

No. 69698-0-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

GURMIT SINGH,

Appellant,

v.

SATVIR KAUR,

Respondent.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(No. 09-3-08181-0-KNT)

GURMIT SINGH'S OPENING BRIEF

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I. Introduction

Permanent spousal maintenance awards are disfavored in this state. Moreover, it is a per se abuse of discretion for a trial court to not fairly consider the statutory factors in RCW 26.09.090 when awarding maintenance. Here, the trial court entered a level lifetime maintenance award to the former wife. It made no finding she had no ability to work. It did not find, conclude, or state that it considered the required statutory factors. Finally, it did not consider what effect the former wife's employment would have upon her need for maintenance or what effect the former husband's retirement or disability would have on his ability to pay maintenance. It also did not consider the effect that wife's receiving one-half former husband's social security benefits would have upon her need for maintenance. Under these circumstances, the trial court abused its discretion in awarding the former wife level lifetime maintenance and reversal is required.

II. Assignments of Error

- A. The trial court erred when it ordered that maintenance should be paid to the former wife for the duration of her life. (Finding of Fact 2.12; Dissolution Decree ¶ 3.7)

- B. The trial court erred when it based its award of lifetime maintenance on Mr. Singh's conduct during the marriage. (Finding of Fact 2.12)
- C. The trial court abused its discretion when it failed to fairly consider the statutory factors in RCW 26.09.090 when making a spousal maintenance award. (Finding of Fact 2.12)
- D. The trial court's finding that the wife's emotional condition makes it likely she will never be able to acquire sufficient education or training to find appropriate employment is not supported by substantial evidence. (Finding of Fact 2.12).
- E. The trial court erred when it overlooked the effect of Mr. Singh's disability or retirement when it ordered lifetime maintenance. (Finding of Fact 2.12)
- F. The trial court erred when it failed to take into account the modest lifestyle of the parties during the marriage. (Finding of Fact 2.12)
- G. The trial court erred when it failed to consider wife's eligibility for half husband's social security and medicare. (Finding of Fact 2.12)

III. Issues

1. Whether the trial court abused its discretion when it failed to fairly consider all the statutory criteria in RCW 26.09.090 as evidenced by its failure to take into account the effect of Mr. Singh's eventual disability or retirement, the parties' modest lifestyle during the

marriage, the effect of the former wife's eventual re-entry into the work force, and Ms. Singh's ability to collect one-half of Mr. Singh's social security benefits and medicare, when it made its level lifetime maintenance award. (Assignments of Error A, C, E, F, G.)

2. Whether the trial court's finding that the wife's emotional condition makes it likely she will never be able to acquire sufficient education or training to find appropriate employment is supported by substantial evidence. (Assignment of Error D.)
3. Whether the trial court's finding that the wife's emotional condition makes it likely she will never be able to acquire sufficient education or training to find appropriate employment is sufficient to support an award of lifetime maintenance. (Assignments of Error A, C, D.)
4. Whether the trial court violated RCW 26.09.090 when it made a lifetime maintenance award and when it based a lifetime maintenance award in part on the conduct of a party during the marriage.
(Assignments of Error A, B.)

IV. Statement of the Case

In 2008, Gurmit Singh separated from his wife of 18 years, Satvir Kaur (the “former wife”).¹ Mr. Singh petitioned for dissolution because he believed that the marriage was broken beyond the point of recovery.²

Mr. Singh and the former wife were married by means of an arranged marriage in India.³ Shortly thereafter, Mr. Singh moved to the United States where he began working.⁴

While Mr. Singh was in the United States, the former wife continued living in India with Mr. Singh’s family.⁵ Mr. Singh remitted money to his family in India while he was working in the United States.⁶ When Mr. Singh sent money to his family, a portion was given to the former wife for discretionary spending; the remainder was used as income to support the household and its expenses.⁷ During that time, the former wife cared for Mr. Singh’s family and did work around the family home.⁸

¹ CP 12 Ln. 16.

² CP 1 Ln. 25.

³ VRP Vol. IV Pg. 274 Ln. 24.

⁴ VRP Vol. IV Pg. 274 Ln. 21-Pg. 275 Ln. 10.

⁵ VRP Vol. IV Pg. 275 Ln. 6.

⁶ VRP Vol. IV Pg. 275 Ln. 22.

⁷ VRP Vol. IV Pg. 275 Ln. 22.

⁸ VRP Vol. IV Pg. 275 Ln. 12.

