

70590-3

70590-3

NO. 70590-3-I

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

SOLOMON MEKURIA,

Appellant,

v.

ASTER MENFESU,

Respondent.

Handwritten mark resembling a stylized 'A' or 'K' with a diagonal line through it, located to the right of the case name.

BRIEF OF RESPONDENT

Elizabeth A. Helm, WSBA #23840
NORTHWEST JUSTICE PROJECT
401 Second Ave S. Suite 407
Seattle, Washington 98104
Tel. (206) 464-1519
Attorney for Respondent, Aster Menfesu

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. COUNTER STATEMENT OF THE CASE	1
III. ARGUMENT	7
A. The trial court properly exercised its discretion when it determined that Mr. Mekuria did not have adequate cause to proceed with his Petition for a major modification of the parenting plan.	7
B. The Motion for Revision was properly considered by the trial court.	11
1. The court properly considered the Motion for Revision, even though emails pertaining to the availability of GAL were included.	11
2. The facts referenced in the Motion for Revision were a proper restatement of facts contained in the submissions to the commissioner and in the court file.	12
C. There is no evidence of bias on the part of the trial court judge and the argument of such is improperly raised for the first time on appeal.	13
IV. ATTORNEY’S FEES	16
V. CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Bowers v. TransAmerica Title Ins. Co.</i> 100 Wn.2d 581, 594, 675 P.2d 193 (1983).....	18
<i>Escude v. King County Pub. Hosp. Dist. No. 2</i> 117 Wn. App. 183, 190 n4, 69 P.3d 895 (2003).....	15
<i>Fetzer v. Weeks</i> 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).....	18
<i>Housing Auth. of Grant Co. v. Newbigging</i> 105 Wn. App. 178, 184-185, 19 P.3d 1081 (2001).....	13
<i>In re Marriage of Flynn</i> 94 Wn. App. 185, 191, 972 P.2d 500 (1999).....	8
<i>In re Marriage of Littlefield</i> 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).....	10
<i>In re Marriage of Mangiola</i> 46 Wn. App. 574 at 577, 732 P.2d. 163 (1987).....	8, 9
<i>In re Marriage of McDole</i> 122 Wn.2d 604, 610. 859 P.2d 1239 (1993)).....	9
<i>In re Marriage of Rideout</i> 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).....	10
<i>In re Marriage of Roorda</i> 25 Wn. App.849, 852, 611 P.2d 794 (1980).....	9
<i>In re Parentage of Ashley Marie Schroeder</i> 106 Wn.App. 343, 350, 22 P.3d 1280 (2001).....	9
<i>In re Parentage of Jannot</i> 149 Wn.2d. 123, 126, 65 P.3d. 664 (2003).....	8, 9
<i>Matter of Welfare of Carpenter</i> 21 Wn. App. 814, 820, 587 P.2d 588 (1978).....	15
<i>State v. Bolton</i> 23 Wn. App. 708, 714, 598 P.2d 734 (1979), review denied, 93 Wn.2d 1014 (1980).....	15
<i>State v. Franulovich</i> 89 Wash.2d 521, 524, 573 P.2d 1298 (1978).....	15
<i>State v. Morgensen</i> 148 Wn. App. 81, 197 P.3d 715(2008).	16
<i>Tofte v. Wash. State Dep't of Soc. & Health Servs.</i> 85 Wn.2d 161, 531 P.2d 808 (1975).....	19
<i>Williams & Mauseth Ins. Brokers, Inc. v. Chapple</i> 11 Wn. App. 623, 629, 524 P.2d 431 (1974).....	13

TABLE OF AUTHORITIES

	<u>Page</u>
Statutes	
RCW 26.09.140	16, 18, 21
RCW 26.09.260	8
RCW 26.09.260(2)(c)	8
RCW 26.09.270	8
RCW 4.12.050	14
Rules	
KCLR 7(b)	13
RAP 10.3.....	15
RAP 10.3(a)(5).....	13
RAP 18.1(c)	17
RAP 2.5(a)	15

I. INTRODUCTION

The Appellant, Solomon Mekuria has failed to meet his burden to establish that the trial court erred when it dismissed his Petition for Modification of the parties' parenting plan. He has not shown how the court manifestly abused its discretion or entered findings on untenable or unreasonable grounds. He failed to cite authority as to why the court should consider his allegation of bias on the part of the trial court or that there was any actual or perceived bias on the part of the trial court. Substantial evidence supports the trial court's decision to dismiss his petition. Based on the evidence before it, the trial court exercised proper discretion when it dismissed his petition.

