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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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Masood Abawi, petitioner below, submits this reply brief in support of his appeal of the trial court's judgment.

II. REPLY TO COUNTERSTATEMENT OF FACTS

A. RE EXCLUSION OF WITNESSES

The respondent has omitted several important procedural and factual details in her discussion regarding exclusion of petitioner's lay witnesses at trial. Delays in producing names of witnesses in this matter were based on good cause and should have been excused due to the late appearance of petitioner's second attorney in the case, the rush to complete lengthy discovery at the demand of opposing counsel, receipt of the FCS parenting plan evaluation at the end of July, barely a month before the originally scheduled trial date, receipt of respondent's answers to petitioner's interrogatories and requests for production in mid-July, and other considerations detailed further below.

The petitioner's second attorney appeared relatively late in the matter, April 10, 2012. Respondent's interrogatories had already been served on petitioner and his previous counsel in February. Drafting of responses to both sets of the lengthy

interrogatories and requests for production propounded by the respondent was immediately commenced, as well as review of the case posture to that point.

Despite the appearance of new counsel in the case, respondent's counsel nevertheless continued to demand rapid response to the outstanding interrogatories and requests for production. These facts were laid out for the trial court in the petitioner's response to respondent's motion in limine, which has inadvertently not been included in the Clerk's Papers. Petitioner will seek to supplement the record on review per RAP 9.10. Additionally, the respondent completely misrepresents and distorts the record when she claims to not have been apprised of petitioner's witnesses until September 5, 2012, when in fact the parties had exchanged a Joint Statement of Evidence naming all petitioner's anticipated witnesses on August 12th (and signed by respondent's counsel and filed with the court on August 13th), over three weeks before commencement of trial September 6. CP 47-52

Petitioner's counsel rushed to complete both sets of respondent's discovery, and they were delivered June 4. In the effort to finish interrogatories and requests for production as demanded by opposing counsel, petitioner and his attorney had not

had sufficient opportunity to develop the case strategy, including a plan for witnesses. It is therefore a mischaracterization for opposing counsel to state that petitioner “refused” to disclose witnesses. Around the same time as completion of respondent’s discovery, petitioner’s counsel was seeking to finish preparing petitioner’s interrogatories and requests for production to send to respondent and her counsel. This was accomplished around May 31 and those responses were not received until July 12. All of this occurred well after the May 21 deadline for disclosure of primary witnesses.

Furthermore, the importance of calling the Family Court Services’ (FCS) Parenting Plan evaluator, Ed Greenleaf, as an expert witness, could not even have been determined until sometime in the week after the evaluation was completed by him July 26. It should also be noted that the respondent’s ultimately named FCS witness Nicole Bynum was not identified on her witness list (served late itself) or in responses to petitioner’s interrogatories received mid-July.

Respondent’s counsel had over three weeks before trial to review and prepare for petitioner’s very short list of witnesses. The petitioner had proposed to call only four people in total, so

minimal prejudice to the respondent existed. In fact, the respondent had named petitioner's sister and co-habitant, Mariam Abawi, as one of her witnesses, so it is further unclear why she was excluded, as it would appear her testimony had already been anticipated.

**B. RE PARENTING PLAN FINDINGS AND FCS
EVALUATIONS**

While the respondent references those portions of the FCS parenting plan and domestic violence evaluations that sound superficially favorable to her, she fails to note that the parenting plan evaluation in fact ultimately recommended equal parenting time for both parents (CP 17-18), and the domestic violence assessment recommended dismissal of the temporary protection order that the respondent had obtained in collusion with the mother of petitioner's oldest daughter. CP 20-29

With regard to the respondent's claims that the petitioner's oldest daughter Sabrina claimed to have been abused by his brother or to the claim that such abuse in fact occurred, this goes to the heart of this appeal, namely that the court relied on the respondent's testimony without any documentary corroboration (e.g. a CPS finding) and denied the petitioner the opportunity to dispute such claims through testimony of family members living at the house where the abuse allegedly occurred or the

testimony of Snohomish County Master Patrol Deputy Robert Rozzano, who was involved with that claim and who observed visitation between the oldest daughter and the petitioner. CP 153

C. RE PETITIONER'S EMPLOYMENT

Evidence of the petitioner's new full-time employment was presented to the trial court in his declaration in support of his motion for reconsideration. CP 147-174. The court disregarded this evidence of the petitioner's new employment and actual wages in its child support determination, imputing his income and making a finding that he was "voluntarily unemployed" (CP 98), not that he was voluntarily underemployed and purposefully underemployed to reduce his child support obligation.