In 2002, the former wife and the couple's daughter (the "daughter") immigrated to the United States.⁹ After the former wife came to the United States, she worked for a number of different employers,¹⁰ including Kelly Services, TS Services, and Sky Chef in positions including working in a warehouse and washing dishes.¹¹ The Wife has also found work cleaning apartments.¹² Though her work was inconsistent, the former wife was capable of earning income and did earn income.¹³

Mr. Singh worked almost every day driving a taxi.¹⁴ As Mr. Singh and the former wife and daughter continued to live together, the stress of demanding work and long hours got the better of Mr. Singh.¹⁵ The marriage began to devolve until, eventually, the parties separated in 2008.

When Mr. Singh and the former wife separated, the former wife and the daughter went to live with Mr. Singh's brother.¹⁶ Since that time, the former wife and daughter have become self-sufficient. They are working different jobs and covering their own expenses.¹⁷ Due to his declining health, Mr. Singh has been unable to continue working as much

⁹ VRP Vol. IV Pg. 276 Ln. 4

¹⁰ VRP Vol. IV Pg. 282 Ln. 10

¹¹ VRP Vol. IV Pg. 286 Ln. 12-Pg. 287 Ln. 2

¹² VRP Vol. IV, Pg. 286, Ln. 10-14.

¹³ VRP Vol. IV Pg. 282-83.

¹⁴ VRP Vol. IV Pg. 281 Ln. 6-11

¹⁵ VRP Vol. IV Pg. 281 Ln. 9

¹⁶ VRP Vol. IV Pg. 285 Ln. 16

¹⁷ VRP Vol. IV Pg. 288 Ln. 11

as previously and his earnings have dropped accordingly.¹⁸ He suffers from depression, for which he takes medication, in addition to high cholesterol, diabetes, and high blood pressure.¹⁹

V. Argument

A. Standard of Review

Maintenance awards are reviewed for an abuse of discretion, but it is always an abuse of discretion for a trial court to award maintenance if it does not fairly consider all the statutory factors in RCW 26.09.090.²⁰ An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence.²¹

B. Permanent Maintenance Awards are Disfavored and Lifetime Maintenance Awards Have Only Been Upheld When the Party Seeking Maintenance has a Permanent Debilitating Health Condition.

Permanent maintenance awards are disfavored in this state.²² Further, it is not the policy of the law to place a permanent responsibility upon a divorced spouse to support a former wife; she is under an

¹⁸ VRP Vol. I Pg. 48 Ln 23-25 and Pg. 128 Ln. 20-22.

¹⁹ VRP. Vol. I Pg. 48 Ln 23-25; Vol. I Pg. 23 Ln 23-25.

²⁰ *In re Marriage of Spreen*, 107 Wn. App. 341, 349, 28 P.3d 769 (2001); and *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954, 960 (1996).

²¹ *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

²² *Mose v. Mose*, 4 Wn. App. 204, 208, 480 P.2d 517, 519 (1971); and *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244, 246 (1991).

obligation to prepare herself so that she might become self-supporting.²³ Nor is the wife entitled to maintain her former standard of living as a matter of right.²⁴ It is the policy of this state to place a duty upon the wife to gain employment, if possible.²⁵ Despite this, the trial court ignored the law and awarded the former wife permanent lifetime maintenance at a level amount.

A lifetime maintenance award can only be approved when it is clear that the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.²⁶ In *Mathews*, the court set out the statutory factors that must be considered when determining the amount and length of maintenance that should be awarded to a former spouse.²⁷

Washington courts have approved lifetime maintenance awards in a reasonable amount when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.²⁸

In *Mathews*, the Court of Appeals held that the trial court's lifetime maintenance award was an abuse of discretion.²⁹ In that case, the

²³ *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508, 512-13 (1973).

²⁴ *Cleaver*, 10 Wn. App. at 20.

²⁵ *Id.*; and *Matter of Marriage of Olsen*, 24 Wn. App. 292, 300, n.2, 600 P.2d 690, 695 (1979).

²⁶ *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462, 466-67 (1993).

²⁷ *In re Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462, 466-67 (1993).

²⁸ *Id.* at 124.

²⁹ *Id.* at 123.

trial court inferred that Mr. Mathews would continue to moonlight when there was no evidence proving he was currently earning income apart from his fire fighter salary and the trial court did not provide for a reduction in maintenance after Mr. Mathews retired; these two factors made it appear as though Mathews did not have the “ability... to meet his needs and financial obligations,” RCW 26.09.090(1)(f), while meeting the obligations imposed by the trial court.³⁰

A second consideration was that Mrs. Mathews had over \$800 a month in excess of the income remaining to Mr. Mathews.³¹ Third, although it was established that Mrs. Mathews had some health problems, there was no finding that these health problems prevented her from working; the Court of Appeals stated that in fact the order requiring that Mr. Mathews pay the tuition for Mrs. Mathews’ retraining conflicted with such a finding.³²

Fourth, while a court may order maintenance to compensate a spouse when allegations such as those Mrs. Mathews made against Mr. Mathews are proved, the record in *Mathews* failed to prove that Mr. Mathews dissipated community assets by dismantling his construction company prior to the divorce or that he concealed community assets

³⁰ *Id.* at 123.

