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COURT OF APPEALS NO. 71295-1-1

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

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ZELEKE KASSAHUN,

Appellant,

and

FANAYE ASHAGARI,

Respondent.

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OPENING BRIEF OF APPELLANT

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**ORIGINAL**

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*Assignment of Errors.*

1. The court below erred by imposing restrictions on the Appellant, pursuant to RCW 26.09.191, because its findings do not support its conclusion that he had engaged in:

A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily injury or the fear of such harm.

2. The court below erred in entering a permanent protection order.

3. The court below erred in finding that the Appellant has a gross monthly income of \$13,750.

4. The court below abused its discretion in ordering the Appellant to pay child support in the amount of \$1,347.72 per month.

5. The court below abused its discretion in ordering the Appellant to pay the Respondent maintenance in the amount of \$5,000 per month.

6. The court below erred in finding that the Appellant has

an earning capacity and financial resources that greatly exceeds what he claims

7. The court below erred in finding that the Appellant could pay maintenance of \$5,000 per month and still have the ability to meet his financial obligations while meeting those of his spouse.

*Issues Pertaining to Assignment of Errors.*

1. Did the court below err by imposing restrictions on the Appellant, pursuant to RCW 26.09.191, based on its conclusion that he had engaged in

A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily injury or the fear of such harm.

when that conclusion was based on its finding that “father assaulted the mother at the birthday party in 2011”, and its conclusion “that this was not an isolated incident”, when the statute requires either a finding of more than one act of domestic violence, or that the assault caused “grievous bodily injury or the fear of such harm”, and the trial court found neither? (Assignment of Error 1).

2. Did the court below err in concluding “and this was

not an isolated incident” without any supporting findings sufficient to enable this Court to make any meaningful review of that conclusion---albeit such a conclusion does not meet the requirements of the statute? (Assignment of Error 1).

3. Did the court below err by entering a permanent restraining order in the absence of a finding, that the Appellant was “likely to resume acts of domestic violence when the order expires”? (Assignment of Error 2).

4. Did the court below err by entering a permanent restraining order against the Appellant in the absence of any evidence that there was a “present likelihood of recurrence” of “physical harm, bodily injury, assault, or the fear of imminent harm”? (Assignment of Error 2).

5. Is the lower court’s finding that the Appellant has a gross monthly income of \$13,750 supported by substantial evidence? (Assignments of Error 3-7).

6. Did the court below err in finding that the Appellant has a gross monthly income of \$13,750 when it did not provide findings which enables this Court to meaningful review its calculation? (Assignments of Error 3-7).

7. Should the lower court's child support and maintenance awards be vacated when they are based on the finding that the Appellant has a gross monthly income of \$13,750 when that finding is not based on substantial evidence?

(Assignments of Error 3-7).

8. Did the court below abuse its discretion by making an award of maintenance which was not based upon a fair consideration of the statutory factors under RCW 26.09.090?

(Assignments of Error 3-7).

9. Is the lower court's finding that the Appellant has an earning capacity and financial resources that greatly exceeds what he claims supported by substantial evidence. (Assignments of Error

3-7).

10. Is the lower court's finding that the Appellant could pay \$5,000 per month in maintenance and still have the ability to meet his financial obligations while meeting those of his spouse supported by substantial evidence. (Assignments of Error 3-7).

*Statement of the Case.*

This appeal arises from a dissolution proceeding.

Fanaye Ashagari and Zeleke Kassahun are each originally from Ethiopia, but met for the first time in Seattle in 1997. 1RP 37; 6 RP 630. They were married on January 3, 1998. 1 RP 37, CP 4.

The parties have three sons: Nathaniel was born on June 4, 2001. Matthew, was born on February 27, 2003. Andrew was born on June 13, 2006.

The parties separated on September 16, 2011. CP 4.

Ms. Ashagari commenced these dissolution proceedings, nearly ten months later, on July 5, 2012. CP 1-10.

**Zeleke Kassahun.** In 1991, Mr. Kassahun, purchased a Texaco gas station with an adjoining convenience store, with his cousin and another friend. 6 RP 636.

On August 4, 1991, during Seafair weekend, some people tried to rob the store. During the course of that altercation, one of the robbers jumped at Mr. Kassahun. His gun discharged killing the robber, as he was defending himself. 6 RP 637-640; See also, 7 RP 715-716; CP 87.

Mr. Kassahun was charged with second degree murder and

assault. The jury found him not guilty of assault, but were unable to reach a verdict on the second degree murder charge. 6 RP 640.

The State re-tried him on the second degree murder charge. Mr. Kassahun did not have the money to pay for an attorney. He was represented by a public defender. He was found guilty and sentenced to ten years and three months in prison. 6 RP 641.

Funds were raised from the Ethiopian community to pay for an appeal. His conviction was reversed. *State v. Kassahun*, 78 Wash.App. 938, 900 P.2d 1109 (1995). 6 RP 642.

While preparing for a third trial, the State and Mr. Kassahun entered into a plea bargain wherein Mr. Kassahun pled guilty to manslaughter and was sentenced to time served. 6 RP 643.

**Fanaye Ashagari.** Ms. Ashagari came to the United States in March of 1995 to visit her sister. She worked as a cashier and food service provider at fast food restaurants. 1 RP 38; 3 RP 303-304.

She met Asfaw Lewate and decided to stay. She married Mr. Lewate in January of 1996. They separated five months later. Her divorce became final in 1997. 1 RP 38-39; 3 RP 303.

Shortly thereafter, she met Mr. Kassahun through a friend who worked with him. She asked Mr. Kassahun for a job and he hired her. I RP 40; 3 RP 307; 6 RP 644-645. About three to eight months after Ms. Ashagari began working with Mr. Kassahun, the two began a romantic relationship and were married on January 3, 1998. I RP 37, 41; 6 RP 645.

Mr. Lewate had petitioned for Ms. Ashagari's to get a green card, but she left him before her petition had been fulfilled, RP 646. So she had to re-file her immigration papers. I RP 45; 3 RP 305. Mr. Kassahun agreed to petition for her, 6 RP 646, and hired an immigration attorney to assist her. I RP 47; 3 RP 305-306; 7 RP 662-663.

After the immigration office told Ms. Ashagari that it had sent papers to her at Mr. Lewate's address which he had not forwarded to her, threatened to have her deported, and had her arrested, 7 RP 662, she retained a second lawyer to obtain a protection order against Mr. Lewate, accusing him of domestic violence. I RP 48; 3 RP 310-313. In denying her Petition for a Protection Order on July 16, 1998, Court Commissioner Hollis C. Holman made the following findings, Exhibit 200, CP 848-862:

1. Respondent filed a petition with the INS for purposes of establishing Petitioner's citizenship during the parties' short marriage, and the July, 1996 interview was scheduled before Petitioner left the family residence in May, 1996. Petitioner does not deny that she knew of the interview and that she failed to appear for it.

2. The statements made by Respondent to the INS Agent during the July, 1996 interview were based upon Respondent's own beliefs and the fact that Petitioner had moved out of the family residence approximately 2 months prior. The INS Agent is free to draw his/her own conclusions from Respondent's statements and Petitioner's actions.

