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COA No. 69260-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

HANAA GOMAA,

Respondent,

v.

ABDELKRIM ZEBDI,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by awarding judgment against Abdelkrim Zebdi for "his sale of the 2006 Honda Odyssey for $16,000 on or about September 21, 2011, in violation of the Court's Temporary Order dated October 6, 2011." (CP 893).

2. The court erred by ordering Mr. Zebdi to pay Hanaa Gomaa's attorney fees in the amount of $30,000 with 50% of the fee awarded under RCW 26.09.140 based on the parties' financial positions at the time of filing and the other 50% awarded pursuant to CR 11 and Mr. Zebdi's intransigence.

3. The court erred by making the following finding of fact in paragraph 2.12.8 at CP 921:

> The Court finds that the Wife has been the victim of domestic violence from the Husband throughout this marriage, including physical violence, verbal and emotional abuse. (Ex. 9, Ex. 17).

4. The court erred by making the following findings of fact in paragraph 2.15 at CP 923-26:

> The Wife's attorney has stated in her fee declaration that in her opinion, the Wife's attorney fees were increased 75% over what should have been necessary in this case, as a direct result of the Husband's intransigence, as evidenced by his argumentative communications (Ex. 8, 26, 27), multiple attempts to disqualify the Guardian ad Litem, refusal to execute the Confirmation of Issues, noting hearings after

> counsel had given notice of unavailability, refusal to timely respond to the Wife's interrogatories and Requests for Production, and failure to fully respond to all of the requests therein, etc. (Ex. 34).
>
> . . .
>
> The Wife has demonstrated the need for payment of her fees and costs under RCW 26.09.140. The "need" is determined as of the outset of the case, and not necessary [sic] as of the time of trial. *Friedlander v. Friedlander*, 58 Wn.2d 288, 362.P.2d 352.
>
> . . . The Husband also sold the Wife's car on September 21, 2011 for $16,000, contrary to Temporary Order dated [sic] restraining the sale or disposition of assets.
>
> . . .
>
> An award of the Wife's attorney fees based partially on her initial need and the Husband's initial apparent ability to pay from present assets and his earnings is appropriate.
>
> An award of the Wife's attorney fees based upon the Husband's intransigence is also appropriate.

5. The court erred by making the following conclusion of law

3.7, Attorney's Fees and Costs, at CP 928:

> Attorney's fees, other professional fees and costs should be paid as set forth in the Decree of Dissolution. Said Decree is incorporated by reference into these Findings of Fact as if set forth fully herein.

6. The court erred by making the following conclusion of law

3.8.1, Domestic Violence, at CP 928:

> This Court finds that there was domestic violence

> involving the Wife and two older children in the home by the Respondent. Respondent's witnesses did not have an opportunity to observe how Respondent treated his family alone in their home. Respondent's repeated denial that any physical contact occurred, reflected in his pleadings and in his interviews with the Guardian ad Litem, and his later explanation of some of the contacts during his testimony, give credence to the statements by the Wife and two older children, that have not changed throughout this litigation.

7. In the Final Parenting Plan, the court erred by determining in paragraph 3.2, School Schedule, at CP 930:

> Mother may remain in Michigan. Children shall Reside with the Mother. . .

8. In the Final Parenting Plan, the court erred by finding and ordering the following in paragraph 2.1, Parental Conduct (RCW 26.09.191(1), (2)), at CP 930:

> The Father's residential time with the children shall be limited or restrained completely, and mutual decision making and designation of a dispute resolution process other than court action shall not be required because this parent has engaged in the conduct which follows:
>
> 2.1.1 Physical, sexual or a pattern of emotional abuse of a child.
>
> 2.1.2. A history of acts of domestic violence as defined in RCW 26.50.010(1).

