

COURT OF APPEALS NO. 75343-6-I

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

In re the Marriage of

ZELEKE KASSAHUN

Appellant,

and

FANAYE ASHAGARI,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Since this Court was unable to “discern the basis on which the trial court calculated Kassahun's monthly gross income”, on the previous appeal of this matter, it remanded this case

with instructions that the trial court enter more specific findings on existing evidence regarding its calculation of Kassahun's gross monthly income. If necessary, the trial court should recalculate Kassahun's income and maintenance and support obligations.

Having previously found that Kassahun had engaged in domestic violence, the lower court on remand continued to demonstrate its bias against him by disregarding the actual evidence in the record regarding his income. Instead, it concocted methods for calculating his income which are flawed on their face, and made up facts for which there is no evidentiary support.

Adding insult to injury---but nonetheless confirming its bias---the court, without explanation, changed the way it calculated Kassahun's taxes so that even though it found that his gross monthly income *decreased* by \$1,000 per month from what it had originally calculated, it *increased* his net monthly income \$4,814.34 to \$5,399.52.

And further, even though its orders are effective from the

original date of its previous orders (November 13, 2013), it used the current ages of the parties' children rather than their ages at the time of its original order to calculate his support obligation.

This case should be remanded to an impartial judge to calculate Kassahun's income based on the actual evidence which was presented at trial, and to recalculate his maintenance and support obligations accordingly.

II. ASSIGNMENTS OF ERROR

1. The court erred by finding that "Respondent's tax returns are not a reliable indicator of his income and are not credible".
2. The court erred by finding that "Respondent admitted as much."
3. The court erred by finding that the "Respondent's wage statements are not a reliable indicator of his income due to the fact that he pays himself a very small wage".
4. The court erred by finding that Kassahun
...used the same credit cards to purchase the inventory for his grocery store and to pay the family's expense. He made no effort to segregate the personal expenses and did not declare any of them income.
5. The court erred by finding

The Respondent has access to large amounts of cash through the business (Abyssinia Market and Taxi Cabs) that he uses to pay his employees, and for other expenses including but not limited to activities with the children, gifts for the children, supervised visitation, and domestic violence treatment.

6. The court erred by finding that the parties

had no credit card debt. They were paying all of their expenses out of cash flow generated by the market and the cab and managed to save enough money to pay for a second cab license.

7. The court erred by finding that the

Respondent has income from the two cab licenses, for which he never provided documentation.

8. The court erred by finding

The testimony of the Respondent's expert, Steven Kessler, was not credible, as Mr. Kessler did not have access to all the financial records of the business or the Respondent's personal financial records, and he did not have a reliable estimate of the amount of cash the Respondent has access to from the business.

9. The court erred by finding

The Respondent claims that he was forced to borrow money to pay his maintenance and child support obligations. The Court finds these claims not credible. The Respondent testified that he used cash from these funds to for personal expenses and that he was using the remaining \$9,000 from this "loan" to pay for his attorney's fees. Based on the Respondent's continued personal and business expenditures after separation, there is evidence that he does not require additional loans to meet his child support and maintenance obligations.

10. The court erred and abused its discretion by relying on the expenditures shown in the parties' financial declarations to calculate Kassahun's gross monthly income.

11. The court erred by finding that Kassahun "paid himself out of the till."

13. The court erred in finding that Kassahun has a gross monthly income of \$12,750.

14. The court erred by finding that the parties' expenditures, as shown by their financial declarations, eliminating duplications, and Kassahun's housing and utilities, equals \$8,700 per month.

15. The court erred by finding that the expenditures in

parties' financial declarations were reliable determinants of Kassahun's income.

16. The court erred by finding that since the parties were able to save \$187,000 during ten years of marriage, that \$1,500 per month should be included in Kassahun's monthly income when it calculated his income in July of 2013.

17. The court erred and abused its discretion by finding:

... the Petitioner's estimate of the Respondent's income is credible.