3. There is no evidence that Respondent took any steps to further the INS process other than strict compliance with the INS procedures for appearing at a scheduled interview and a scheduled hearing for which he was required to attend.

4. Petitioner admits that she sent notice to the INS of her change in address.

5. There is no evidence to contradict Respondent's statement that when he received correspondence from the INS addressed to Petitioner that he returned it to the INS indicating that she did not reside at his address and that he had no knowledge of her current address.

6. There is no dispute that Petitioner did not inform Respondent of her address, and there is agreement that Respondent did not have knowledge of Petitioner's current address.

7. The fact that Petitioner requested a police standby to remove her belongings from the family residence in May, 1996 is not proof of Petitioner's allegations of domestic violence. It is quite common in dissolution matters

for parties to secure a police standby even when there is no history of domestic violence, but both parties are upset over the dissolution of the marital relationship and want to avoid the possibility of trouble.

8. Petitioner alleged "horrific violence" by Respondent during their short term marriage, including physical violence as well as rape, and yet Petitioner and her family members admit that the family had no knowledge of the alleged abuse. Petitioner admits she did not contact the police, she did not seek medical assistance, and there is no independent evidence of the alleged abuse. In light of the type of abuse alleged by Petitioner, it is difficult to accept that there would be no outward signs of abuse that, at the very least, her family with whom she is admittedly very close to, would not have noticed.

9. There is no dispute, and in fact, there is agreement that the parties have had no contact since Petitioner vacated the family residence in May, 1996; and there is agreement that Respondent has not even attempted to contact Petitioner since she vacated the residence in May, 1996.

10. There is no evidence that Petitioner's family members and/or those filing declarations in support of Petitioner had any actual, personal knowledge of abuse of Petitioner by Respondent, and in fact, Petitioner admitted that they had no knowledge of the alleged abuse until she told her sister of the alleged abuse.

11. The declarations in support of Petitioner provide no facts, evidence or any basis as to how they could have personal, actual knowledge of the alleged abuse, and therefore, this Court concluded that said declarant did not have the requisite actual, personal knowledge of the alleged abuse as indicated by each declarant.

12. Petitioner admits she took no action to secure a protection order when she separated from Respondent even though she alleged he threatened to kill her if she left and the police officer informed her that she could have obtained a protection order for herself.

13. When Petitioner filed the petition for dissolution of marriage, she indicated that there was no necessity of obtaining a permanent restraining order against Respondent. This is supported by the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage which were drafted by Petitioner and presented to the Court for entry by the Court by Petitioner.

14. There is no credible evidence to support Petitioner's allegations that Respondent physically or sexually abused her during their short term marriage.

15. Petitioner only sought a protection order against Respondent *after* she received notice from the INS that she was being deported, and had been arrested by INS Agents in conjunction with the deportation notice.

16. This evidence supports that Petitioner has misrepresented the parties' circumstances to the Court, and therefore, there is a basis for an award of attorney's fees to Respondent. However, pending a motion for revision herein and a hearing thereon, the issue of the award of fees to Respondent is reserved to the Trial Judge to determine the appropriate amount after the hearing on the motion for revision.

These findings were affirmed at the hearing on the motion for revision, and attorney fees and costs were imposed against Ms. Ashagari. Exhibit 200; I RP 48; 6 RP 656.

Even so, Ms. Ashagari told the immigration judge that her former husband, Mr. Lewate, had abused her. Based on these representations, the immigration judge granted her permanent residency in January of 1999. I RP 49; 5 RP 506-507; CP 112.

**Marital Relationship.** When they married, Mr. Kassahun owned a taxi license and was a part owner of a Texaco gas station with an adjoining convenience store. 3 RP 307.

Ms. Ashagari did not bring any property into the marriage.

Mr. Kassahun sold the Texaco gas station/ convenience store franchise back to Texaco in 2001 when Texaco and Shell merged. 3 RP 308-309; 5 RP 505-506.

The parties purchased Abyssinia Market in 2002. I RP 82; 6 RP 527; Ex. 48. During their marriage, Mr. Kassahun worked at the Absynnia Market from 6:00 or 7:00 in the morning until 8:00 or 9:00 in the evening seven days each week. I RP 150, 206, 208; 3 RP 346-347; 4 RP 439-440; 7 RP 664.

Ms. Ashagari did not go back to work after the birth of their first child, Nathaniel, on June 4, 2001. I RP 75.

Ms. Ashagari was always at home when Mr. Kassahun got

home, except when there was a child's birthday. 1 RP 49. Up until 2008 or 2009, she would have food ready and would eat with him--- even when he came home late. 3 RP 348; 4 RP 440; 7 RP 665.

Mr. Kassahun had a good relationship with his children. 8 RP 771. Even though work did not permit him to have much free time, when he did have that time, he would play and interact with them. 5 RP 445; 7 RP 673-675.

Beginning in June of 2009, Mr. Kassahun began getting weaker and having excruciating headaches. 7 RP 665-666; 752; 8 RP 860-861. He confused things. He had trouble getting dressed by himself. He was unable to walk properly. He became incontinent. 7 RP 454-456, 460, 474-475, 752. Taketu Truneh, a family friend, and Mr. Kassahun's cousin's ex-wife, 7 RP 672, had to drive him to and from work. 7 RP 764.

Ms. Ashagari became very angry when Mr. Kassahun hired someone to help him at the Absynnia Market. 7 RP 670; 8 RP 834-837. In Ethiopian culture, people often try to resolve marital issues with the help of family members and friends, who are often referred to as "the elders". 8 RP 772. This dispute led to such a mediation in September of 2009. 7 RP 671-672, 752-753.

In addition to his complaint about how Ms. Ashagari had responded when he hired an employee to help him at the store, Mr. Kassahun also complained that he and Ms. Ashagari no longer celebrated holidays together, and that she would take the kids to her friends and not invite him. He also complained that she would hide her cell phone and not answer it when it rang. 7 RP 672.

At the conclusion of the mediation, Ms. Ashagari apologized and promised to refrain from those acts. 7 RP 673; 7 RP 751. The parties also agreed that Mr. Kassahun could hire a new employee because he could not function properly without one. 7 RP 753.

On the day before Thanksgiving, Mr. Kassahun collapsed. 7 RP 668. On Thanksgiving Day, he was operated on for a subdural hematoma on his brain. 7 RP 669. His activities were restricted for an additional two months, so Yared Ashagari, Ms. Ashagari's brother, helped him at the store. 7 RP 669.

The parties' marriage began to deteriorate rapidly in the summer of 2010. Ms. Ashagari tried to cut Mr. Kassahun out of her and his children's lives. Ms. Ashagari and the children would not be home when he came home from work. They would not return home until 9 or 10 at night. Ms. Ashagari would not call to say

where she and the children were or that they were going to be late. 7 RP 677. She would not tell him what they had done during the day while he worked. If he asked, she responded by telling him that she did not have to report to him. 7 RP 768.

