, as she wanted. 3 RP 269:

Q: Why did you wait until July 2012 to file for divorce?

A: Many times he leaves and he comes back, and I thought he was doing the same thing, leaving and coming back. Also, because he went and talked to the elders, and the elders also wanted to reconcile or mediate us together. Because I do what he wants, and also, if possible, to separate peacefully. That's why.

There were no alleged incidents of domestic violence after May of 2011. 2 RP 176.

Ms. Ashagari did not even seek an Order of Protection until nearly ten months after the parties separated, and nearly a year and two months after the May 2011 incident, and then only because she had become convinced that Mr. Kassahun did not wish to reconcile. There were no violations of that Order.

By the time the lower court entered its permanent Order of Protection, on November 15, 2013, Ms. Ashagari had not even accused Mr. Kassahun for engaging in an act of domestic violence in two and a half years.

Ms. Ashagari's reliance upon *Spence v. Kaminski,* 103 Wash.App. 325, 12 P.3d 1030 (2000), for the proposition that a protection order can be made permanent based on "past abuse and

present fear" alone, is misplaced because it is distinguishable from the facts in this case for the same reasons, the Court distinguished that case from the facts in *Freeman v. Freeman,* 169 Wash.2d 664, 674-675, 239 P.3d 557 (2010):

> Robin cites two Court of Appeals cases, *Barber v. Barber*, 136 Wash. App. 512, 150 P.3d 124 (2007), and *Spence v. Kaminski*, 103 Wash.App. 325, 12 P.3d 1030 (2000), for the proposition that permanent protection orders can be permanent based on "past abuse and present fear" alone. Pet. for Review at 7. Robin's reliance on these cases is misplaced. These cases stand for the proposition that to renew or make permanent a protection order, the victim does not need to prove a new act of domestic violence if the present likelihood of a recurrence is reasonable. See *Spence*, 103 Wash. App. at 333, 12 P.3d 1030; *Barber*, 136 Wash.App. at 513, 516, 150 P.3d 1 24. Unlike Robin, the victims in both *Spence* and *Barber* showed a reasonable present likelihood of violence, in addition to past abuse. Id. Notably, the victims had ongoing relationships with their abusers. In Spence the couple's relationship continued after a divorce as they bickered over child custody. "[T]he continuing relationship of the parties, who still struggled over custody issues, presented ongoing opportunities for conflict." *Spenc*e, 103 Wash.App. at 333, 12 P.3d 1030. In *Barber* the couple also interacted after their divorce. 136 Wash.App. at 513, 150P.3d 124. Robin, on the other hand, shows past abuse but the facts show recurrence of domestic violence is unlikely.

Contrary to Ms. Ashagari's contention, the fact that Mr.

Kassahun may have shot someone who was assaulting him during the course of a robbery in 1991, more than twenty years earlier, does not show a "reasonable likelihood of *imminent* harm", or that there is a "*present* likelihood of recurrence" of domestic violence, in this case, as required by *Freeman v. Freeman,* 169 Wash.2d at 674-675.

For each of the foregoing reasons, the permanent Order of Protection, CP 489-493, must be vacated.

C. The Court Below Erred In Finding That The Appellant Has A Gross Monthly Income Of $13,750.

In *Weyerhauser v. Pierce County*, 124 Wash.2d 26, 35-36, 873 P.2d 498(1994), the Washington Supreme Court held:

> The purpose of findings of fact is to ensure that the decision maker "has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved" and the appellate court "may be fully informed as to the bases of his [or her] decision when it is made." (Quotation marks and citations omitted.) *In re LaBelle,* 107 Wash.2d 196, 218-19, 728 P.2d 138 (1986). Findings must be made on matters "which establish the existence or nonexistence of determinative factual matters ...". *In re LaBelle,* at 219, 728 P.2d 138. The process used by the decision maker should be revealed by findings of fact and conclusions of law. *Hayden v. Port Townsend,* 28 Wash.App. 192, 622 P.2d 1291 (1981).

Moreover, a trial court's findings of fact must be supported by substantial evidence. *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C., supra*; *In Re Marriage of Schumacher, supra*. In this case, the trial court's finding that Mr. Kassahun has a gross monthly income of $13,750 is not supported by substantial evidence.