18. The court erred and abused its discretion by finding:

The Petitioner presented an estimate of the Respondent's income based on the business accounts and credit card statements showing the personal expenditures the Respondent made using credit cards (which balances are paid regularly by the Respondent using business funds) and checks from the business totaling approximately \$11,000. This figure is a net figure.

19. The court erred by finding that Kassahun "has access to substantial amounts of cash that the Court estimates is, at a minimum, \$1,750 a month".

20. The court erred by finding

Due to the parties' ability to save substantial amounts of money during the marriage, the parties' standard of living during the marriage,

the Respondent's standard of living after separation, and the Respondent's use of his business to fund personal expenditures, the Court finds that the income figure of \$12,750 is a conservative figure and is supported by the record.

21. The court erred and abused its discretion by changing the manner in which it had originally computed Kassahun's taxes to determine his net monthly income, with the result that even though the court found that his gross monthly income was \$1,000 less than what it had originally found, it found that his net monthly income increased from \$4,814.34 to \$5,399.52.

22. The court erred and abused its discretion by using the current ages of the children when it entered its Order of Child Support following remand, rather than the ages of the children on the effective date of that Order of Child Support.

23. The court abused its discretion by increasing Kassahun's transfer payment from \$1,347.72 to \$1,592.73 each month, after finding that his gross monthly income had decreased by \$1,000 per month.

24. The trial court erred and abused its discretion by refusing to impute income to Ashagari.

25. The trial court erred in concluding that if Ashagari

worked at a minimum wage job, the cost of childcare for the parties' three children would be a net loss.

26. The court below abused its discretion by ordering Kassahun to pay Ashagari maintenance in the amount of \$5,000 per month.

27. The court below erred by finding that Kassahun has an earning capacity and financial resources that greatly exceeds what he claims.

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

29. The court erred and abused its discretion by basing its maintenance award on bias, fault, or misconduct, rather than the actual existing evidence in the record.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are the findings to which Kassahun has assigned error supported by substantial evidence?

2. Is proper to calculate a party's monthly income based on the monthly expenses both parties allege in their respective financial declarations?

3. Since the parties' purported expenditures in their

financial declarations were not verified by their income tax returns or pay stubs, were they verified by “other sufficient verification”, as required by RCW 26.19.071(2)?

4. Did the court err, abuse its discretion and/or exhibit improper bias, fault or misconduct, when it changed the manner in which it had originally computed Kassahun’s taxes to determine his net monthly income, *sua sponte*, so that even though the court found that his gross monthly income was \$1,000 less than what it originally found, his net monthly income increased from \$4,814.34 to \$5,399.52?

5. Did the court err, abuse its discretion and/or exhibit improper bias, fault or misconduct, by using the current ages of the children when it entered its Order of Child Support following remand, rather than the ages of the children on the effective date of that Order of Child Support?

6. Did the court below err and/or 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?

IV. STATEMENT OF THE CASE

Fanaye Ashagari and Zeleke Kassahun¹ are each originally

¹ For ease of consideration, the parties shall be referred to by their last names. No

from Ethiopia. They met in Seattle in 1997. 1RP 37; 6 RP 630.

Before the parties married, Kassahun was the part owner of a Texaco gas station and an adjoining convenience store, which he had purchased with his cousin and another friend in 1991. 3 RP 307, RP 636; Ex. 124. He sold a taxi license he owned shortly before the parties married. 3 CP 315; 5 RP 505-506.

When the parties married, he had savings of at least \$82,948.34. Ex. 93; 6 RP 649-650.

The parties married on January 3, 1998. 1 RP 37, CP 330.

Ashagari did not bring any property into the marriage.

In 1999, Kassahun purchased a home with his separate savings and credit. 1 RP 67; 5 RP 505; 6 RP 649-653; 7 RP 724-725; Exs. 89, 90, 91, 93.

Ashagari worked with Kassahun. She did not go back to work after the birth of their first child, Nathaniel, on June 4, 2001. 1 RP 75. Matthew was born on February 27, 2003. Andrew was born on June 13, 2006. 1 RP 37; 2 RP 205-206; 6 RP 613.