Mr. Kassahun started drinking 3-4 beers every day. 7 RP 679-680. Before that time, he would only have a drink or two once a month or when there was an occasion. 7 RP 720.

In September of 2010, Ms. Ashagari went to a wedding without Mr. Kassahun and lied about it. This caused the parties to argue. 7 RP 678. Mr. Kassahun had been drinking beer. Ms. Ashagari videotaped their exchange, Exhibit 6; 7 RP 679, during which she taunted him, which infuriated him. Mr. Kassahun told Ms. Ashagari that she “should be fried with a bullet”, which is a figure of speech the equivalent of the idiom “you should be shot for that”. 7 RP 681-682. Ms. Ashagari told Mr. Kassahun that they could delete the video together. She later told him that she had thrown the video away. 7 RP 682-683. She also told her brother, Yared, that she had destroyed the video. 5 RP 463.

In response to Ms. Ashagari continuing to ignore him and

being so secretive about her cell phone, Mr. Kassahun hired a private investigator. Within two days, the private investigator saw her enter a convenience store in Richmond Beach, and go into a back room for almost one hour with the man who worked there. 7 RP 682-683. Mr. Kassahun received this information on November 29, 2010. 7 RP 683.

The following day, on November 30, 2010, after celebrating her birthday with their children and going to bed, Mr. Kassahun asked Ms. Ashagari to be honest with him about being in the back of the convenience store. Ms. Ashagari buried her head in the blanket. 4 RP 381-382; 7 RP 683-685. She denied having an affair, and said he was just a friend. 2 RP 222, 225; 7 RP 685.

Mr. Kassahun was devastated by this news and moved out of the house. 2 RP 221-222; 4 RP 382; 7 RP 685. But following a mediation a few days later with the "elders", Mr. Kassahun moved back home. 4 RP 383, 7 RP 685-686.

However, the parties continued to have marital strife. 7 RP 686. According to Ms. Ashagari, Mr. Kassahun assaulted her with a whiskey bottle, and choked both her and their oldest son, Nathaniel, on the evening of December 30, 2010. 3 RP 244-245.

She testified that Mr. Kassahun had hit her in the face three or four times with his fists--- with hands "like steel". She claimed her nose and cheek were bruised and that her eyes and face were swollen. 4 RP 383-384, 392. Mr. Kassahun denied hitting her. 7 RP 689.

Ms. Ashagari testified that she did not call the police because she did not want Mr. Kassahun arrested, 4 RP 385, but she did not hesitate to call the police few days later, on January 3, 2011. This was the only time she ever called the police. 4 RP 353.

Ms. Ashagari testified that while she was sitting folding clothes she had taken out of the laundry, Mr. Kassahun lost his temper for some unknown reason, grabbed her pony tail and started choking her. Exhibits 11 and 211; 4 RP 386; CP 59-60.

According to Mr. Kassahun, Ms. Ashagari became angry after she refused to go to the Costco Business Center to help him with the load he had purchased for the store, and he told her, "You have time to go and sit for an hour in somebody's back room, but you don't have time to help me out?" 7 RP 687.

Ms. Ashagari left the house with their youngest son, Andrew, and walked about one short block. When Mr. Kassahun followed her to try to get them to return home, 4 RP 387, 7 RP 687, Ms.

Ashagari called the police. 4 RP 388; 7 RP 687. According to the police officer, she told him that Mr. Kassahun:

*...had a history of assaulting her, but none are/were ever reported. She also accused him of drinking all night long, although I did not smell any alcohol on [Mr. Kassahun's] breath. I could not find any indication/evidence that any assault had occurred: no redness, marks, etc. on any part of [Ms. Ashagari's] anatomy. [emphasis added].*

**[Mr. Kassahun's] version.** He said that [Ms. Ashagari] has been having an affair w/ another Ethiopian male in Shoreline. Upon discovering this, he confronted her about it. She grabbed their 4 yr old son and left on foot. [Mr. Kassahun] said he followed her (and the boy) trying to get them to return home. *He was cooperative and not intoxicated in the least.* He said he had consumed two beers last night and was not drinking this morning. *He said that nothing physical had occurred* and he accused [Ms. Ashagari] of being a "pathological liar". He said that she has been hiding the affair from him, but he has suspected it due to her acting suspicious/out of the ordinary. No evidence of a crime occurred. I gave [Mr. Kassahun] a courtesy ride to QFC and he called his sister-in-law for a ride.

Exhibits 11 and 211; See also, 4 RP 389-392.

When the police officer asked Ms. Ashagari where the red mark was around her neck if Mr. Kassahun had choked her, she told the police officer that since he had just choked her, she did not have a red mark. 4 RP 391.

Taketu Truneh gave Mr. Kassahun a ride home, and saw Ms. Ashagari. Like the police officer, she did not observe any injuries, bruises, or red marks on Ms. Ashagari. 7 RP 755.

From savings accrued over many years and from Mr. Kassahun's share of the sale proceeds of the Texaco station, the parties had saved \$187,158 which was deposited in their joint account in a Certificate of Deposit in his name. 6 RP 623.

On February 28, 2011, Ms. Ashagari went to the Abyssinia Market and told Mr. Kassahun that she wanted her name added to the Certificate of Deposit. They drove together to the bank. Mr. Kassahun became frustrated when Ms. Ashagari began discussing "her dirty laundry" with the banker, and left. As he was walking back to the Abyssinia Market, he was contacted by Taketu Truneh, who had been first contacted by Ms. Ashagari.

Ms. Truneh drove Mr. Kassahun back to the bank where they found Ms. Ashagari trying to persuade the banker to put her name---and her name alone---on the Certificate of Deposit. When Mr. Kassahun told the banker to stop, Ms. Ashagari became hysterical and told him that she would see him in court. Mr.

Kassahun then took that money and put it into another Certificate of Deposit in a separate account under his name. 6 RP 624-626.

Mr. Kassahun subsequently used \$180,000 of these funds to purchase a second taxi license. 6 RP 604-605, 626.

Ms. Ashagari continued to be secretive. She would not answer her cell phone when he was with her. 7 RP 690. Since her cell phone was in his name, and he was paying for it, he went on the computer in March of 2011, obtained the cell phone records, and discovered that she had been talking almost non-stop with a person who had T-Mobile telephone number (206) 280-8940. Those records revealed that from May, 2010 to October, 2010, she had spent the following amount of time talking with this person:

4764 minutes in May;  
5824 minutes in June;  
5030 minutes in July;  
4660 minutes in August; and  
1469 minutes in September.

Exhibit 220; 2 RP 155-156, 223-224; 7 RP 691-692.

On the Saturday before Mother's Day of 2011, Mr. Kassahun arrived home about 4 p.m. Ms. Ashagari was dressed up and leaving. When Mr. Kassahun asked her where she was going, she

told him, "I don't have to tell you," and then drove away. Mr. Kassahun became upset and started drinking. 7 RP 693.

Ms. Ashagari and the parties' children had gone to a birthday party for the daughter of Siefudin Hassen. 2 RP 167-169, 171, 228.