Ms. Ashagari does not deny that she has never even contended that Mr. Kassahun's gross income was greater than $11,000 per month, 9 RP 888-889.

"The process used by the decision maker" to find that Mr. Kassahun had a gross monthly income of $13,750 was clearly flawed.

Ms. Ashagari does not deny that the trial judge claimed that she could not determine Mr. Kassahun's income from the parties' tax returns, bank statements, and/or credit card statements, 10 RP 248-249, and so she tried to determine his income from the parties' Financial Declarations. 10 RP 949-950; see also, 10 RP 956-959.

Ms. Ashagari does not deny the fact that the parties' Financial Declarations do not support the court's finding.

Ms. Ashagari does not deny that the trial court's addition of "another 25 percent...for [income] taxes... to get to gross", 10 RP 950, is contrary to the evidence presented at trial, which showed that the parties had never paid any income taxes during the entire course of their marriage and only a nominal amount of self-employment taxes, Exhibits 29 and 30. And even if 25 percent were added, Mr. Kassahun would still not have a gross monthly income of $13,750.

Ms. Ashagari does not deny that when the trial judge was pressed to explain how she arrived at her finding, the judge claimed she could not even remember how she calculated his income. 10 RP 980-981.

Ms. Ashagari does not deny that the trial court's speculation that the $180,000 the parties had saved over the course of ten years before the parties separated meant that Mr. Kassahun had--- much less continues to have--- an additional $1,500 each month in income.[2]

Ms. Ashagari does not deny that even if that speculative

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[2] The trial court ignored the evidence that these savings also included sale proceeds which Mr. Kassahun had received from the sale of the Texaco station and Star-Mart. 6 RP 623.

phantom income of $1,500 each month were included, Mr. Kassahun would still not have a gross monthly income of $13,750.

Ms. Ashagari does not deny that the court below failed to recognize that Mr. Kassahun had to borrow $50,000 from Taketu Truneh to meet the additional obligations imposed upon him by the lower court, 6 RP 564, 566-568, 619-620; 7 RP 762; Exhibit 59: p. 1209; Exhibit 102, although it is true that he had to use some of that loan to meet his other personal expenses as well.

On the other hand, what Mr. Kassahun reported in his Financial Declaration is consistent with the findings of Steve Kessler, a Certified Public Accountant, who reviewed Mr. Kassahun's financial records and concluded that that they were accurate. 7 RP 734-735. Mr. Kessler found that Mr. Kassahun received $3,000 per month in wages, $2,000 per month from leasing the two taxi cabs (for which he has a Labor and Industries' expense and other expenses), and about $1,500 per month where he uses his business credit card to cover personal expenses and the repayment of a shareholder loan, 7 RP 732-733, 742, 745-746.

While the trial court was at liberty to disregard the testimony

of Mr. Kessler and of Mr. Kassahun, it did not have a license to just make up numbers to reach a particular outcome.

Ms. Ashagari is unable to explain how the trial court calculated Mr. Kassahun's income, other than to say in effect, that "it's there in the record somewhere" and that the court below could do whatever it wanted to do "in the exercise of its discretion". As the Court held in *Weyerhauser v. Pierce County*, 124 Wash.2d at 36:

> Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an "indefinite, uncertain, undeterminative narration of general conditions and events", are not adequate.

In *Marriage of McCausland,* 159 Wash.2d 607, 620, 152 P.3d 1013 (2007), the Washington Supreme Court held:

> Although cursory findings of fact and the trial record might appear to justify awarding a child support amount that exceeds the economic table, only the entry of written findings of fact demonstrate that the trial court *properly exercised its discretion* in making the award.

And, in this case, the trial court was not even able to remember or explain how she calculated his income. This Court held in *In re Marriage of Fiortio*, 112 Wn. App. 657, 663-664, 50 P.3d 298 (2002):

> We review a trial court's decision setting child support for abuse of discretion. A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. The amount of child support rests in the sound discretion of the trial court. 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.

In this case, the trial court's decision setting child support constituted an abuse of discretion. It was "manifestly unreasonable" because its decision "is outside the range of acceptable choices, given the facts and the applicable legal standard". Its decision is based on untenable grounds, because its "factual findings are unsupported by the record". And, it's based on untenable grounds because "it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." It did not consider all the relevant factors. And its award is unreasonable under the

circumstances.