II. COUNTER STATEMENT OF THE CASE

Aster Menfesu and Solomon Mekuria were married in 2007. The parties' child, EM, was born on April 23, 2008. CP 395. The parties separated when Ms. Menfesu filed a petition for an order for protection in April 2009. CP 39. A full Order for Protection was entered in King County Cause No. 09-2-17625-6 KNT, which expired on August 20, 2010. CP 63-66.

Ms. Menfesu suffers from a progressive medical condition that impairs her sight. She was diagnosed with this condition in 1999, and at

the time of the divorce trial in August 2010 she was legally blind and receiving Supplemental Security Income. CP 165-166, 176, 198, 234-235.

Trial was held on August 2-3, 2010. Ms. Menfesu was unrepresented. CP 40. At trial she testified as to the particulars of this medical condition and the limitations to her sight. CP 235. The court entered a final Parenting Plan. CP 1-10.

Both parties requested reconsideration of the court's decision. CP 40. Ms. Menfesu also asked for a new trial based on the fact that she could not understand her interpreter and that she could not read the final documents because they were not interpreted to her. CP 40. The court granted Ms. Menfesu's request for reconsideration of the provisions of the parenting plan, but denied her request for a new trial. CP 40. The court also denied Mr. Mekuria's request for reconsideration. CP 40. An Amended Parenting Plan was entered on September 27, 2010. CP 11-20.

The trial court declined to enter any restriction under RCW 26.09.191 for either parent. CP 12. The residential schedule prior to school age was set from Tuesday at noon until Friday at noon with Mr. Mekuria and Friday at noon until Tuesday at noon with Ms. Menfesu. CP 12. The school schedule began when the child entered kindergarten in August 2013. Under this schedule, the child resides primarily with Ms. Menfesu and spends every other weekend with Mr. Mekuria. CP 13. The

court awarded Ms. Menfesu sole decision making for educational decisions. CP 18. The court ordered joint decision making for non-emergency medical decisions and religious upbringing. CP 18.

During the three year period since entry of the parties parenting plan in September 27, 2010, Mr. Mekuria was found in contempt for being chronically late to exchange the child without good cause. CP 40-41, 68. In May 2012, he filed a CR 60 Motion to Vacate the final orders entered in this matter. CP 42, 145. After Ms. Menfesu responded, he withdrew this motion two days before the hearing date. CP 322-324.

On March 5, 2013, Mr. Mekuria filed a Petition for a major modification of the Final Parenting Plan. Mr. Mekuria sought to change the primary residence of the child and limit Ms. Menfesu's residential time to supervised visitation in Everett. CP 29. He also asked the court to order a psychological evaluation of Ms. Menfesu (CP 30) and to enter RCW 26.09.191 findings against Ms. Menfesu in the parenting plan for:

- Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions.
- Physical, sexual or a pattern of emotional abuse of a child.
- A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 26.09.004.
- The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.
- Neglect or substantial non-performance of parenting functions.

CP 28-29.

Ms. Menfesu responded on March 27, 2013, and requested that Mr. Mekuria's petition be dismissed. CP 36-38. On April 4, 2013, Ms. Menfesu filed a Counter-Petition for a Minor Modification. CP 193-199. Adequate Cause for her petition was established on May 10, 2013. CP 506-508. The trial for a hearing on her petition is scheduled for February 10, 2014. Respondent's Designation of Clerk's Papers, Sub 113.¹

On April 10, 2013, Mr. Mekuria filed a Motion for Finding of Adequate Cause and Entry of Temporary Parenting Plan. CP 211. He requested a finding of adequate cause and immediate transfer of primary custody based on his allegations that 1) the mother's sight impairment was a physical impairment which interfered with her ability to perform parenting functions; 2) the mother engaged in abusive use of conflict because she did not provide information he requested in order to process a medical claim and because she had been taking the child to a primary care physician in Renton while he had taken the child to a physician in Everett; 3) he was now remarried; and 4) he attempted to mediate his requests for modification. CP 211-218. Ms. Menfesu denied his allegations in her

¹ This Order Setting Case Schedule was issued when Mr. Mekuria filed his original petition. Because Ms. Menfesu's petition was filed after Mr. Mekuria's but before the trial date set in the schedule, the mother's petition was set on the same case schedule with the same set of deadlines and trial date.

response filed on April 17, 2013. CP 231-394 (Declaration and exhibits) and CP 395-419 (Memorandum). She requested his motion be denied and his major modification action be dismissed. CP 232, 395.