9. In the Final Parenting Plan, the court erred by ordering the following condition on Mr. Zebdi's visitation with his daughter, Mariam, in paragraph 3.2, School Schedule, at CP 931:

> After the Father has completed at least six months of domestic violence treatment and he is in compliance with the treatment and has signed the appropriate release(s) so that the mother and/or her counsel can confirm completion/ongoing compliance, Father shall have a monthly visit (or more if agreed by the mother) with Miriam [sic], which shall be for a two day visit or if there is no school on Monday or Friday, then a three day visit. Visits shall be supervised by an agreed upon third party or if there is no agreement then by a professional supervisor until the father has completed domestic violence treatment and is enrolled and participating in a DV Dad's Program.

10. In the Final Parenting Plan, the court erred by ordering the following condition on Mr. Zebdi's visitation with his sons in paragraph 3.2, School Schedule, at CP 931:

> Once the Father completes DV Treatment and DV Dads, the schedule set for Mariam during the school Year will be followed by them as well with the assistance of a reunification therapist. Once the boys have had at least two in person visitations with their father and if the reunification therapist recommends moving forward (see paragraph 3.10 herein), the boys and their father shall have summer vacation time together to be arranged by the boys and their father with the therapist's help.

11. In the Final Parenting Plan, the court erred by ordering the same condition requiring completion of DV treatment and DV

Dads with respect to Mr. Zebdi's visitation in paragraph 3.3, Schedule for Winter Vacation, at CP 931:

> Same as school schedule (see paragraph 3.2) until Father completes DV treatment and DV Dads.

12. In the Final Parenting Plan, the court erred by ordering the same condition requiring completion of DV treatment and DV Dads with respect to Mr. Zebdi's visitation in paragraph 3.4, Schedule for Other School Breaks, at CP 931:

> Same as school schedule (see paragraph 3.2) until Father completes DV Treatment and DV Dads.

13. In the Final Parenting Plan, the court erred by ordering the same condition requiring completion of DV treatment and DV Dads with respect to Mr. Zebdi's visitation in paragraph 3.5, Summer Schedule, at CP 932:

> Upon completion of the school year, the children shall reside with the Mother.
>
> **Father's Summer Vacation time with Mariam.** Once the father has completed the domestic violence treatment program and provided proof of same to the mother and/or her counsel, he shall have three days of vacation with Mariam during the summer or on a school break until she is eight years old; five days of vacation time until she is twelve and a full week vacation thereafter each year.
>
> **Father's Summer Vacation Time with Boys.** Same as the school schedule (see paragraph 3.2).

14. In the Final Parenting Plan, the court erred by ordering the following in paragraph 3.10, Restrictions, at CP 933-935:

> The Father's residential time with the children shall be limited because there are limiting factors in paragraph 2.1. The following restrictions shall apply when the children spend time with this parent: . . .
> Father shall immediately enroll in domestic violence treatment . . .
>
> Until the father has successfully completed both a State-approved domestic violence treatment program and a DV Dads Program approved by his DV treatment program, and provided written confirmation of same to the Mother, all in-person contact between the Father and children shall either be supervised by an agreed-upon third party or be professionally supervised at the Father's sole expense. After the Father has successfully completed both the DV Dads and State-approved domestic violence treatment program and provided written confirmation of same to the Mother, he may have non-supervised visitation with Mariam, but shall make arrangements for any ongoing recommended follow-up treatment and provide written confirmation of his continued successful participation in the program to the Mother at least 48 hours in advance of the time his visitation will commence. . .
>
> Father shall execute appropriate releases with both the Domestic Violence Treatment Program and DV Dads Program so that the Mother may confirm his successful participation in the program. . .
>
> The Father shall select a reunification therapist . . .
>
> The reunification process shall begin once the father has completed the first six months of the domestic violence program. . .

Issues Pertaining to Assignments of Error

A. Did the court err by awarding a $16,000 judgment against Mr. Zebdi for selling the Honda Odyssey when the sale took place before entry of the October 6, 2011 temporary order restraining the sale or disposition of assets that the court found he violated? (Assignments of Error 1, 4).

B. Did the court err by ordering Mr. Zebdi to pay $30,000 attorney fees to Ms. Gomaa when he did not have the ability to pay under RCW 26.09.140, he was not intransigent, and the court entered no findings supporting its imposition of CR 11 sanctions? (Assignments of Error 2, 4, 5).