In 2001, Kassahun sold the Texaco gas station/ convenience store franchise back to Texaco. 3 RP 308-309; 5 RP 505-506.

In 2002, when Kassahun refinanced the home, he paid down

disrespect is intended.

the mortgage by \$52,862.95, again using his separate money and credit. Ashagari was put on the title to make the home community property. Exs. 96, 97; 6 RP 653-655, 7 RP 661-662.

The parties purchased a taxi license in 2002. 1RP 86; 5 RP 505-506, 6 RP 601-604; Exs. 54, 103-107.

They established Nathaniel, Inc. to purchase the Abyssinia Market in 2002, using a line of credit on their home ("HELOC), and money Kassahun had received from the sale to Texaco. 1 RP 83-84; 4 RP 370; 6 RP 527, 536, 655; Ex. 48.

During their marriage, 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. 1 RP 49, 150; 2 RP 206, 208; 4 RP 346-347; 4 RP 439-440; 7 RP 664.

From savings accrued over many years, monies owed to Kassahun from his cousin, and from the sale proceeds of the Texaco station and the taxi license before the parties married, the parties saved \$187,158 which was deposited in their joint account in a Certificate of Deposit in Kassahun's name. 1 RP 88, 4 RP 395; 6 RP 623; Ex. 54. Kassahun used \$180,000 of these funds to purchase a second taxi license in March of 2011. 6 RP 601-605, 626. CP 124-125, 141-151; Exs. 103-107.

In May of 2011, after discovering that his wife had been unfaithful, Ex.220; 2 RP 155-156, 223-224; 7 RP 691-692, Kassahun lunged at her at a birthday party. Kassahun was immediately restrained. The testimony was in dispute as to whether he actually made contact with Ashagari, but she did fall down. There was no evidence she was hurt. 5 RP 415-419, 425-426; 8 RP 789-790.

Ashagari spent the night at her mother's and returned to the parties' home the following day. 2 RP 231. When she returned home, Kassahun apologized for his behavior to his wife, 7 RP 695-696, and to the host of the birthday party. 5 RP 420, 428; 7 RP 695.

But Kassahun could not live with his wife's infidelity. So, he moved out of the parties' home on September 16, 2011. CP 4; 2 RP 172, 174; 3 RP 267; 4 RP 398. Ashagari did not ask him to leave. 2 RP 174, 4 RP 398.

After the parties separated, Kassahun continued to pay the household bills and to provide whatever support the children needed *voluntarily*. 2 RP 176; 3 RP 267-269; 4 RP 403-404; 6 RP 585-589, 618-619; 7 RP 709; Exs. 54 and 221.

He continued to see his children at least 3 or 4 times each month. 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 Ashagari

would drive them to restaurants and other places in her car. 7 RP 676. ; 8 RP 821-822; 863-865.

In Ethiopian culture, people often try to mediate marital issues with the help of family members and friends, who are often referred to as "the elders". 8 RP 772. Ashagari wanted to reconcile. Kassahun did not. 2 RP 174-175; 8 RP 782, 795-796. These mediations continued until April or May of 2012. 3 RP 273.

Nearly ten months after the parties separated, Ashagari commenced these dissolution proceedings, on July 5, 2012, CP 1-10, and did so *only* after she became convinced that Kassahun would not reconcile with her and return home. 3 RP 269.

When she commenced these dissolution proceedings, Ashagari obtained ex parte orders and moved for temporary orders for maintenance and child support. CP 11-16.

She also sought an Order of Protection, alleging that Kassahun was an alcoholic and had engaged in domestic violence towards her and the parties' children throughout their marriage---and even before. CP 40, 121.

Kassahun denied her accusations. 7 RP 710-711; CP 52-78.