With his motion, Mr. Mekuria's submitted photographs of the child taken over a two year period that showed a small burn on the child's leg, a rash on the child's back, "puffy eyes", a small scratch on the child's cheek, and a small scab under the child's eye should form the basis for a major modification of the parenting plan. CP 220-222. Without any evidence, he claimed that these photographs represented "injuries" either negligently or intentionally caused by Ms. Menfesu and which he claimed were "unique, bizarre and troubling injuries that occur on a regular basis." CP 213.

Mr. Mekuria's motion was heard on April 24, 2013. VRP 2. Court Commissioner Bonnie Canada-Thurston granted adequate cause for his petition finding that "This commissioner has concerns as to the injuries that have occurred to the child, the fact that the parents are taking the child to two different doctors and has concerns as to whether the mother's sight is declining." CP 451-453. Although she found adequate cause, she denied Mr. Mekuria's request for entry of a temporary parenting plan that would immediately transfer custody of the child to him. CP 452, VRP 21.

The child continues to reside primarily with Ms. Menfesu according to the parties' parenting plan entered September 27, 2010. CP 11-20.

Commissioner Canada-Thurston also appointed Lisa Barton as Guardian ad Litem (GAL). CP 494-496. The GAL order specified (in a boilerplate provision) that the GAL shall make a "full and complete report to the court and counsel/parties within 30 days, provided that an extension may be provided by the court." CP 495. On April 29, 2013, Ms. Barton requested an extension of the deadline and indicated that she could complete her investigation and report by July 1, 2013. CP 470. She asked the parties to agree to the extension. CP 470. Mr. Mekuria refused. CP 471.

On May 6, 2013, Ms. Menfesu filed a Motion for Revision on court commissioner's finding of adequate cause entered for Mr. Mekuria's major modification action. CP 457-472. Copies of emails from the GAL were submitted to Judge Cahan with the Motion for Revision with a request that the court address this issue if it declined to dismiss Mr. Mekuria's petition for a major modification of the parenting plan. CP 470-472. On May 21, 2013, the parties entered a Stipulation and Agreed Order Extending Deadline for Completion of the GAL Report. CP 509-512. The GAL was also tasked with investigating the issues raised by Ms. Menfesu

in her petition for minor modification by order dated May 10, 2013. CP 506-508.

On May 31, 2013, Judge Cahan heard Ms. Menfesu's Motion for Revision. CP 527-528, VRP 25-39. Judge Cahan found that the issue of Ms. Menfesu's sight impairment did not constitute a change of circumstances because this was considered by the trial judge during the divorce trial. VRP 37-39. She also found that the minor injuries, if they could even be considered injuries, were not sufficient to warrant a modification of the parenting plan. VRP 37-39. Judge Cahan granted Ms. Menfesu's request for revision of the commissioner's ruling and dismissed Mr. Mekuria's petition for major modification of the parenting plan. VRP 37-39, CP 527.

On June 28, 2013, Mr. Mekuria timely filed his Notice of Appeal.²

III. ARGUMENT

- A. The trial court properly exercised its discretion when it determined that Mr. Mekuria did not have adequate cause to proceed with his Petition for a major modification of the parenting plan.***

The trial court did not err in its decision to dismiss Mr. Mekuria's petition for a major modification of the parties' Final Parenting Plan. CP

² Mr. Mekuria did not include his Notice of Appeal in his Designation of Clerk's Papers.

527-528. A parent seeking a finding of adequate cause to modify a parenting plan must present “something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.” *In re Marriage of Mangiola*, 46 Wn. App. 574 at 577, 732 P.2d. 163 (1987) (quoting *In re Marriage of Roorda*, 25 Wn.App. at 852, 611 P.2d 794.(1980)) overruled on other grounds by *In re Parentage of Jannot*, 149 Wn.2d. 123, 126, 65 P.3d. 664 (2003). A trial court determines adequate cause by reviewing the affidavits submitted in support of the petition. The “court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.” RCW 26.09.270.