C. Did the court err by finding Mr. Zebdi engaged in conduct that was physical or emotional abuse of a child with a history of acts of domestic violence when it did not sufficiently consider the perceived offending acts in light of Islamic culture when making its determination? (Assignment of Error 7).

D. Did the court err by finding Ms. Gomaa was the victim of domestic violence when it did not sufficiently consider the perceived offending acts in light of Islamic culture when making its determination? (Assignments of Error 3, 6, 7, 8).

E. Did the court err by finding Mr. Zebdi's two sons were the victims of domestic violence when it did not sufficiently consider the perceived offending acts in light of raising children in Islamic culture when making its determination? (Assignments of Error 6, 7, 8, 9, 10, 11, 12, 13, 14).

F. Did the court err by ordering Mr. Zebdi to complete a domestic violence treatment program and DV Dads before visitation with his three children when it did not sufficiently consider the perceived offending acts in light of Islamic culture when making its determination? (Assignments of Error 7, 8, 9, 10, 11, 12, 13, 14).

II. STATEMENT OF THE CASE

Hanaa Gomaa and Abdelkrim Zebdi married on November 22, 1994, in Michigan while they were attending Michigan State University (MSU). (CP 918; 7/24/12 RP 98-99). Ms. Gomaa filed a petition for dissolution of marriage in King County Superior Court on August 19, 2011(CP 1).

Ms. Gomaa was born and raised in Egypt. (7/24/12 RP 94). She had a middle class upbringing and came to the United States in 1989. (*Id.* at 96-98). She met Mr. Zebdi through Peggy Arbanas, the international student adviser at MSU. (*Id.* at 98). They began seeing each other in 1993 and had an Islamic marriage in summer

1994. (*Id.* at 99). They had a civil marriage in East Lansing, Michigan, in November 1994. (*Id.* at 99; 7/24/12 RP 236). Ms. Gomaa received her Ph.D. in psychology in 1998. (7/23/12 RP 99).

Mr. Zebdi is Algerian and enrolled in graduate school in Algiers, where he stayed two years. (7/24/12 RP 220-224). He then went to London, England, for a year before moving in 1989 to Juneau, Alaska, to attend graduate school at the University of Alaska – Fairbanks, which is actually in Juneau. (*Id.* at 224-225). He was there from January 1989 to August 1992 and obtained his masters in fisheries. (*Id.*). Mr. Zebdi moved to East Lansing, Michigan, in August 1992 for a research project between MSU, the Department of Fisheries & Wildlife, and the National Marine Fisheries Service. (*Id.* at 227).

Before meeting Ms. Gomaa, Mr. Zebdi had an incident on an airplane where he passed out from dehydration while fasting. (7/24/12 RP 227, 230). Mr. Zebdi was fasting for spiritual reasons outside Ramadan. (*Id.* at 230). He woke up in an ambulance. (*Id.*). Also before meeting Ms. Gomaa, he had a 1993 car incident in Ann Arbor, Michigan, resulting in his arrest. (*Id.* at 227-230). The case was dismissed. (*Id.* at 232). Although alleged that Mr.

Zebdi had his criminal record cleaned up, he did no such thing as he did not have a record. (*Id.* at 230).

Ms. Gomaa and Mr. Zebdi have three children: two boys, Mohammed (born 4/28/96) and Abdelrahman (born 4/19/98); and one girl, Mariam (born 7/17/07). (CP 1269). In 2000, the parents and their boys moved to Seattle, where Mr. Zebdi had been offered a job. (7/24/12 RP 107). Mohammed was 4; Abdelrahman was 2. (*Id.*). Ms. Gomaa testified about troubles with Mr. Zebdi.