In her Financial Declaration, CP 17-22; Ex. 16; Ashagari

claimed that her monthly expenses were \$6,485.54.² CP 17. But, her monthly expenses included the loan payment of \$730.28 for the HELOC loan used to purchase the Abyssinia Market, CP 19, which Ashagari knew was paid by the business, CP 64; 6 RP 536, and \$1,289 for monthly expenses for the parties' children, CP 20, as well as many other unverified expenses.

In her Declaration, Ashagari "estimated" that Kassahun earned "at least \$10,000 to \$12,000 per month between the store and the taxi (or taxis)." CP 39. In her financial declaration, she estimated that he had a gross monthly income of \$11,000. CP 17-18.

In his financial declaration, Kassahun reported that his gross monthly income consisted of \$3,000 in wages, \$900 in taxi lease income,³ and approximately \$1,200 to \$1,500 in additional earnings from the store (where he used the business to pay for personal expenses and a shareholder loan). CP 80. His monthly

² 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. 6 RP 589-590, 618-619; Ex.221. See also, CP 70, 73-78.

³ Kassahun inadvertently omitted the income from the lease of the second taxi, but corrected it later when he realized his omission. 6 RP 594-595.

expenses were \$3,110. CP 79-84.

Disregarding this actual evidence in the record, and instead relying upon Ashagari's "estimate", and her allegations of domestic abuse, the court *imputed* income to Kassahun of \$11,000 per month gross, CP 100, 116, as Ashagari had requested. The court imputed income of \$1,500 per month to Ashagari, CP 101-102, 116. It ordered Kassahun to pay \$2,111.26 per month in child support. CP 102, 117.

In addition, the court ordered him to continue paying all of the household bills, plus \$1,000 a month for maintenance. CP 91-96.

As a result of these additional financial obligations for maintenance and child support, and the expense of maintaining two households, Kassahun was compelled to borrow \$50,000 from his cousin's ex-wife, Taketu Truneh. 6 RP 564, 566-573, 618-620; 7 RP 762; Ex. 59: p. 1209, Ex. 102; CP 127-128, 155-160, 445, 470. At the time of trial, Kassahun had approximately \$9,000 remaining from this \$50,000 loan. 6 RP 573-574; Ex. 123.

These court-imposed financial obligations rendered Mr. Kassahun destitute. 6 RP 595.

This case went to trial before the Honorable Palmer Robinson. In spite of the many lurid tales of abuse alleged by

Ashagari, the court identified only one act which constituted domestic violence; namely, the birthday party assault, 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.

In his financial declaration, and in his trial testimony, Kassahun testified that he had a gross monthly salary of \$3,000 (which netted out to \$2,707.75/month, Ex. 112, 6 RP 559-561), income from the two taxi licenses of \$2,000 per month⁴(less expenses of \$528.38 for each taxi paid each quarter to Labor and Industries, 6 RP 581-582, 622-623, 7 RP 732), and an additional \$1,200 to \$1,500 which he took from the business each month to pay his personal expenses and a shareholder loan. 6 RP 531-532, 591-592, 7 RP 733, 746.

His net monthly income is \$4,714. 6 RP 592.

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

⁴ At the time of trial, Kassahun had changed his lease agreements so that the gross monthly income from the taxi licenses had increased to \$2,000 per month from \$1,800. 6 RP 595-597, 621-623.

What Kassahun reported in his financial declaration was corroborated by Steven Kessler, a Certified Public Accountant, who reviewed Kassahun's financial records, and concluded that that they were accurate. 7 RP 730-735. Kessler also found that Kassahun received \$3,000 per month in wages (with a net of \$2,706.65/month, 6 RP 559; Ex. 112), \$2,000 per month from leasing the two taxi cabs (less the Labor and Industries' expense, 7 RP 732-733), and approximately \$1,200 to \$1,500 per month he took from the business to cover personal expenses and the repayment of a shareholder loan, 7 RP 732-733, 742, 745-746.