Mr. Kassahun tried to call Ms. Ashagari several times. But Ms. Ashagari did not answer. She testified that she was playing with the kids in the backyard, her phone was in her purse, and she had not heard it. 4 RP 392-393; 7 RP 693.

Mr. Kassahun had heard Ms. Ashagari talking about this birthday party earlier in the week, figured out where it was, and walked over to it. 7 RP 693. When he arrived at the party, he got into his wife's car and honked the horn for her to come out. 5 RP 413; 7 RP 693.

Mr. Hassen, and three other people, went out to investigate. Mr. Kassahun was sitting in the car. Mr. Kassahun indicated that he was having problems with his wife. Mr. Hassen suggested they talk about it, and went to get some chairs. 5 RP 413-415; 7 RP 694.

By the time he returned, Ms. Ashagari had come outside, and the parties had started arguing. 7 RP 694; 8 RP 790. Mr.

Kassahun jumped up and approached Ms. Ashagari with outstretched arms, while people tried to restrain him. 5 RP 415.

Mr. Kassahun testified that as he approached Ms. Ashagari, she moved back, tripped and fell. 7 RP 694. Mr. Hassen testified that he saw Mr. Kassahun make physical contact with her, 5 RP 415, 419, but his wife did not see any physical contact. 5 RP 425. Nor did Besset Zenebe, her best friend. In any event, Ms. Ashagari fell down. 5 RP 415-419; 8 RP 789-790.

Ms. Ashagari claimed Mr. Kassahun threw her to the ground and choked her. 2 RP 230; 5 RP 430; CP 61. But, no one else saw or remembers Mr. Kassahun doing that. 5 RP 419.

People continued to restrain Mr. Kassahun and to talk to him. 5 RP 416, 425-426. Ms. Ashagari gathered her children and left. After Mr. Kassahun calmed down, Mr. Hassen and two other men drove him home. 5 RP 416, 419-420, 426; 7 RP 695. Ms. Ashagari spent the night at her mother's. 2 RP 231.

Mr. Kassahun called the next day to apologize to Mr. Hassen for his behavior. 5 RP 420, 428; 7 RP 695.

He also apologized to Ms. Ashagari. 7 RP 695-696.

The parties had a mediation with the elders a few days later. The elders included Taketu Truneh, Dr. Lulu Gizaw, and his wife Besset Zenebe, and Haikel Shukry. 7 RP 757; 8 RP 772-773.

Ms. Ashagari testified at trial that she told the elders at this mediation in June that Mr. Kassahun had choked her. 3 RP 272, 4 RP 393-394. But Mr. Kassahun and the elders denied that she ever mentioned this incident. 5 RP 480, 484, 490-491; 7 RP 700, 759.

At this mediation, Mr. Kassahun expressed his concerns that Ms. Ashagari was having an affair. He was also concerned that Ms. Ashagari had tried to take money from their account at the bank by removing his name from the Certificate of Deposit. Mr. Kassahun also complained that Ms. Ashagari did not treat him with respect and would not let him freely interact with his children. 5 RP 486-488, 496; 7 RP 696; 8 RP 773, 791-792.

He also expressed concerns about the videotape Ms. Ashagari had taken. Ms. Ashagari told the elders that she had thrown the videotape into the garbage and destroyed it. 7 RP 697, 757-758; 8 RP 774, 793. But she had not done so. Exhibit 6.

Ms. Ashagari denied having a romantic relationship with the person with whom she had been talking, as shown on the phone

records(Exhibit 200), although she later admitted that she did to Mr. Kassahun. 7 RP 697; 8 RP 774.

She apologized for all of it. 7 RP 699, 758; 8 RP 777.

From Ms. Ashagari's viewpoint, the purpose of the mediation was to find out what had happened to the \$187,158 which had been in the Certificate of Deposit in the parties' joint savings account. 4 RP 393-394, 399; 5 RP 489-490; 7 RP 698-699; 8 RP 775. According to Ms. Ashagari, Mr. Kassahun told her that he had invested the money, but would not tell her where. 4 RP 393-397 Mr. Kassahun, Taketu Truneh, and Haikel Shukry all testified that Mr. Kassahun specifically told Ms. Ashagari that he had used the money to buy a second taxi license. Exhibits 103-107; 5 RP 490, 494, 497; 7 RP 699, 759; 8 RP 867-868.

Both parties apologized and that seemed to resolve their dispute. 8 RP 783, 794. But it had not.

Mr. Kassahun chose to leave the home for good on September 16, 2011. 2 RP 172; 3 RP 267; 4 RP 398.

Ms. Ashagari did not ask him to leave. 2 RP 174.

After the parties separated, Mr. Kassahun continued to pay the community bills and to provide whatever support the children

needed *voluntarily*. 7 RP 709. He deposited his paycheck and the rent proceeds from the taxi licenses into the parties' joint account to pay the household bills, including the mortgage on the parties' home, Ms. Ashagari's car payment, and the T-Mobile bill. Exhibits 54 and 221; 6 RP 585-589, 618-619.

After the parties separated, Ms. Ashagari did not seek employment. Even though she had learned English in elementary and high school, and spoke English to her children and others without an interpreter, 3 RP 302-303, she decided to continue her ELS class before getting training to be a caregiver or nursing assistant. 4 RP 431-432.

Mr. Kassahun continued to see his children at least 3 or 4 times each month. Ms. Ashagari testified it was twice each month. 2 RP 175; 3 RP 267-269; 4 RP 402. They would meet at Sam's Club, and Ms. Ashagari would drive them to restaurants and other places in her car. 7 RP 676. ; 8 RP 821-822; 863-865.

Once again the parties sought out the help of the "elders" to help mediate their dispute. 3 RP 270-273. Ms. Ashagari wanted to reconcile. Mr. Kassahun did not. 2 RP 175; 8 RP 782, 795-796. These mediations continued until April or May of 2012. 3 RP 273.

### ***Statement of Proceedings***

Nearly ten months after the parties separated, Ms. Ashagari commenced these dissolution proceedings, on July 5, 2012, and did so *only* after she became convinced that Mr. Kassahun would not reconcile with her and return home, as she wanted.

Q: Why did you wait until July 2012 to file for divorce?

A: Many times he leaves and he comes back, and I thought he was doing the same thing, leaving and coming back. Also, because he went and talked to the elders, and the elders also wanted to reconcile or mediate us together. Because I do what he wants, and also, if possible, to separate peacefully. That's why.

3 RP 269. When she commenced these dissolution proceedings, Ms. Ashagari also sought an Order of Protection, alleging that Mr. Kassahun was an alcoholic and had engaged in domestic violence throughout their marriage---and even before. CP 48-86. When she was asked by her attorney why she had waited so long to seek an Order for Protection, she testified (3 RP 269-270):

Q: Why did you wait until July to file for an order for protection?

A: Because I was asking to come to court because I am doing this against his will. Because he didn't want this to be filed in court.

Q: Well, why didn't you file a protection order as soon as he left?