As this Court held in *State ex rel. Stout v. Stout,* 89 Wash. App. 118, 126, 948 P.2d 851(1997):

> A court exercises its discretion in an untenable and manifestly unreasonable way when it essentially guesses at an income amount. Here there was ample reliable evidence for the court to set an accurate income estimate, but the court ignored it.

See also, *In re Marriage of Bucklin,* 70 Wash.App. 837, 841, 855 P.2d 1197 (1993) (court abused its discretion by "essentially guessing at" father's income, where it had explicitly found it had no verification of income).

Accordingly, the trial court's maintenance and child support orders which were premised upon its finding that Mr. Kassahun has a gross monthly income of $13,750, must be vacated and reversed.

D. Attorney Fees Should Not Be Awarded.

Even though she has paid nothing for her attorney fees, Ms. Ashagari seeks an award of attorney fees against Mr. Kassahun, pursuant to RCW 26.09.140.

Mr. Kassahun has no ability to pay his own attorney fees, much less, an ability to contribute to those requested by her

attorney. Her request should be denied.

CONCLUSION

The lower court's finding of a lone assault against Ms. Ashagari which did not cause "grievous bodily injury or the fear of such harm" is not sufficient to meet the statutory requirement necessary to impose restrictions on Mr. Kassahun's time with his children, pursuant to RCW 26.09.191, particularly where the court below found that he has no history of domestic violence with his children.

Similarly, the absence of any evidence---much less, a finding---that there is "reasonable likelihood of *imminent* harm", or that there is a "*present* likelihood of recurrence" of domestic violence, is insufficient to impose a permanent restraining order on Mr.Kassahun, and it should be vacated.

Finally, the lack of any evidence, much less substantial evidence, to support the trial court's finding that Mr. Kassahun has a gross monthly income of $13,750, requires that the trial court's maintenance and child support orders, which were premised upon that finding also be vacated and reversed.

This case should be remanded to the trial court to make an accurate determination of Mr. Kassahun's income based on the evidence which was duly admitted at trial, in a manner that can be properly reviewed by this Court, RCW 26.19.035(2); *Marriage of McCausland , supra; In re Marriage of Bucklin,* 70 Wash.App. at 840-841; *In re Marriage of Sacco,* 114 Wash.2d 1, 3-4, 784 P.2d 1266 (1990).

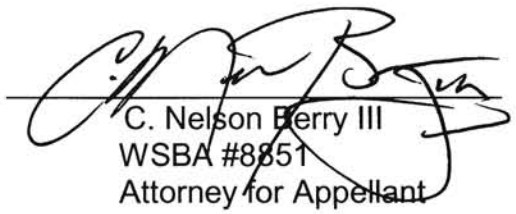
Respectfully submitted this 2nd day of October, 2014.

C. Nelson Berry III
WSBA #8851
Attorney for Appellant

Certificate of Service

I certify that on the 2nd day of October, 2014, I caused a copy of the foregoing Reply Brief of Appellant to be served on the attorney for the Petitioner, by hand-delivery by ABC Messenger Service, to the following address:

Elizabeth J. Helm
Northwest Justice Project
401 Second Avenue South
Suite 407
Seattle, Washington 98104



C. Nelson Berry III
WSBA #8851
Attorney for Appellant

Appendix

RCW 26.50.010(1) defines domestic violence as follows:

(1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking *as defined in RCW 9A.46.110* of one family or household member by another family or household member.

RCW 9A.46.110 defines "stalking" as follows:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class B felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.825, while stalking the person; (v)(A) the stalker's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an employee, contract staff person, or volunteer of a correctional agency; court employee, court clerk, or courthouse facilitator; or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services; and (B) the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the

victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) “Correctional agency” means a person working for the department of natural resources in a correctional setting or any state, county, or municipally operated agency with the authority to direct the release of a person serving a sentence or term of confinement and includes but is not limited to the department of corrections, the indeterminate sentence review board, and the department of social and health services.

(b) “Follows” means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(c) “Harasses” means unlawful harassment as defined in RCW 10.14.020.

(d) “Protective order” means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(e) “Repeatedly” means on two or more separate occasions.