Kassahun acknowledged and testified that, in addition to his salary of \$3,000 per month, he occasionally wrote checks to himself from his business to pay personal expenses, Ex. 55, 6 RP 536-540; and included some personal charges on his Sam's Club Discover Card, Ex. 49, 6 RP 546-554; the Costco American Express credit card, Ex. 108; 6 RP 542-544; and the AAA Visa card, 6 RP 555-557. However, these items did not exceed, and were included in the approximately \$1,200 to \$1,500 per month Kassahun and Kessler both testified he took from the business to cover personal expenses and the repayment of a shareholder loan.

But the trial judge disregarded this evidence. Even though

Ashagari had never even contended that Kassahun's gross income was greater than \$11,000 - \$12,000 per month, the court found that Kassahun had a gross monthly income of \$13,750. 10 RP 950; CP 324, 332-333.

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

In terms of the issues, let me start out by saying I had---I spent a lot of time trying to figure out the financial issues, primarily the income, as that would drive the child support and also impact the---my decision as to the allocation of property and debts, and also the issue of maintenance. And I---well the trouble from my point of view, anyway, was that I found the income tax returns, both individual and the returns of Nathaniel, Inc., not to be very helpful because I don't---I think they are internally consistent, and I think when we get to the valuation, Mr. Kessler's opinion was also consistent with that. But I don't---I couldn't reconcile them with the reality of this family's economic situation. For instance, it was well, Mr. Kassahun testified that although he paid himself \$3,000 a month as salary, he admitted that he took---paid the employees out of the till. He paid himself out of the till. And it was the testimony that the Sam's Club, and that the practice was that they would go to Sam's Club and Costco and buy whatever they

needed for the family and inventory for the store, and I wasn't able, in terms of going through banking records or credit card records, to make any meaningful allocation of which was which. 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. The trial judge then stated that she could not even 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 addition, even though the trial court found that Asahagari could work a minimum wage job, it refused to impute income to her because it thought that the cost of childcare for the parties' three children would result in a net loss, 10 RP 950:

...I carefully considered the arguments that she could go to work now, and she could probably find a minimum wage job,

but the reality of the situation she's got, with childcare for three children I think it would be a net loss.

Based on its finding that Kassahun's monthly gross income was \$13,750 per month, the trial court entered its Final Order of Child Support, CP 310-328, requiring him to pay child support in the amount of \$1,347.72 per month, CP 313, 326; 10 RP 951.

In addition, the court ordered Kassahun to pay Ashagari \$5,000 each month for maintenance, CP 306; 10 RP 951.

On appeal, this Court agreed with Kassahun that the trial court did not adequately explain its method in calculating his gross monthly income for purposes of establishing the child support and maintenance awards. This Court held at A-13:

But the court's oral ruling explaining its method in determining Kassahun's gross monthly income is unclear. And we are unable to arrive at this numerical finding based on the record before us, even when discounting the evidence the trial court found not credible. Because we cannot discern the basis on which the trial court calculated Kassahun's monthly gross income, we are unable to determine whether substantial evidence supported this finding.

Accordingly, this Court held at A-14:

We remand with instructions that the trial court enter more specific findings on

existing evidence regarding its calculation of Kassahun's gross monthly income. If necessary, the trial court should recalculate Kassahun's income and maintenance and support obligations.

Upon remand, the court below essentially "rubber-stamped" the Order and Findings on Remand proposed by the Petitioner, CP 1154-1158, as its own. It found that Kassahun's gross monthly income was \$12,750 instead of its original finding that his gross monthly income was \$13,750, but the court never explained its \$1,000 "calculation error". CP 393.

The court set forth two different ways in which it calculated Kassahun's income. In the first, it stated, CP 396:

In order to calculate the Respondent's income of \$12,750 the Court relied on the parties' financial declarations. The Court added the sums the parties stated under oath that they spent and took note of the fact that they had no credit card debt. They were paying all of their expenses out of cash flow generated by the market and the cab and managed to save enough money to pay for a second cab license. The Court looked at the expenditures of the parties and eliminated duplications. The Court added up the expense, minus Mr. Kassahun's housing and utilities, and reached a figure of about \$8,700. The Court determined that over ten years the parties were able to save \$187,000, \$181,000 of which was used to pay for

the second cab license, which the Court finds is approximately \$1,500 a month. The resulting figure of \$10,200.00 is a net figure. In order to reach a gross figure the Court then estimated what the taxes would be if taxes were being paid using a figure of 25 percent. The resulting total is \$12,750 which the Court finds to be the Respondent's gross monthly income.