A: When he left, he left peacefully. When I filed, I filed because I believe that he would hurt me. He told me that don't go to the court to file. I did this against his will. He always said he would kill me. He tried to kill me. He also said he would kill others. He is someone who has killed before.

THE INTERPRETER: The interpreter will ask again.

A: When I go to court I say anyway what happened in court. I have to say what happened in our marriage. I was afraid he would hurt me.

Mr. Kassahun denied her accusations. 7 RP 710-711; CP 93

Ms. Ashagari also claimed that she did not know what had happened to the \$180,000 that Mr. Kassahun had used to purchase a second taxi license, CP 62, 65, even though she had never questioned what had happened to this money after the mediation in June of 2011, more than a year earlier. 5 RP 499-500; 7 RP 729.

In her Financial Declaration, CP 17-22, she claimed that her monthly expenses were \$6,485.54.<sup>1</sup> CP 17. But, in those monthly

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<sup>1</sup> In fact, since the parties separated on September 16, 2011, the household expenses through June of 2012, averaged \$4,912.67 per month, including the extraordinary expense for property taxes which are paid in April and October. When those months are removed, the household expenses average \$3,809.21 per month. Exhibit 221. See also, CP 95, 98-103.

expenses, she included the monthly loan amount of \$730.28 for the HELOC loan used to purchase the Abyssinia Market, CP 19, even though she knew that that loan was paid by the business, CP 64, and \$1,289 for monthly expenses for the parties' children. CP 20.

In her Declaration, she "estimated" that Mr. Kassahun earned "at least \$10,000 to \$12,000 per month between the store and the taxi (or taxis). CP 64, 114. In her Financial Declaration, she estimated that Mr. Kassahun had a gross monthly income of \$11,000. CP 17,18.

In his Financial Declaration, Mr. Kassahun reported that his gross monthly income consisted of \$3,000 in wages, \$900 in taxi lease income,<sup>2</sup> and \$1,500 in additional earnings from the store (where he used the business to pay for personal expenses and a shareholder loan), and monthly expenses of \$3,110. CP 104-109.

Based on these representations, the Court *imputed* income to Mr. Kassahun of \$11,000 per month gross. CP 144. In addition, the Temporary Order, entered on August 8, 2011, CP 116-122,

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<sup>2</sup> Mr. Kassahun omitted the income from the lease of the second taxi license.

ordered Mr. Kassahun to continue paying all of the household bills, plus \$1,000 a month for maintenance. A Temporary Order of Child Support, entered that same day, ordered him to pay an additional \$2,111.26 per month in child support. CP 122-145.

After these temporary orders were entered, Mr. Kassahun continued to deposit his entire pay check into the parties' joint account to pay for Ms. Ashagari's household expenses. 6 RP 597. He also took \$1,200 to \$1,500 per month from the business to meet these additional obligations, 6 RP 532, 537-539, as he had reported in his Financial Declaration.

Even so, Mr. Kassahun had to borrow \$50,000 from Taketu Truneh that August to meet his additional obligations for child support and maintenance, as well as the household expenses. 6 RP 564, 566, 619-620; 7 RP 762; Exhibit 59: p. 1209; CP 445, 470. He signed a promissory note for this loan. 6 RP 567-568; 7 RP 762; Exhibit 102. Each month, Mr. Kassahun withdrew the balance of the loan, from which he would fund a cashier's check to Ms. Ashagari in the amount of \$3,111 for his maintenance and child support obligations, and use to pay his own personal expenses, before re-depositing the balance into his account. 6 RP 569- 573,

618. At the time of trial, Mr. Kassahun had approximately \$9,000 remaining from this \$50,000 loan. 6 RP 574; Exhibit 123.

These financial obligations rendered Mr. Kassahun destitute. 6 RP 595.

This case went to trial before the Honorable Palmer Robinson. The evidence presented at trial established that, just as with the accusations Ms. Ashagari had made against her former husband:

“12. Petitioner admits she took no action to secure a protection order when she separated from Respondent even though she alleged he threatened to kill her if she left when she separated from Respondent even though she alleged he threatened to kill her if she left ...”.

“15. Petitioner only sought a protection order against Respondent ***after*** ...”

...she became convinced that the Respondent was unwilling to reconcile. 3 RP 269-270.

8. Petitioner alleged "horrific violence" by Respondent during their ... marriage, including physical violence as well as rape...

In the words of her attorney during closing argument, 9 RP 883-884:

Ms. Ashagari gives a detailed history of the

parties' marriage, the violence, the name calling, the stalking, the isolation, the fear that she experienced. She talks about the choking, the hitting, the pushing, the pulling on her ponytail, pulling her down the ground, spitting, forcing her or coercing her to have sex when she didn't want to. She describes her fear, hiding in the bathroom, hiding in the boys' room. She described her fear because he choked her in the fight and she didn't want to sleep. She described how her fear was heightened by the fact that she knew her husband had killed somebody in the past.

She describes in painful detail how her son, Nathaniel, intervened during one attack and how his father choked him. She described how her children tried to protect her.<sup>3</sup>

"8. ...and yet Petitioner and her family members admit that the family had no knowledge of the alleged abuse. Petitioner admits she did not contact the police," [with the exception of one call on January 3, 2011, 4 RP 353] "she did not seek medical assistance, and there is no independent evidence of the alleged abuse. In light of the type of abuse alleged by Petitioner, it is difficult to accept that there would be no outward signs of abuse that, at the very least, her family with whom she is admittedly

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<sup>3</sup> Although Ms. Ashagari described numerous events in which her children either witnessed or were themselves victims of Mr. Kassahun's alleged domestic violence, See eg. Exhibit 1: 8, Jennifer Bercot, the social worker with Family Court Services, who conducted the Parenting Evaluation, 2 RP 107; Exhibit 1, never even asked the children---who were of suitable age and discretion--whether they had ever witnessed or been victims of domestic violence. 2 RP 156-157. The children were never fearful of their father. 2 RP 157-159; 7 RP 756; 8 RP 805, 809-810.

very close to, would not have noticed.” 2 RP 161, 170-171; 4 RP 375, 391-392; Exhibits 11, 211.

In the prior proceeding with her former husband, her family members and others submitted declarations attesting to abuse, but the declarants lacked any actual, personal knowledge of the abuse. Exhibit 200: Paragraphs 10 and 11. In this case, with the partial exception of the May 2011 birthday party incident which will be discussed more fully hereafter, no family member, or anyone else, witnessed any physical abuse of Ms. Ashagari, or corroborated her accusations in any way. In fact, they denied ever witnessing any physical abuse of Ms. Ashagari. 2 RP 159-160, 171, 195; 5 RP 443, 454, 468; 7 RP 755, 760-761.

“10. ...in fact, Petitioner admitted that they had no knowledge of the alleged abuse.” 7 RP 755-756, 761; 8 RP 778-779, 797.

There were no medical reports of any injuries. Although Ms. Ashagari took many pictures to show that the Respondent had been intoxicated at various times, she did not have a single photograph documenting any injury to herself. 2 RP 171.