III. ARGUMENT

A. RE PARTIAL REPORT OF PROCEEDINGS

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 party or the court. Therefore, if the respondent believes factual or procedural portions of the record require supplementation, she may do so without prejudice.

**B. RE EXCLUSION OF WITNESSES AND
PARENTING PLAN**

It is undisputed that Mr. Abawi was denied the opportunity to rebut the respondent's allegations about alleged abuse of his older daughter despite offering the testimony of three witnesses: Mariam Abawi, Amir Abawi, and Snohomish County Sheriff's Deputy Robert Rozzano, all of whom would have been able to offer the court additional perspective on the issue. RP Vol. 1 53-55, Vol. 2 17:9-23. Simply put, exclusion of the petitioner's witnesses was an unnecessarily punitive action by the court, especially in light of such facts as the respondent herself had even named the petitioner's witness as one of her own and the fact that the respondent was in fact aware several weeks before trial of whom the petitioner intended to call, despite her misrepresentations to the contrary.

With regard to the finding in the parenting plan cited by respondent as the basis for restrictions under RCW 29.09.191 that the petitioner “neglected and substantially deferred parenting functions to his extended family...”, how can such a finding (unchanged from the proposed plan drafted by respondent’s counsel) be not be an abuse of discretion when those very members of the petitioner’s extended family to whom he allegedly deferred parenting were not allowed to testify?

Given the resulting prejudice to petitioner as a result of the trial court’s rulings on these issues, this court is urged to remand the parenting plan for reconsideration by the lower court.

C. RE PETITIONER’S EMPLOYMENT AND CHILD SUPPORT DETERMINATION

The respondent argues that the trial court properly imputed income to the father despite his presentation of current, actual full-time employment at a significantly lower wage. CP 166 This argument, however, would seem to contravene the child support statutes concerning imputation of income at RCW 26.19. “The court **may not impute income** to a parent who is gainfully employed full-time **unless** the court finds that the parent is voluntarily underemployed **and** is purposefully underemployed to

reduce the parent's child support obligation." RCW 26.19.071(6). *In re Marriage of Dewberry*, 115 Wn.App. 351, 62 P.3d 525 (2003); *In re Marriage of Pollard*, 99 Wn.App. 48, 52, 991 P.2d 1201 (2000); *In re Marriage of Peterson*, 80 Wn.App. 148, 153, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996). As noted above, the trial court found only (and incorrectly) that the petitioner is "voluntarily unemployed." As such, the record cannot sustain the lower court's support determination and it should be remanded for review.

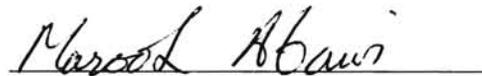
D. RE PROPERTY DISTRIBUTION

The respondent is correct in referencing the factors at RCW 26.09.080 as guidelines for the court regarding distribution of property. The court also heard testimony that the respondent routinely wired money over an extended period to family members in Central America and also spent thousands of dollars on cosmetic surgery procedures. RP Vol. 1: 9, 31-34 Given these obviously personal expenditures by the respondent, it appears the court may have abused its discretion in compensating her for certain contributions to the family without adequately balancing her claims against the the appellant's extended period of unemployment and new work at significantly reduced wage.

and the fact that parties also jointly declared bankruptcy in 2008 after her claimed contributions. The court is therefore urged to remand the issue of property distribution for reconsideration.

IV. CONCLUSION

On the basis of the foregoing, the appellant Masood Abawi 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*