The trial court explained its second method of calculating Mr.

Kassahun's income as follows, CP 396-397:

In addition the Court finds that the Petitioner's estimate of the Respondent's income is credible. The Petitioner presented an estimate of the Respondent's income based on the business accounts and credit card statements showing the personal expenditures the Respondent made using credit cards (which balances are paid regularly by the Respondent using business funds) and checks from the business totaling approximately \$11,000. This figure is a net figure. Adding in estimated taxes to reach a gross figure results in a total gross monthly income of \$13,750. In addition, the Respondent has access to substantial amounts of cash that the Court estimates is, at a minimum, \$1,750 a month and the Respondent has demonstrated the ability to save at least \$1,500 per month.

Even though the court below found that Kassahun's gross monthly income was \$1,000 less than what it originally found, it changed the manner it had previously used to compute his taxes,

sua sponte, without explanation, Compare CP 426-427 with CP 459-460, so that his Kassahun's net monthly income increased from \$4,814.34, CP 312, to \$5,399.52, CP 399.

Moreover, even though the Order of Child Support on Remand was effective as of November 13, 2013, CP 401-402, the date of its original Final Order of Child Support, the lower court used the current ages of the children, CP 399, rather than the ages of the children when the original Order of Child Support was entered, CP 311, to calculate Kassahun's support obligation.

As a result, even though the court found that Kassahun's gross monthly income had *decreased* by \$1,000 per month, his transfer payment *increased* from \$1,347.72, CP 313, to \$1,592.73, CP 400.

The court also refused to modify its maintenance order. CP 393.

This appeal followed. CP 482-508. Additional facts will be presented as they become relevant to the issues under review.

V. ARGUMENT

A. Standard of Review.

In *In re Marriage of Schnurman*, 178 Wash.App. 634, 638, 316 P.3d 514 (2013), this Court set forth the proper standard of

review of a child support order as follows:

We review a trial court's order of child support for abuse of discretion. *In re Marriage of Booth*, 114 Wash.2d 772, 776, 791 P.2d 519 (1990). A trial court abuses its discretion if its decision rests on unreasonable or untenable grounds. *Dix v. ICT Grp., Inc.*, 160 Wash.2d 826, 833, 161 P.3d 1016 (2007). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or involves incorrect legal analysis.

In this case, the trial court abused its discretion.

B. The Court's Findings on Remand Are Not Supported By Substantial Evidence.

In its Findings on Remand, CP 394-397, the court made certain findings that are not supported by substantial evidence.

In particular, it found that the "Respondent's tax returns are not a reliable indicator of his income and are not credible". CP 394.

In *Mansour v. Mansour*, 126 Wash.App. 1, 13,106 P.3d 768 (2004), the lower court concluded that the Mr. Mansour's tax returns were not a correct measure of his income because he took tax deductions to which he was not entitled. The court here gave no reason as to why it found Kassahun's tax returns were "not a reliable indicator of his income and are not credible".⁵

⁵ The court found, CP 394, "Respondent admitted as much." No. He did not. This finding is not supported by substantial evidence.

The lower court in *Mansour, supra*, then based Mr. Mansour's income on his last three years as a real estate agent at a net of \$4,000 per month. But this Court rejected that determination:

We note nothing in the record to support the finding of an income for the father as low as \$4,000 per month. Because we are unable to review the trial court's determination of the father's income without further information, we remand to allow the trial court to specify the basis for its determination of income.

Likewise here, there is nothing in the record to support the court's finding that Kassahun's income is \$12,750 per month.