She said he became more distant with her when she became pregnant with Mohammed. (7/24/12 RP 102). Ms. Gomaa recalled Mr. Zebdi pushing Mohammed outside the apartment door and closing it on him. He was outside for a few minutes banging on the door and Mr. Zebdi pushed her away from it when she tried to open the door. (*Id.* at 104). She further stated Mr. Zebdi made her sit on the floor of the back seat to change the seating arrangement for Mohammed. (*Id.* at 104-105).

Ms.Gomaa testified that from 2005 until she left, the pattern of anger and abuse became more physical and frequent. (7/24/12 107). She mentioned Mr. Zebdi slapped Mohammed very hard while he was reciting the Quran, whereupon he fell to the floor and his father kicked him. (*Id.*). She testified Mr. Zebdi told him that if

he ever disrespected his dad, he would slaughter him like a sheep. (*Id.* at 106-107). Ms. Gomaa perceived it as a threat. (*Id.* at 107). She observed the boys had a fear of upsetting their father. (*Id.* at 109).

She said Mr. Zebdi also gave her the silent treatment, where she was ignored completely, several times. (7/24/12 RP 112). The first time was in 2006 when she was pregnant and had a miscarriage; the second time was when she was pregnant with Mariam. (*Id.*). On the latter occasion, there was no communication for nine months. (*Id.* at 112-113). Ms. Gomaa felt her authority was being undermined by Mr. Zebdi. (*Id.* at 113). Ms. Gomaa also testified about a hair-pulling incident in 2005 when she was pulled outside the room and the door slammed shut on her. (7/24/12 RP 116).

She said Mr. Zebdi was stricter with the boys and slapped them on the back if their form was not good for exercises. (7/24/12 RP 119). Ms. Gomaa felt intervention would have been ineffective. (*Id.* at 120).

She said that in March 2008, Mariam had a cold and Mr. Zebdi was angry because she was crying a lot. (7/24/12 RP 120-121). When Ms. Gomaa told him to calm down, he got mad and

slapped her twice, grabbed her by the hair, and shoved her on the bed with Mariam in her arms. (*Id.* at 121).

Ms. Gomaa stated the boys would talk in low voices around Mr. Zebdi, who asked why they were doing that. (7/24/12 RP 121). When she told him maybe they are afraid of you, Mr. Zebdi became very upset. (*Id.*). In one instance, he slapped Abdelrahman for not completing his math sheets. (*Id.* at 122-123). Ms. Gomaa reacted by throwing the math book on the floor, taking the table, and throwing it out. (*Id.* at 123). She said that was uncharacteristic of her. (*Id.*).

In 2009, Ms. Gomaa decided to take a trip to Egypt with Mariam. (7/24/12 RP 124). Mr. Zebdi went along with it after a while. (*Id.*). They spent almost three months in Egypt. (*Id.* at 124-125). The boys were being home-schooled so they stayed with Mr. Zebdi. (*Id.*). Upon their return, Ms. Gomaa said she felt welcomed and loved in Egypt and would like to go there with the kids where they could go to school and study Arabic for a year. (*Id.* at 125). Mr. Zebdi listened, but nothing happened so they stayed in Seattle in 2010. (*Id.*). About October 2010, Ms. Gomaa told Mr. Zebdi she wanted to go to Egypt with the kids for a month during Christmas vacation. (*Id.*; CP 90-91). Mr. Zebdi told her around the first week

of October 2010 that pronounced an Islamic divorce and said it would be over in three months at the end of December 2010. (7/26/12 RP 508-516). He told her to go to Egypt with the children and they left the last day of February 2011. (7/24/12 RP 128).

Ms. Gomaa and the children stayed in an apartment owned by her brother, Omar Abdel Alim. (7/24/12 RP 128). Mr. Zebdi had contact with the boys by iphone using FaceTime about one to two times a week. (*Id.* at 129). Near the end of their Egyptian stay, Mr. Zebdi asked for passport photos of the kids. (*Id.* at 130). Ms. Gomaa indicated he would not say for what purpose he wanted the photos. (*Id.*). She said he was upset the photos were not sent and threatened to call the FBI to come take the kids and bring them back to the U.S. in handcuffs. (*Id.* at 131).