Unlike the situation with her former husband, Ms. Ashagari

continued to have regular contact with Mr. Kassahun after the parties separated, and wanted to reconcile with him. Even so, there is no allegation that Mr. Kassahun was abusive to her in any way after the parties separated. 2 RP 176.

Additional facts will be presented in the context of discussing the issues raised by this appeal.

*Argument.*

**A. The Lower Court's Findings Do Not Support Imposing Restrictions On The Appellant, Pursuant To RCW 26.09.191.**

To support restrictions in the Parenting Plan, pursuant to RCW 26.09.091(1)(c), the court must include, as the trial court did here, under Section 2.1 of the Parenting Plan Final Order, CP 478, its conclusion that there has been:

A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily injury or the fear of such harm.

Yet, in spite of the many lurid and horrific tales of abuse alleged by Ms. Ashagari, the trial court found only one act which constituted domestic violence, CP 472:

There is a history of domestic violence and a basis for 26.09.191 restrictions.

The father had the mother followed, and monitored her phone records. The court finds that the father assaulted the mother at the birthday party in 2011, and that this was not an isolated incident. The evidence presented at trial satisfies the statutory definition of domestic violence.

The trial court did **not** find Mr. Kassahun engaged in stalking or domestic violence by either “monitoring” the mother’s phone records which were in his name, or by having the mother followed by a private investigator for two days to determine whether she was unfaithful. Nor would the evidence here support such a finding.<sup>4</sup>

**1. The Trial Court’s Finding Of But One Act Of Domestic Violence Is Not Sufficient To Meet The Statutory Requirement Of “A History Of Acts of Domestic Violence”.**

The *only* act which trial court found that met the definition of domestic violence is the assault at the birthday party in May of 2011. CP 472. This finding of but one incident of domestic violence is legally insufficient to meet the statutory requirement of

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<sup>4</sup> The trial court did **not** find Mr. Kassahun engaged in stalking or domestic violence by “monitoring” the mother’s phone records which were in his name, or by having the mother followed by a private investigator for two days, to determine whether she was unfaithful. Nor would the evidence here support such a finding.

“a history of acts of domestic violence”, which by its plain language requires more than just one act.

The trial court’s conclusion that “this was not an isolated incident” does not remedy this legal insufficiency. RCW 26.09.191 requires the court to find more than one act of domestic violence.

Nor did the trial court make any findings to support its conclusion that “this was not an isolated incident”. As the Supreme Court held *In re LaBelle*, 107 Wash.2d 196, 218-219, 728 P.2d 138 (1986):

Generally, where findings are required, they must be sufficiently specific to permit meaningful review. [citation omitted]. While the degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions. [citations omitted].

Although Ms. Ashagari reported this birthday party incident to Jennifer Bercot, the Parenting Plan evaluator, Exhibit 1: 6, Ms. Bercot testified Ms. Ashagari reported no further incidents of physical violence to her after the incident she alleged had occurred on December 30, 2010, five months earlier. 2 RP 174, 185. Ms. Bercot stubbornly refused to recognize the many inconsistencies in Ms. Ashagari’s testimony about this earlier incident during her

cross-examination, 2 RP 162-166, 199-202, but the trial court was unpersuaded---or it would have identified this incident as an act of domestic violence. Ms. Ashagari's testimony that Mr. Kassahun had hit her in the face at least four times with "hands of steel" which left her face bruised and swollen was simply not credible given Taketu Truneh's and the police officer's observations of her only a few days later. Exhibits 11 and 211. As the Supreme Court held in *Caven v. Caven*, 136 Wash.2d 800, 809, 966 P.2d 1247(1998):

Actually, RCW 26.09.191(1)(c) requires a finding by the court that there is "a history of acts of domestic violence." Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute.

The absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue. *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wash.App. 541, 562, 222 P.3d 1217(2009); *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash.2d 514, 524, 22 P.3d 795 (2001); *City of Spokane v. Dep't of Labor and Indus.*, 34 Wash.App. 581, 589, 663 P.2d 843 (1983).

**2. The Assault At The Birthday Party Does Not Meet The Statutory Requirement of RCW 26.09.091(1)(c).**

In *Caven v. Caven*, *supra*, the Washington Supreme Court affirmed this Court's holding in *In re Marriage of C.M.C.*, 87 Wash. App. 84, 88, 940 P.2d 669 (1997), that for an assault to qualify as a basis for restrictions, pursuant to RCW 26.09.091, it must be an "assault ... which causes grievous bodily injury or the fear of such harm." There was no such finding about this assault.

In this case, as a result of Mr. Kassahun's assault at the birthday party, Ms. Ashagari fell down. She did not suffer a *grievous* bodily injury. In fact, there is no evidence she suffered any injury.

Nor was there any evidence that this incident created any fear of such harm. Although Ms. Ashagari spent the night at her mother's, 2 RP 231, the parties continued to live with each other for the next several months, until Mr. Kasahun voluntarily chose to leave the home on September 16, 2011. The "elders", who were all disinterested witnesses, denied that Ms. Ashagari even mentioned this incident during their mediation which occurred a few days later. 5 RP 480, 484, 490-491; 7 RP 700, 759. She never expressed any fear of Mr. Kassahun to anyone prior to commencing these proceedings on July 5, 2012, more than a year later.

Once again, the absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue. *Yakima Police Patrolmen's Ass'n v. City of Yakima, supra; Ellerman v. Centerpoint Prepress, Inc., supra; City of Spokane v. Dep't of Labor and Indus., supra.*

**3. The Restrictions Imposed By RCW 26.09.091 Should Be Removed.**

As this Court explained in *In re Marriage of C.M.C.*, 87 Wash. App. at 88:

The commentary to the proposed Parenting Act states that the term "history of domestic violence" was intended to exclude "isolated, de minimus incidents which could technically be defined as domestic violence." *1987 Proposed Parenting Act, Replacing the concept of child custody, Commentary and Text 29 (1987).*

Such caution is clearly warranted---particularly given our natural empathy for victims of domestic violence and our predisposition to believe people who hold themselves out as victims of domestic violence at face value---when the consequences of such a finding are taken into account, as this case illustrates.

Simply as a result of Ms. Ashagari's mere *accusations* of

domestic violence, and in spite of Mr. Kassahun's denials, 7 RP 710-711, she obtained an Ex Parte Temporary Order for Protection when she commenced these proceedings, which prohibited him from having any contact with his three children. CP 40-43.

A Temporary Order, 116-121, and a Reissuance of the Temporary Order of Protection, CP 146, were entered on August 8, 2012, which permitted Mr. Kassahun to have professionally supervised visitation with his children for only four hours, from 2 p.m. until 6 p.m. on Sunday, every other week. His time was eventually increased to 6 hours every other week. 6 RP 614.

So, in addition to the other financial obligations imposed on him by the court below to continue paying all of the household bills, CP 120-121, maintenance of \$1,000 per month, CP 119, and child support of \$2,111.26, CP 122-145, he had to pay \$720 per month just to spend 12 hours each month with his children. 6 RP 614.