³¹ *Id.* at 123-24.

³² *Id.* at 124.

earned as a result of an unspecified interest in a restaurant.³³ Fifth and finally, the trial court overlooked the effect of Mr. Mathews' disability or retirement when it ordered one-half of his current monthly income for an indefinite period.³⁴

In *Morrow*, the trial court's maintenance award was upheld for several reasons, including that Mrs. Morrow had a "progressively deteriorating physical condition,"³⁵ diabetic retinopathy that occasionally rendered her legally blind,³⁶ with the court expressly stating that it was "[h]er disability" which made "lifetime maintenance reasonable in the circumstances."³⁷ In *In re Marriage of Tower*, the Court of Appeals upheld the amount and permanent duration of an award of maintenance in a 19-year marriage where the wife had multiple sclerosis that substantially limited her activities.³⁸ In *In re Marriage of Bulicek*, the wife was awarded monthly maintenance until her former husband retired, but there again she was "in ill health."³⁹ The Court of Appeals reversed Mrs. Mathews' maintenance award despite the trial court having heard testimony from her two doctors and her counselor raising a "question as

³³ *Id.* at 124.

³⁴ *Id.* at 124.

³⁵ *In re Marriage of Morrow*, 53 Wn. App. 579, 586, 770 P.2d 197 (1989).

³⁶ *Id.* at 581.

³⁷ *Id.* at 588.

³⁸ *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990).

³⁹ *In re Marriage of Bulicek*, 59 Wn. App. 630, 634, 800 P.2d 394 (1990).

to whether or not she will ever be able to handle full-time gainful employment.”⁴⁰

C. The Lower Court Erred When It Ordered Mr. Singh To Pay Lifetime Maintenance To The Former Wife.

While “the award of maintenance is within the trial court's discretion,” the statutory factors must be considered by the court in its award.⁴¹ It is an abuse of discretion to make a maintenance award without fairly considering all the statutory factors in RCW 26.09.090 when making the award.⁴² “RCW 26.09.090(1) provides the court may grant a maintenance order ... in an amount and for a period of time the court deems just.”⁴³ In ordering such maintenance, the court considers all relevant factors, including:

- (a) The financial resources of the party seeking maintenance ... and his ability to meet his needs independently[; ...]
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment[; ...]
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.⁴⁴

⁴⁰ *Mathews*, 70 Wn. App. at 119.

⁴¹ *In re Marriage of Vander Veen*, 62 Wn. App. 861, 867, 815 P.2d 843, 846 (1991).

⁴² *In Re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954, 960 (1996); and *Mathews*, 70 Wash.App. at 123, 853 P.2d 462

⁴³ *In re Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462, 466-67 (1993)

⁴⁴ *Id.* at 122-23, citing RCW 26.09.090.

Here, as in *Mathews*, the trial court failed to consider all the factors in RCW 26.09.090 when awarding lifetime maintenance to the former wife at a level amount.

1. The trial court erred when it awarded lifetime maintenance without any knowledge of Mr. Singh's financial resources in the future.

The trial court in this case, just like the trial court in *Mathews*, failed to consider the effect Mr. Singh's eventual disability or retirement would have upon his ability to pay maintenance while meeting his own needs when it ordered him to make a level monthly maintenance payment to the former wife for the rest of her life. The lower court must consider the "ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance."⁴⁵ There is no consideration whatsoever on what effect Mr. Singh's eventual decrease in income due to disability or retirement would have on his ability to make a maintenance award to the former wife for as long as she may live. The trial court made no reduction in his maintenance payment when he retired or became disabled. The trial court only considered Mr. Singh's current capacity to support himself while paying maintenance to the former wife. Moreover, Mr. Singh testified that his health is

⁴⁵ RCW 26.09.090(f).

declining,⁴⁶ and the trial court failed to consider what Mr. Singh's capacity for earning an income will be as his health continues to decline, and if or when he is unable to drive his taxi himself.

For the court to make no inquiry into Mr. Singh's ability to pay maintenance to the former wife as his earnings continued to shrink, and no provision for a reduction in payment in the event of his retirement or disability, was error, just as it was in *Mathews*.