They left Egypt and arrived in East Lansing, Michigan, on August 4, 2011. (7/24/12 RP 134, 155). Ms. Gomaa did not tell Mr. Zebdi what she was doing. (*Id.* at 132-134). He last had contact with the children on July 31, 2011, the night before Ramadan. (7/26/12 RP 534). He found out Ms. Gomaa and the kids had gone on a trip. (*Id.* at 536). Mr. Zebdi had no idea where the kids were. (*Id.* at 540). He got notice where Ms. Gomaa and the kids were from her lawyer in a letter along with the dissolution papers that

were served on August 19, 2011. (*Id.* at 541). Mr. Zebdi first got notice they were back in the U.S. from the FBI. (*Id.* at 545).

The August 19, 2011 letter from Ms. Gomaa's lawyer stated in part:

> You should know that Ms. Gomaa recently permanently settled in Michigan. It was necessary for her to move there with the children. She felt that permanently giving up the right to be admitted to the U.S. was too much of a risk, given that (1) the children are U.S. citizens, and (2) the situation in Egypt is still unstable, and (2) [sic] you are a U.S. citizen but she is not. Also, you insisted that she file for divorce when she was in Egypt, and then you insisted that she send photos to place the children on your Algerian passport. When she hesitated, you threatened to call the FBI and "bring the kids in handcuffs" if she refused to send the photos. All of these actions culminated in her decision to permanently settle in the United States. These actions also have her worried that you might not return the children to her after they visit you. (CP 64).

Nowhere in the lawyer's letter is there any mention of or concern about domestic violence. (CP 64-65). The letter also states:

> 4. That if you have [the children] visit in Seattle, that you will sign an order stating exactly when they will be returned to her in Michigan. (CP 65).

In response to Ms. Gomaa's allegations of domestic violence against her and the children, Mr. Zebdi testified that they did not happen or were inadvertent; his actions were not wrong; and they were rather physical reminders according to his culture:

> I have no recollection [about "banging" Mohammed's head with a cane with a rubber ball at the end]. Maybe once in a while. It might have happened in the total of his seven years of training – the four years in which he was supposed to receive physical reminders, maybe once a year, twice a year, and it doesn't hurt. It doesn't hurt him, it doesn't leave any bruises, he doesn't even cry . . .
>
> Tradition, we have three phases of training kids, from zero to seven, seven to fourteen, and fourteen to twenty-one. And they are called in summary the play years, the training years and the friendship years. The training years are divided into two pieces from seven to ten and from ten to fourteen. From seven to ten if their parents are work hard enough and they are [inaudible] by the time the kid reaches ten they are trained and they know what is right, what is wrong, what they can do and what they cannot do. However, if the parents lack or lag behind in their upbringing of the kids, by the age of ten if you ask them to do something and you repeat that several times and they still don't get it, it doesn't register, you impressed their mind. Both [Mohammed] and [Abdelrahman] know that. And that is the sort of questions that I did ask Ms. Ballantyne [the GAL] to ask the kids. How unfortunately she didn't ask them. (7/23/12 RP 60, 61).

The corrected behaviors were "[e]ssentially things that really mattered in their lives as adults, punctuality, cleanliness, assuming responsibility of what they are supposed to assume responsibility of for, their homework." (7/23/12 RP 61-62). There are no more physical reminders or corrections after the boys are over 14 as the training phase is done. (7/26/12 RP 431-32).

Mr. Zebdi explained the cultural lens through which his actions should be viewed:

> There are certain events that are presented under a different light. It is my belief that two people looking at the same event under two different lights – two reasonable people looking at the same event under two different lights can come up with two different conclusions. They cannot come up with a description that seemingly are contradictory. So, when you say you shoved her, I wouldn't describe it as being shoving her [inaudible]. (7/23/12 RP 64)

Mr. Zebdi testified he did not slap Ms. Gomaa or pull her hair. (7/23/12 RP 63). For her bad action when she was gone for six hours when a few-weeks-old Mohammed was breast-feeding he did throw a slipper at her, but not to hit her. (*Id.*). Mr. Zebdi also said the silent treatment was reciprocal and Ms. Gomaa started it. (*Id.*). He maintained there was no domestic violence with the kids or Ms. Gomaa and perceptions are different from the same objective facts. (*Id.* at 68).