The trial judge eliminated the restriction that Mr. Kassahun's residential time with his children continue to be supervised, and increased his residential time to six hours every week. But, based on her finding "that father assaulted the mother at the birthday party in 2011, and that this was not an isolated incident", CP 472, the trial

court imposed restrictions, pursuant to RCW 26.09.091, and required him to complete DV treatment at Well Spring Family Services, CP 478, consisting of weekly sessions for a *minimum* of one year, 3 RP 328-329, at \$45 per week plus an intake fee of \$205, 3 RP 331, followed by the DV Dad's Group which meets twice each month for five months, 3 RP 332.

These restrictions are not warranted in the absence of the trial court's finding "acts of domestic violence", its lone finding of an assault which did not result in "grievous bodily injury or the fear of such harm," and its unsupported conclusion that "this was not an isolated incident." Those restrictions should be removed.

**B. The Court's Findings Do Not Support Entry Of A Permanent Protection Order.**

RCW 26.50.060(2) states in pertinent part:

*...if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.*

The trial court ruled that a permanent domestic violence

Order for Protection should be entered, CP 474, but did not make the requisite finding that Mr. Kassahun is “likely to resume acts of domestic violence when the order expires”. CP 471.

In *City of Seattle v. May*, 151 Wash.App. 694, 213 P.3d 945 (2009), this Court reviewed a permanent Order of Protection, like the one here, CP 493, which contained the boiler-plate language:

...the court finds that an order of less than one year will be insufficient to prevent further acts of domestic violence.

While the Court of Appeals in *City of Seattle v. May*, 151 Wash. App at 698, agreed with the superior court that that the protection order's language was lacking because it was “not the finding required by RCW 26.50.060(2),” it held that it was “not *facially* invalid” because the “the municipal court properly concluded that the order [itself] did not have to contain the issuing court's finding on which it based its determination to make the protection order permanent.”

But, in this case, the trial court made no “finding on which it based its determination to make the protection order permanent,” apart from the boiler-plate language in the Order itself, which is

legally insufficient. As the Court held in *In re Marriage of Allen*, 78 Wash.App. 672, 679, 898 P.2d 1390 (1995):

The law must drive the forms, not vice versa.

In *Freeman v. Freeman*, 169 Wash.2d 664, 674, 239 P.3d 557(2010), the Washington Supreme Court held:

The facts supporting a protection order must reasonably relate to physical harm, bodily injury, assault, or the fear of *imminent* harm. It is not enough that the facts may have justified the order in the past. Reasonable likelihood of imminent harm must be in the present.

No evidence was admitted at trial to support either a finding that Mr. Kassahun is “likely to resume acts of domestic violence when the order expires”---much less, to show a “reasonable likelihood of imminent harm”, or that there was a “*present* likelihood of recurrence”. *Freeman v. Freeman*, 169 Wash.2d at 674-675.

There were no allegations of any incidents of domestic violence after the assault at the birthday party in May of 2011. She continued to live with Mr. Kassahun thereafter. Mr. Kassahun is the party who chose to leave the home four months later. Ms. Ashagari wanted to reconcile after the parties separated. Mr. Kassahun did not want to reconcile. The parties continued to meet with their

children several times each month. There were no alleged incidents of domestic violence after separation. 2 RP 176.

Ms. Ashagari did not even seek an Order of Protection until nearly ten months after the parties separated, and then only because she had become convinced that Mr. Kassahun did not wish to reconcile. There were no violations of that Order.

For each of the foregoing reasons, the permanent Order of Protection, CP 489-493, must be vacated.

Unfortunately, it appears that the trial court's perception that that the birthday party assault "was not an isolated incident" improperly influenced its financial rulings, as well.

**C. The Court Below Erred In Finding That The Appellant Has A Gross Monthly Income Of \$13,750.**

Although Ms. Ashagari has never even contended that Mr. Kassahun's gross income was greater than \$11,000 per month, 9 RP 888-889, the trial court found that Mr. Kassahun's had a gross monthly income of \$13,750. 10 RP 950; CP 463, 471-472.

A trial court's findings of fact must be supported by substantial evidence. *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wash.2d 387, 391, 97 P.3d 745 (2004); *In Re*

*Marriage of Schumacher*, 100 Wn.App. 208, 211, 997 P.2d 399 (2000), *review denied*, 129 Wash.2d 1014 (1996). In this case, the trial court's finding that Mr. Kassahun has a gross monthly income of \$13,750 is not supported by substantial evidence.

According to the trial judge, she could not determine Mr. Kassahun's income from the parties' tax returns, bank statements, and/or credit card statements, 10 RP 248-249,

So what I did then was go to the parties' financial declarations and eliminated the obviously duplicate expenditures. By "duplicate," I don't -- I mean housing, in terms of what did they have and what were they spending before separation while they were only supporting one household. So I took out that housing and utilities and added them together, and then I also -- then I also considered the fact that the testimony was that over the course of pretty close to ten years they were able to save \$180,000 to buy the second car, and I figured that was another \$1,500 a month, and then I will tell you what I did because I'm not sure the final orders -- they kind of backed into this, and I'm not sure which way the final orders should go. But I added to get to gross figures another 25 percent, which I figured for taxes on, if that's what they were spending and saving, that the income taxes to get to gross would have been roughly 25 percent, and that got me to \$13,750 gross monthly income, and that's my finding.

10 RP 949-950; see also, 10 RP 956-959. Then the judge stated she could not remember how she calculated his income, 10 RP 980-981:

I did not include in here -- for instance, I don't think health insurance is in here, and I can't now remember if I added up the -- I think maybe I took off of the financial declaration sort of extra expenses for the boys, in terms of Kumon and all that stuff and included it in here. I can't -- you know, I'm sorry. I don't remember. That needs to be addressed, and whether it's done on the percentage deal or how it's done, I'm not -- I would look -- I would need to look at that before I sign the final order.

MR. BERRY: Yeah. It seems to me those expenses should be included in the maintenance payment because there's no more money for anything like that.

THE COURT: I think that's what I --

MR. BERRY: You did?

THE COURT: I don't remember. I know I dealt with it, or I looked at it. To be honest, to be quite candid, I don't remember if I was adding those up in the context of what I thought their combined income really was or their --- or, you know, the combined expenditures which got me to the income really was, or if I was doing it --- I just don't --- I can't tell you.

In the first place, it is not possible to accurately determine a person's income by what someone is claiming as their expenditures in a Financial Declaration. Those claimed expenditures are often

aspirational. No evidence was provided to establish that the parties' claimed expenses were their actual expenditures, apart from the mortgage payment on the parties' home, and the HELOC loan which they used to purchase Abyssinia Market.

Moreover, the parties' Financial Declarations do not support the lower court's finding. Ms. Ashagari's Financial Declaration showed that her only income was the \$1,000 she received each month in maintenance. She claimed that her monthly expenses were \$6,667.54. CP 305-310. But once again, she included in her monthly expenses the \$730.28 for the HELOC loan which was paid by the Abyssinia Market. CP 307. She provided no corroborating evidence for any of her claimed expenses, apart from the mortgage payment and the HELOC loan.