2. The trial court erred when it did not take into account that the former wife had the ability to earn a living independently.

Similarly, the lower court failed to fairly consider the impact the former wife's eventual employment would have upon her need for maintenance. RCW 26.09.090 dictates that the lower court should have considered "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to [her] skill, interests, style of life, and other attendant circumstances." While the former wife's vocational horizons may currently be limited due to cultural isolation, language barriers, and duties in the home, there is nothing in the record to indicate that the wife is somehow permanently disabled and that with education and training could not earn an income

⁴⁶ VRP Vol. IV Pg. 303 Ln. 20-22; VRP. Vol. I Pg. 48 Ln 23-25; Vol. I Pg. 23 Ln 23-25.

and support herself. The trial court did not find that the former wife will never be able to contribute significantly to her own livelihood.

The only similar finding the trial court made was that the former wife could not presently “meet her needs independently” and that it was “likely that she will [n]ever be able to acquire sufficient education or training to find *appropriate* employment.”⁴⁷ Nowhere did the trial court ever discuss what appropriate employment might be or what the former wife’s financial needs were or what the difference is between her current financial needs and her current financial ability. Nowhere does it explain how those needs will be affected when she works or how much it will cost or how long it will take for her to acquire language skills or other retraining.

The court suggests, without support, that the wife could never again attain the very modest lifestyle that she had previously enjoyed. As in *Mathews*, there is no finding that the wife’s health or lack of training *prevent* her from working, merely that it is *likely* she will not find *appropriate* employment. The Wife is relatively young at only 44 years of age.⁴⁸

Permanent lifetime maintenance awards are reserved for spouses who have a permanent debilitating illness and no capacity to earn an

⁴⁷ CP 14 (emphasis added).

⁴⁸ CP 1.

income presently or in the future. Washington “courts have approved awards of lifetime maintenance in a reasonable amount when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.”⁴⁹ Unlike the cases where a spouse has a permanent, debilitating illness, the former wife has previously earned income at nearly the same amount as the maintenance order by the trial court, roughly \$1,000 per month.⁵⁰ There was no impediment in her continuing to earn a similar income. She filed a financial declaration showing \$1,117 in total monthly expenses, indicating the income she is capable of earning is commensurate with her expenses.⁵¹ There is nothing in the record to suggest that the former wife is incapacitated or suffers from some permanent disability such as impaired vision like the wife in *Morrow* or multiple sclerosis like the wife in *Tower*, nor did the trial court make any finding to this effect. Here, the former wife not only has present earning capacity, but her earning capacity would only increase as she acquires additional training, education, and language skills.

The trial court never considered the fact the former wife, having been married to Mr. Singh for 10 years, will receive social security

⁴⁹ *In re Marriage of Mathews*, 70 Wn. App. 116, 124 (citing *In re Marriage of Sheffer*, 60 Wn. App. 51, 56-58, 802 P.2d 817 (1990); *In re Marriage of Bulicek*, 59 Wn. App. 630, 633-34, 800 P.2d 394; *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197)

⁵⁰ VRP Vol. IV Pg. 283 Ln. 10

⁵¹ CP pending. *See* Supplemental Designation of Clerk’s Papers sent separately.

benefits. These benefits include one-half Mr. Singh's social security retirement benefits when she reaches retirement age and Medicare when she reaches 65.⁵² This will decrease her need for maintenance and increase her ability to be self supporting. The trial court did not consider this important and required factor.

3. The trial court erred when it failed to give weight to the reality that Mr. Singh and the former wife enjoyed a very modest lifestyle during the marriage.

One of the statutory factors the court must consider when determining a maintenance award is the "standard of living established during the marriage."⁵³ The trial court, in its findings of fact, noted that during the 18 year marriage, Mr. Singh and the former wife were accustomed to "a modest standard of living."⁵⁴ For more than half the time they were married, the former wife lived in a developing country in modest conditions; her days involved cooking, cleaning, and farming.⁵⁵ The former wife's standard of living did not much improve upon entering the United States; her duties in the home remained the same while her work outside of the home continued to involve menial day labor.⁵⁶

⁵² 20 C.F.R. § 404.331.

⁵³ RCW 26.09.090(c).

⁵⁴ CP Pg. 13 Ln. 23, Finding of Fact 2.12.

⁵⁵ VRP Vol. IV Pg. 275 Ln. 12

⁵⁶ CP Pg. 14 Ln. 3

The trial court erred when it failed to recognize that the former wife's ability to support herself through various low-skill jobs would afford her the same lifestyle that she maintained during the marriage.

4. The trial court erred when it alluded to the former wife's recent surgery and the possibility of trauma as the basis for lifetime maintenance.

