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**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 69567-3-1**

In Re the Marriage of:

MASOOD ABAWI,
Appellant/Petitioner,

And

WALQUIRIA GUTIERREZ,
Respondent/Respondent.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by excluding appellant's direct witnesses in granting respondent's motion in limine.
2. The trial court erred by excluding rebuttal witnesses offered by appellant.
3. The trial court erred by excluding evidence from separate but related Snohomish County matter but then relying on testimony regarding that case in the final parenting plan.
4. The trial court erred in its determination of appellant's income by imputing past income when he had been unemployed for almost two years and he presented evidence of new employment at significantly lower income.
5. The trial court erred in its disposition of property not properly considering testimony re respondent's personal expenses and petitioner's prolonged period of unemployment, financial situation and presently reduced income.

II. ISSUES

1. Did the trial court properly exercise its discretion by excluding appellant's direct witnesses in granting respondent's motion in limine?
2. Did the trial court properly exercise its discretion by excluding rebuttal witnesses of appellant?

3. Did the trial court properly exercise its discretion by excluding evidence from separate but related Snohomish County case yet relying on testimony regarding that case in its parenting plan?
4. Did the trial court properly consider evidence of appellant's prolonged period of unemployment and new employment at significantly lower wage in imputing appellant's income for purposes of determining child support?
5. Did the trial court properly consider evidence of respondent's personal expenditures and appellant's prolonged period of unemployment and new employment at significantly lower wage in disposition of property, including vehicles?

III. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The parties were married in April 2006 and have three children together. CP 8. The appellant/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 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 17:9-23. Appellant/Petitioner is also involved in a modification action in

Snohomish County, involving the same opposing counsel, 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 COURT'S RULING

The 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 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 court properly weighed factors under RCW 26.09.080 in its property distributions at trial. CP 178-179.

IV. ARGUMENT

A. Parenting Plan.

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 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 such a requirement, 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.

B. 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 the 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.

C. 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.

D. 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.

V. CONCLUSION

On the basis of the foregoing, the appellant/petitioner respectfully requests 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 appellant's financial situation, and reconsideration of property distributions, allowing for consideration of all relevant testimony.



Masood Abawi

Appellant/Petitioner *pro se*