The affidavits supporting a litigant’s petition for modification must set forth specific relevant factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260. RCW 26.09.270; *In re Marriage of Flynn*, 94 Wn. App. 185, 191, 972 P.2d 500 (1999). Under RCW 26.09.260(2)(c), the court shall retain the established residential schedule unless “[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the

advantage of a change to the child.” An appellate court may overturn a trial court’s adequate cause decision only if the trial court has abused its discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 126.

Litigation over custody is inconsistent with a child’s welfare. *In re Marriage of Roorda*, 25 Wn. App.849, 852, 611 P.2d 794 (1980), (overruled on other grounds by *Jannot*, 149 Wn.2d 123). Accordingly, courts should accord great weight to prior custody determinations because of the presumption that a change of residence is highly disruptive to a child. *In re Parentage of Ashley Marie Schroeder*, 106 Wn.App. 343, 350, 22 P.3d 1280 (2001) (citing *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993)). Trial courts need not grant a hearing to a petitioner who seeks modification of the custodial provisions of a parenting plan unless the petitioner makes factual allegations which, if true, would overcome the presumption of custodial continuity. *Mangiola*, 46 Wn. App. at 578-579 (quoting *Roorda*, 25 Wn. App. At 852).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. 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 the incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). In a case involving a revision of a commissioner's ruling, the appellate court's review is of the revision court's decision, not the commissioner's decision. *In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).

In this case, Judge Cahan properly determined that the mother's sight impairment was not a new circumstance because it existed prior to entry of the parenting plan and was known to the divorce trial court when it entered the Final Parenting Plan on September 27, 2010. VRP 37-39 at 37. Judge Cahan found that the trial court was "well aware of the vision impairment and after hearing all of the evidence decided that the mother was the appropriate person to have custody of the child." VRP 37-38. Because Mr. Mekuria did not meet his burden to show that Ms. Menfesu's sight impairment was a substantial change in circumstances, Judge Cahan properly exercised her discretion in declining to find adequate cause.

Judge Cahan also properly found that Mr. Mekuria provided no evidence that the mother's sight impairment was in any way related to the so called "injuries" he alleged as a basis for the modification. VRP 38. She found the six photographs presented by Mr. Mekuria to support his

petition did not depict “injuries” that warrant a modification of the parenting plan:

I don’t find these – for lack of a better word, “injuries,” are substantial. I don’t find them concerning. I looked at the pictures and they – I just don’t – these are not the kind of incidents and no one ran to CPS. These are not the kind of incidents that are alarming. You know, kids can get scratched and even get burned in the best – under the best care...

VRP 38

The court found no connection between the incidents and the mother and Mr. Mekuria provided no proof that the incidents happened in the mother’s care or were in any way related to her sight impairment.

VRP 38. The trial court’s decision to dismiss the father’s petition was well within the range of acceptable choices, given the facts, the applicable legal standard, and the father’s failure to meet his burden of proof.³

B. The Motion for Revision was properly considered by the trial court.

1. The court properly considered the Motion for Revision, even though emails pertaining to the availability of GAL were included.

³ In his appeal Mr. Mekuria discusses the issue of the mother’s sight impairment as it relates to her ability to perform parenting functions. Other allegations raised in his Petition for Modification and Motion for Adequate cause are not addressed in his appeal.

Emails regarding the GAL's availability were attached to the Motion for Revision. CP 470-472. While these emails occurred after the Commissioner's ruling and were not available at the original hearing, they were properly included because they contained information that would have been necessary for the court to consider if the court had not dismissed the petition. If the court had decided not to dismiss the petition, it would have needed the information in the emails about GAL's availability to determine whether to order an extension of time to complete her report. Even if the emails were improperly included, it was a harmless error because the court had no need to consider or rely on the emails to support its decision to dismiss the petition for modification.