The lower court erred when it referred to the former wife's recent surgery and potential trauma from the marriage as reason for the award of lifetime maintenance.

As stated above, in *In Re Marriage of Tower*, the wife was diagnosed with multiple sclerosis. The court determined that "progressively debilitating disease 'substantially limited' [the wife's] activities."⁵⁷ Such a diagnosis was sufficient grounds for the award of lifetime maintenance. Similarly, the wife in *Morrow* had a severe vision problem. Two doctors and a counselor testified to long term health problems afflicting the wife in *Mathews*, but even this was not sufficient for the Court of Appeals to affirm her maintenance award.

Here, there was no expert testimony as to any long term or potentially debilitating physical or emotional conditions affecting the former wife's ability to work or get training. Neither is there any finding that the former wife has a debilitating diagnosis or condition that prevents

⁵⁷ *In re Marriage of Tower*, 55 Wn. App. 697, 698, 780 P.2d 863, 864

her from working or getting training. Instead, the trial court states in its Findings of Fact, “Given her limited skills and emotional condition, it is likely that she will ever [sic] be able to acquire sufficient education or training to find appropriate employment,” but does not otherwise substantiate a long-term physical impairment.⁵⁸

There is no expert testimony supporting even this finding. The wife’s own testimony contains nothing about an emotional condition that prevents her from working. She did testify to some physical problems, including that she quit one job after her “blood pressure went high”⁵⁹ and that she has “some back problems.”⁶⁰ There is no indication of how high her blood pressure went, or whether she quit the job on the advice of a doctor, or whether she even saw a doctor. But the maintenance award was based on a finding of “limited skills and *emotional* condition,” not any physical condition.

Although the trial court makes reference to the former wife’s emotional condition, there is no finding that her emotional condition incapacitates her or prevents her from working.⁶¹ The trial court simply

⁵⁸ CP Pg. 14 Ln. 6

⁵⁹ VRP Vol. 4, Pg. 282, Ln. 13-14.

⁶⁰ VRP Vol. 4, Pg. 290, Ln. 14.

⁶¹ CP Pg. 14 Ln. 7

suggests that the former wife will never be able to acquire education or skills to find “appropriate” employment.⁶²

5. The trial court erred when it based its award of lifetime maintenance on Mr. Singh’s marital misconduct.

RCW 26.09.090 clearly states that “maintenance ... shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct.”⁶³

Here, the trial court erred when it ordered lifetime maintenance in favor of the former wife placed against the unflattering backdrop of alleged marital misconduct on the part of Mr. Singh.⁶⁴ The lower court seems to have relied on marital misconduct in its order of maintenance. The trial court’s findings regarding maintenance state that Mr. Singh “physically traumatized and abused” the former wife.⁶⁵ Such misconduct cannot form the basis for an award of maintenance. While the trial court alludes to issues of health and mental well-being, it never states that the former wife is incapable of earning a living for any reason.

To base a maintenance award on misconduct is to fail to consider the statute and is an abuse of discretion. “Because [the record] does not

⁶² CP Pg. 14 Ln. 7

⁶³ RCW 26.09.090 (emphasis added)

⁶⁴ VRP Vol. IV Pg. 328 Ln. 8

⁶⁵ CP 14, ¶ 2.12.

evidence a fair consideration of the statutory factors [it] therefore constitutes an abuse of discretion.”⁶⁶

VI. Conclusion

Mr. Singh asks the court to hold that the trial court erred in awarding maintenance to the former wife for the remainder of her life. He asks that the issue of maintenance be remanded so that it may be structured as rehabilitative maintenance which will support the former wife while she seeks and acquires the necessary training to increase her earning capacity. In doing so, the former wife will enjoy the prospect of self-sufficiency and a more comfortable lifestyle.

After the former wife has acquired training and education, she and Mr. Singh can part ways permanently and enter the next chapter of their respective lives, leaving this difficult chapter behind.

To achieve this goal, Mr. Singh asks that the Court find that the trial court erred when it awarded lifetime maintenance to the former wife, relying on the backdrop of marital misconduct during the marriage, and remand to the trial court.

⁶⁶ *In re Marriage of Mathews*, 70 Wn. App. 116, 123

DATED this 7th day of May 2013.

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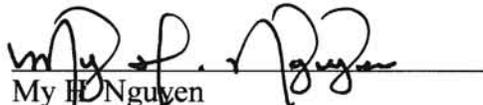
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Gurmit Singh's Opening Brief to the following individuals via U.S. Mail:

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Signed this 7th day of May, 2013 Seattle, Washington.


My H. Nguyen
Legal Assistant