In his Financial Declaration, Mr. Kassahun testified that he had a monthly salary of \$3,000, income from the two taxi licenses of \$2,000 per month<sup>5</sup>, and an additional \$1,500 which he took from the business each month to pay his personal expenses and a shareholder loan. His net monthly income is \$4,714. 6 RP 591-

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<sup>5</sup> At the time of trial, the income from the two taxis had increased to \$2,000 per month from \$1,800. 6 RP 595-597.

592. His monthly expenses are \$3,682. 6 RP 594.

Secondly, the trial court's estimate of the parties' effective tax rate of 25% is incorrect. They have never paid any income taxes, and only a nominal amount of self-employment taxes. Exhibits 29 and 30.

What Mr. Kassahun reported in his Financial Declaration is consistent with the findings of Steve Kessler, a Certified Public Accountant, who reviewed Mr. Kassahun's financial records and concluded that that they were accurate. 7 RP 734-735. Mr. Kessler found that Mr. Kassahun received \$3,000 per month in wages, \$2,000 per month from leasing the two taxi cabs (for which he has a Labor and Industries' expense) and about \$1,500 per month where he uses the business to cover personal expenses and the repayment of a shareholder loan, 7 RP 732-733, 742, 745-746.

No evidence was presented which showed that Mr. Kassahun had any other income. The trial court's speculation that the \$180,000 the parties had saved over the course of ten years before the parties separated meant that Mr. Kassahun had--- much less continues to have--- an additional \$1,500 each month in

income is not evidence.<sup>6</sup> But, even if that phantom \$1,500 were included, he would not have a gross monthly income of \$13,750.

Finally, the lower court failed to recognize that Mr. Kassahun had to borrow \$50,000 from Taketu Truneh to meet the additional obligations imposed upon him by the lower court. 6 RP 564, 566-568, 619-620; 7 RP 762; Exhibit 59: p. 1209; Exhibit 102.

While the trial court was at liberty to disregard the testimony of Mr. Kessler and of Mr. Kassahun, it did not have a license to just make up numbers to reach a particular outcome. Since the record lends no support to the court's findings, its decision is untenable and constitutes an abuse of discretion. As this Court held in *State ex rel. Stout v. Stout*, 89 Wash. App. 118, 126, 948 P.2d 851(1997):

A court exercises its discretion in an untenable and manifestly unreasonable way when it essentially guesses at an income amount. Here there was ample reliable evidence for the court to set an accurate income estimate, but the court ignored it.

See also, *In re Marriage of Bucklin*, 70 Wash.App. 837, 841, 855 P.2d 1197 (1993) (court abused its discretion by “essentially guessing at” father's income, where it had explicitly found it had no

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<sup>6</sup> The trial court ignored the evidence that these savings also included sale proceeds which Mr. Kassahun had received from the sale of the Texaco station and Star-Mart. 6 RP 623.

verification of income).

Accordingly, the trial court's maintenance and child support orders which were premised upon its finding that Mr. Kassahun has a gross monthly income of \$13,750, must be vacated and reversed.

**D. The Trial Court Did Not Base Its Award Of Maintenance Upon A Fair Consideration Of The Statutory Factors Under RCW 26.09.090.**

A trial court abuses its discretion in awarding maintenance when it does not base its award upon a fair consideration of the statutory factors under RCW 26.09.090. *In re Marriage of Mathews*, 70 Wash.App. 116, 123, 853 P.2d 462 (1993).

In this case, the trial court failed to fairly consider the post-dissolution financial resources of the parties; and, the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations. In particular, substantial evidence does not support the trial court's finding that:

*Mr. Kassahun has an earning capacity and financial resources that greatly exceed what he claims and which is sufficient to support Ms. Ashagari as she obtains the necessary training and experience to earn a living wage. CP 471. (emphasis added).*

Likewise, substantial evidence does not support the trial court's finding that:

Mr. Kassahun [has the ability] to meet his financial obligations while meeting those of the spouse. CP 471.

Of primary concern when making an award of maintenance is the parties' respective economic positions following dissolution. *In re Marriage of Washburn*, 101 Wash.2d 168, 181, 677 P.2d 152 (1984). The court's decision on maintenance "is governed strongly by the need of one party and the ability of the other party to pay an award." *In re Marriage of Foley*, 84 Wash.App. 839, 845–46, 930 P.2d 929 (1997). The only limitation on the maintenance award is that the amount and duration, in light of all the relevant factors, be just. *Mathews*, 70 Wash.App. at 122.

In this case, because the lower court's finding regarding Mr. Kassahun's income is so clearly erroneous, and so inflated, the amount of maintenance awarded is not just. *Mathews*, 70 Wash. App. at 123. Mr. Kassahun does not have the ability to pay it.

A court abuses its discretion when its decision is "based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Krieger and Walker*, 147 Wash.App. 952, 959, 199 P.3d 450 (2008).

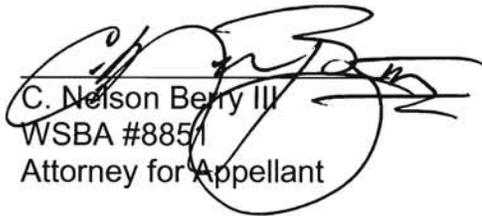
## CONCLUSION

Due to the absence of the requisite findings, the restrictions imposed upon Mr. Kassahun, pursuant to RCW 26.09.191, and the permanent restraining order must be vacated and reversed.

The trial court's maintenance and child support orders, which were premised upon its finding that Mr. Kassahun has a gross monthly income of \$13,750 must also be vacated and reversed.

This case should be remanded to the trial court to make an accurate determination of Mr. Kassahun's income based on the evidence which was duly admitted at trial, in a manner that can be properly reviewed by this Court, RCW 26.19.035(2); *In re Marriage of Bucklin*, 70 Wash.App. at 840-841; *In re Marriage of Sacco*, 114 Wash.2d 1, 3-4, 784 P.2d 1266 (1990), and to make new orders of child support and maintenance--- if the evidence establishes that Mr. Kassahun actually has the income to pay maintenance and still have the ability to "meet his needs and financial obligations".

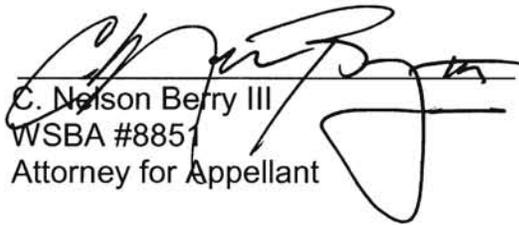
Respectfully submitted this 3rd day of July, 2014.

  
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**Certificate of Service**

I certify that on the 3rd day of July, 2014, I caused a copy of the foregoing Opening Brief of Appellant to be served on the attorney for the Petitioner, by hand-delivery by ABC Messenger Service, to the following address:

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## *Appendix*

RCW 26.50.010(1) defines domestic violence as follows:

(1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 9A.46.110 defines "stalking" as follows:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.