2. **The facts referenced in the Motion for Revision were a proper restatement of facts contained in the submissions to the commissioner and in the court file.**

The facts set forth in the brief section entitled Statement of Facts were a brief restatement of the facts included in the pleadings, memoranda, declarations, exhibits submitted to the commissioner and the court file. This section did not include new testimony or reference to evidence not before the commissioner in the court file. "All motions for revision of a commissioner's order shall be based on the written materials

and evidence submitted to the commissioner, including documents and pleadings in the court file.” KCLR 7(b).

Mr. Mekuria does not cite any portion of the record to support his self-serving statement that the revision motion’s statement of facts was “full of new testimony and reference to things not before the commissioner.” According to RAP 10.3(a)(5) all factual statements must include a reference to the record. Appellate courts do not consider self-serving statements that are not supported by the record. *Housing Auth. of Grant Co. v. Newbigging*, 105 Wn. App. 178, 184-185, 19 P.3d 1081 (2001).

C. There is no evidence of bias on the part of the trial court judge and the argument of such is improperly raised for the first time on appeal.

Mr. Mekuria’s unsupported claim of bias is without merit and it is untimely because it is brought for the first time on appeal. He presents no evidence of actual or perceived bias, and instead asks this court to presume bias. “The law does not presume prejudice on the part of the trial judge. To justify a mistrial, a new trial, or a reversal on appeal, an affirmative showing of prejudice which would alter the outcome of the pending litigation is required.” *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*. 11 Wn. App. 623, 629, 524 P.2d 431 (1974).

Like any party, Mr. Mekuria could have filed an affidavit of prejudice against Judge Cahan when he learned that she was the assigned judge. However, any party wishing to have a judge recuse himself or herself must raise that request prior to the judge making a substantive ruling in the case:

- (1) Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion ...

RCW 4.12.050

A party may not simply wait until they receive an adverse ruling to raise the issue of prejudice. “(A party) is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case and, if the rulings do not happen to be in his favor, to then for the first

time raise the jurisdictional question.” *State v. Franulovich*, 89 Wash.2d 521, 524, 573 P.2d 1298 (1978).

Mr. Mekuria had ample opportunity to file an affidavit of prejudice, for any reason, but he chose not to. Instead, he waited until after the trial court ruled against him before raising this issue for the first time on appeal. He claims that he is entitled to raise the issue for the first time on appeal because it involves a due process argument but he does not cite any authority to support this contention. “It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n4, 69 P.3d 895 (2003)

Under RAP 2.5(a), an “appellate court may refuse to review any claim of error which was not raised in the trial court.” The doctrine of waiver applies to bias and appearance of fairness claims. *See, e.g., State v. Bolton*, 23 Wn. App. 708, 714, 598 P.2d 734 (1979) (refusing to consider appearance of fairness issue raised for first time on appeal), review denied, 93 Wn.2d 1014 (1980); *Matter of Welfare of Carpenter*, 21 Wn. App. 814, 820, 587 P.2d 588 (1978) (“finding that a litigant who proceeds to trial

knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal"). *State v. Morgensen*, 148 Wn. App. 81, 197 P.3d 715(2008).

IV. ATTORNEY'S FEES

Respondent requests attorneys' fees under RCW 26.09.140, which provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RCW 26.09.140

The Appellant works for Boeing as an Aviation Maintenance Technician and Inspector.⁴ The respondent is legally blind and receives \$1365 per month from Supplemental Security Income. CP 377. The respondent requests an award of attorney's fees on appeal.

Even though the Respondent is represented by the Northwest Justice Project (NJP), and receives legal services free of charge, she is entitled to recovery of attorney's fees, just like any other litigant. NJP is publicly funded and incurs costs for the representation of its clients. NJP attorneys are paid salaries based on years of experience. Expenses related to free civil legal services include not only the cost of providing an attorney, but also the opportunity costs of reduced availability to represent other clients in a climate of scarce resources and significant demand for representation in family law cases.

As a state and federally-funded civil legal services provider, NJP is permitted by the Legal Services Corporation ("LSC") and the Office of Civil Legal Aid ("OCLA") to pursue attorney's fees in cases where such fees are authorized by statute or case law. As a condition of

⁴ The evidence of Mr. Mekuria's current income is not in the record, but it is available and will be produced pursuant to RAP 18.1(c).

representation, Ms. Menfesu agreed to assign any attorney's fees recovered as part of the action to NJP.