Karen Ballantyne, the guardian ad litem, was appointed on September 14, 2011, and had the task of writing an interim report within 60 days of the order with a full and complete written report by May 23, 2012 and at least 60 days before trial. (CP 197). No reports were filed, however, until July 12, 2012. (CP 671, CP 692,

1269; Ex. 2, 49). Mr. Zebdi received no interim report from Ms. Ballantyne, who interviewed him for it. (7/26/12 RP 551-552).

Her public interim report was dated December 17, 2011, but was filed until July 12, 2012. (CP 671). The report recommended, among other things, the children remaining in Michigan, domestic violence treatment for Mr. Zebdi and visits with the children in Washington after enrolling in domestic violence treatment. (*Id.*). The update report filed July 12, 2012, made the same recommendations. (CP 1269; Ex. 2). Nowhere in this report did the GAL address the cultural aspect of an Islamic or North African upbringing. (*Id.*). The court essentially adopted the GAL's recommendations in its final parenting plan. (CP 929

On August 1, 2012, the court entered findings and conclusions, a final parenting plan, a final order of child support, and a decree of dissolution. This appeal follows. (CP 1014).

III. ARGUMENT

1. The court erred by awarding a $16,000 judgment against Mr. Zebdi for selling the Honda Odyssey when the sale took place before entry of the October 6, 2011 temporary order restraining the sale or disposition of assets that the court found he violated.

Mr. Zebdi sold the Odyssey on September 21, 2011, for $16,000 and the court so found. (Ex. 111; CP 892). It determined the sale took place in violation of the temporary order entered on October 6, 2011. (CP 892). The sale, however, was September 21, 2011, some two weeks before the entry of the order the court identified as being violated by Mr. Zebdi. Although there was a temporary order entered September 14, 2011, the court did not find a violation of that order. (CP 201).

In further explaining its decision, the court found:

> The Court finds that the most fair and equitable ruling on the Wife's request for maintenance is to confirm that the Wife has a need for maintenance which will likely last for the next two years, and that the Husband's present inability to pay maintenance is temporary. The court, therefore, has made a disproportionate allocation of the proceeds of the sale of the Honda Odyssey ($16,000 to Wife) in order to provide additional necessary resources that but for the Father's recent loss of employment would otherwise have been imposed as two years of monthly maintenance. (CP 922-923).

Even though denoted a disproportionate allocation, the trial court based its decision on finding Mr. Zebdi violated a court order restraining the selling of assets that was entered on October 6, 2011. Indeed, in its oral opinion, the court stated the Odyssey was sold after the restraining order was entered. (8/1/12 RP 697). The sale took place September 21, 2011. Mr. Zebdi cannot be in

violation of the order identified by the court that was entered after the sale. The court erred.

Decisions on maintenance and property distribution are matters left to the discretion of the trial court. *In re Marriage of Zahm*, 138 Wn.2d 213, 226, 978 P.2d 498 (1999); *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-243, 170 P.3d 572 (2007). The court clearly abused its discretion by awarding judgment and making the disproportionate allocation founded on this error because its decision was manifestly unreasonable and based on untenable grounds and for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). The $16,000 award must be reversed.

2. The court erred by determining there was domestic violence involving Ms. Gomaa and the two boys in the home by Mr. Zebdi.

The court ordered the children to reside with Ms. Gomaa in Michigan. (CP 930). Its finding domestic violence by Mr. Zebdi was the foundation for that decision. (8/1/12 RP 699-700).

RCW 26.50.010(1) defines domestic violence:

> Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.

RCW 26.09.191(2)(a) provides:

> The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotion abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010 . . .

Ms. Gomaa testified about incidents of physical contact with her and the boys by her husband. (*See also* Ex. 17). Mr. Zebdi testified to the contrary. (*See also* CP 235). Credibility determinations, however, are for the finder of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Rather, the question is whether those acts constituted domestic violence as defined in RCW 26.50.010(1)(a). The court so recognized the issue:

> The first question I think we need grapple with is the allegation of domestic violence in the relationship between Mr. Zebdi and Ms. Gomaa and as well as [the two boys.] In large measure, going through my notes and the testimony, including the exhibits, it's kind of surprising how little is really disputed. . .
>
> So, it's very surprising how few of the factual scenarios are actually disputed. It's just what to derive from the factual scenarios.
>
> Now, undoubtedly, cultural issues play a role here, but but even acknowledging that reality, there are several

> things I can conclude from the evidence. (8/1/12 RP 691-692)

The court went on to find domestic violence had occurred in a sufficient measure to find a history of it. (CP 928, 930).

In its oral opinion, the court mentioned cultural issues played a role, but it did not consider them as reflected by the lack of further discussion or findings. In family law, cultural factors are a proper consideration for the court. *See In re Marriage of Mahalingam*, 21 Wn. App. 228, 232, 584 P.2d 971 (1978). These were the core of Mr. Zebdi's case. (*See, e.g.*, 7/23/12 Brittingham RP 61-63; 7/24/12 RP 212-213; 7/25/12 RP 295-296, 319, 357; 7/26/12 RP 431-435, 466-68, 552). Yet, the cultural factors were not even discussed by the GAL. (Ex. 2, Ex. 49).

The court's failure to consider the Islamic culture and the three phases of upbringing that explained Mr. Zebdi's actions was improper and led to the erroneous conclusion that he committed domestic violence against the boys. *See Mahalingam*, 21 Wn. App. at 232. The court's conclusions must flow from its findings and are reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002). Here, the court's conclusion of a history of domestic is unsupported by the findings of fact even if they are

assumed to be true. Mr. Zebdi's explanations and the role of Islamic culture in this case were pushed to the side and were heard but not considered. It is true that cultural factors do not excuse behavior that is contrary to Washington law, but consideration of those factors is nonetheless appropriate to view the behavior in context and determine whether it truly is domestic violence. *See In re Dependency of A.A.*, 105 Wn. App. 604, 610-11, 20 P.3d 492 (2001).

The court did not do so here and erroneously found a history of domestic violence as defined in RCW 26.50.010(1) when there was no physical harm, bodily injury, or assault even if the perceived offending acts were true. Particularly telling is the August 19, 2011 letter from Ms. Gomaa's attorney that made no mention of domestic violence and contemplated the children visiting Mr. Zebdi in Seattle with the only condition being that he sign an order telling exactly when they would be returned to Michigan. (CP 64-65). So viewed, it is clear Ms. Gomaa did not then consider Mr. Zebdi's actions as domestic violence. The cultural issues were an important factor that the court should have considered.

Because the finding of domestic violence cannot stand, the court's requirements that Mr. Zebdi attend a domestic violence

treatment program and DV Dads should be removed and unrestricted visitation and contact should be ordered as RCW 26,09.191(2)(a) has no application.

Moreover, the court's determination the children should remain in Michigan with Ms. Gomaa cannot be supported because there is then no basis for it. Indeed, in the order appointing guardian ad litem, the court ordered that "[i]f, after consideration of the GAL's report, the court determined that the children are not at risk of DV from the father, the children shall be returned to Seattle on a date to be determined by the court." (CP 200). There is no domestic violence or a risk of it so the children should be in Seattle. (*Id.*).

3. The court erred by ordering Mr. Zebdi to pay Ms. Gomaa $30,000 attorney fees with 50% awarded under RCW 26.09.140 based on the parties' financial positions at the time of filing and the other 50% awarded pursuant to CR 11 and Mr. Zebdi's intransigence.