The plain language of RCW 26.09.140 provides for payment of costs incurred, including reasonable attorney's fees, not actual attorney's fees incurred or paid. "Reasonable attorney's fees" is a term of art and is differentiated from fees actually paid or incurred. It is not determined based on the amount of fees actually incurred. *See Fetzer v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). In awarding reasonable attorney fees, absent any expressed statutory direction, Washington courts commonly use the "lodestar" method to calculate the award. *Bowers v. TransAmerica Title Ins. Co.*, 100 Wn.2d 581, 594, 675 P.2d 193 (1983). The lodestar method first looks at the number of hours reasonably expended to obtain the result, multiplied by a reasonable hourly rate. *Id.* Indeed, the "reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation." *Id.*

Regardless of the method of calculation of a fee award under RCW 26.09.140, in no event does the statute require actual payment of fees to obtain an award. The statute does not require the petitioner to have paid attorney's fees out of her own pocket to a private attorney in order to be

awarded fees, nor does the statute carve out an exception for litigants who receive free legal representation. There is no support in the statute or any case law for such a presumption.

Reported case law affirms that historically, Washington courts do not distinguish between paid private attorneys and providers of free civil legal representation in awarding attorney's fees where fees are authorized by statute. For example, in *Tofte v. Wash. State Dep't of Soc. & Health Servs.*, the Supreme Court held that the fundamental underpinning of the statutory provision authorizing the fee award is determinative and the petitioner's representation by a non-profit legal aid program was irrelevant to whether the successful litigant was entitled to attorney's fees. *Tofte v. Wash. State Dep't of Soc. & Health Servs.*, 85 Wn.2d 161, 531 P.2d 808 (1975) (citing a California case holding that successful fee applicant represented by legal aid program was not required to actually incur an attorney fee to be eligible for an award). Hence, the court must look to the "fundamental underpinning of the fee award provision" in order to determine whether a litigant, in this case the respondent, is entitled to a "reasonable attorney's fees" award. *Id.* In this case, Ms. Menfesu is entitled to attorney's fees for legal services rendered based on a consideration of the financial resources of both parties.

V. CONCLUSION

The trial court properly exercised its discretion when it dismissed Mr. Mekuria's Petition for Modification. The court correctly found that Ms. Menfesu's sight impairment is not a basis for a modification of the parenting plan because it does not represent a change of circumstances since the parties parenting plan was entered in 2010. The court's decision to dismiss his petition and the court's finding that the minor childhood "injuries" presented by the father and attributed to the mother's sight impairment were not a basis to modify the parenting plan was well within the range of acceptable choices, and well supported by the evidence before the court. The court did not err in its decision to maintain custodial continuity.

The court did not err in allowing the revision motion to go forward when the mother's counsel attached emails pertaining to the GAL's availability. These emails were inconsequential to the outcome and by the time the matter was heard by the court the issue of the deadline for the GAL report had been resolved by agreement.

The father's allegation that the trial court was biased is without merit, and should have been brought before the trial court made a

substantive decision. The father presents no authority as to why the court should consider this issue on appeal.

Ms. Menfesu asks this court to uphold the decision of the trial court dismissing Mr. Mekuria's petition for modification of the parenting plan. Further, she asks to court to make an award of attorney's fees based on relative income and resources of the parties pursuant to RCW 26.09.140.

Respectfully submitted this 6th day of December, 2013

NORTHWEST JUSTICE PROJECT

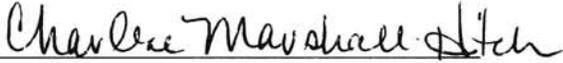


Elizabeth A. Helm, WSBA#23840
401 2nd Avenue South, Suite 407
Seattle, WA 98110
Tel: (206) 464-1519
Fax: (206) 624-7501
bethh@nwjustice.org
Attorneys for Respondent Aster Menfesu

CERTIFICATE OF SERVICE

I certify that on December 6, 2013, I caused a true and correct copy of this Brief of Respondent to be delivered to Solomon Mekuria at 10421 Meridian Ave. S., Apt. B, Everett, WA 98208, by ABC Legal Services.

DATED this 6th day of December, 2013.


Charlene Marshall-Hitch
Legal Assistant
NORTHWEST JUSTICE PROJECT
401 2nd Ave. S., Suite 407
Seattle, WA 98104
(206) 464-1519