The court may award attorney fees and expenses in marriage dissolution cases both at trial and on appeal. RCW 26.09.140; RAP 7.2(d). The award of attorney fees is a matter of discretion for the trial court, which must balance the needs of the

spouse requesting them with the ability of the other to pay. *Kruger v. Kruger*, 37 Wn. App. 329, 333, 679 P.2d 961 (1984). As noted by the trial court, neither party had the financial ability to pay at the time of trial. (CP 895, 922). Citing *Friedlander v. Friedlander*, 58 Wn.2d 288, 362 P.2d 532 (1961), the court determined Ms. Gomaa had the need at the outset of the case and Mr. Zebdi then had the ability to pay. (CP 924, 925). But *Friedlander* does not stand for the proposition that the ability to pay is measured at the time of filing.

The ability to pay is determined at the time the fees are requested. *In re Marriage of Steadman*, 63 Wn. App. 523, 530-31, 821 P.2d 59 (1991). The court found that, at the time of trial, Mr. Zebdi had no significant assets from which attorney fees could be paid to Ms. Gomaa. Since he did not have the ability to pay, the court abused its discretion by awarding attorney fees under RCW 26.09.140 because its decision was based on untenable grounds or for untenable reasons as well as a misapplication of the law. *Junker*, 79 Wn.2d at 27. The award must be reversed.

As for the CR 11 sanctions, the court recited the factors for such an award, but made no findings with respect to those factors. (CP 925). An award of CR 11 fees is reviewed for an abuse of

discretion. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). Because it failed to make any findings as to any of the CR 11 factors, the court abused its discretion by awarding sanctions because the decision was based on untenable grounds and for untenable reasons. *Junker*, 79 Wn.2d 27. The CR 11 sanctions must be reversed.

Aside from the relative abilities of the two spouses to pay is the extent to which one spouse's intransigence caused the spouse seeking the award to require additional services. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). If intransigence is established, the financial resources of the spouse seeking the award are irrelevant. *Id.*

Ms. Gomaa's attorney opined that her fees were increased 75% over what should have been necessary as a direct result of Mr. Zebdi's intransigence, as evidenced by his argumentative communications, multiple attempts to disqualify the GAL, refusal to execute the Confirmation of Issues, noting hearings when counsel had given notice of unavailability, and refusal to timely answer or fully respond to interrogatories and requests. (*See* CP 923). The court found Ms. Gomaa's attorney fees were substantially

increased by his intransigence for the reasons cited by counsel. (CP 925).

But Mr. Zebdi contested those items in good faith. He had incurred $31,000 in attorney fees in the two months he was represented by counsel at the beginning of the case. (7/23/12 RP 54). He tried to remove the GAL because she did not timely prepare her report and in fact received no report until the eve of trial. (7/26/12 RP 551). On December 7, 2011, he had to file a motion to produce the overdue report. (CP 355). The argumentative communications were mutual in that regard and show no intransigence. Mr. Zebdi refused to sign off on the Confirmation of Issues because he could not agree to one portion. He failed to timely answer the interrogatories and requests, but counsel ably presented her client's case and suffered no prejudice to justify a finding of intransigence.

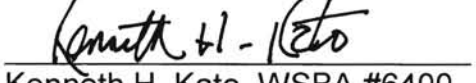
The record does not support a finding that Ms. Gomaa's attorney fees were substantially increased by Mr. Zebdi's purported intransigence. Rather, the record shows he contested issues in good faith. This is not intransigence. *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969). The award of fees against Ms. Zebdi based on intransigence must also be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Zebdi respectfully urges this Court to reverse the $16,000 award regarding the sale of the Odyssey, the award of attorney fees, the finding of domestic violence and the restrictions placed on him for visitation with the children, and to order their return to Seattle.

DATED this 8th day of May, 2013.

Respectfully submitted,



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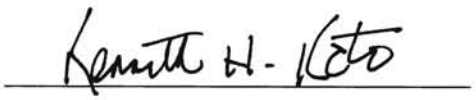
I certify that I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Margaret D. Fitzpatrick, Attorney at Law, 11300 Roosevelt Way NE, Ste 300, Seattle, WA 98125.