The court found that the "Respondent's wage statements are not a reliable indicator of his income due to the fact that he pays himself a very small wage". CP 394. Yet, there was no evidence to support the court's finding/conclusion that his wage is "very small", or that his wage statements are not a reliable indicator of his income.

The court found, CP 394, that Kassahun

...used the same credit cards to purchase the inventory for his grocery store and to pay the family's expense. He made no effort to segregate the personal expenses and did not declare any of them income.

In a similar vein, the court found, CP 394:

...the Respondent uses business funds to pay for groceries and other household

items when he shops for Abyssinia Market at COSTCO and other retailers. The Respondent uses credit cards to make purchases of both personal and business expenses.

Again, the first finding is not supported by substantial evidence, while the second finding is misleading. Kassahun did occasionally make charges on his business credit cards for personal expenses, as he testified, Exs. 49, 55, 6 RP 538-540, 546-554; but he did try to segregate those items and report them as income. They were included in the approximately \$1,200 to \$1,500 per month both Kassahun and Steve Kessler testified he took from the business to cover personal expenses and the repayment of a shareholder loan, 7 RP 733, 742, 746---and which he reported as income in his financial declarations, CP 80-81; 6 RP 532, 592.

The court also found, CP 394-395:

The Respondent has access to large amounts of cash through the business (Abyssinia Market and Taxi Cabs) that he uses to pay his employees, and for other expenses including but not limited to activities with the children, gifts for the children, supervised visitation, and domestic violence treatment.

While it is true that Kassahun testified he paid his employees “out of the till”, 6 RP 562-563, See also, 7 RP 742-743, there is no

evidence that he paid himself “out of the till” (contrary to the court’s finding in its oral ruling, 10 RP 249, which it wisely did not repeat in its Order and Findings on Remand., CP 393-397); See also, 6 RP 561-562. Obviously, the money he paid his employees was not available to him.

Although Kassahun did testify that he used his Macy’s credit card and cash to pay for his supervised visitation with his children, 6 RP 614-615, there was **no** evidence that cash was unreported or came from some unverified source. Nor was there any evidence that he used cash---much less, unreported cash----to pay “for other expenses including but not limited to activities with the children, gifts for the children... and domestic violence treatment.”

The court also found that the “Respondent has income from the two cab licenses, for which he never provided documentation.” Once again, this finding is not supported by substantial evidence. Kassahun documented the income he received from the two cab licenses in his tax returns, Exs. 29 Schedule C, and 30; bank records, Exs. 54, 123; 6 RP 580-582, 586, 600-601; and quarterly reports to the Department of Labor and Industries and the Department of Revenue, 6 RP 598.

In addition, the court found, CP 395:

The testimony of the Respondent's expert, Steven Kessler, was not credible, as Mr. Kessler did not have access to all the financial records of the business or the Respondent's personal financial records, and he did not have a reliable estimate of the amount of cash the Respondent has access to from the business.

These findings are also not supported by substantial evidence. There was no evidence that he did not have access to all of Kassahun's personal and business financial records. While Kessler may not have reviewed the parties' joint bank statements, Kassahun's personal bank account statements, or credit card statements, there was no evidence that Kessler needed those statements for his review, or that those statements were inconsistent with the financial records he did review.

Nor was there any evidence that Kessler did not have a reliable estimate of the amount of cash to which Kassahun had access from the business. Ex. 12; 7 RP 732-742, 745-748.

The court also found, CP 395-396:

The Respondent claims that he was forced to borrow money to pay his maintenance and child support obligations. The Court finds these claims not credible. The Respondent testified that he used cash from these funds for personal expenses

and that he was using the remaining \$9,000 from this “loan” to pay for his attorney’s fees. Based on the Respondent’s continued personal and business expenditures after separation, there is evidence that he does not require additional loans to meet his child support and maintenance obligations.

However, the evidence presented at trial was undisputed that Kassahun had to borrow \$50,000 from Taketu Truneh after the Temporary Orders were entered in August of 2012 to meet his maintenance and child support obligations, as well as his personal expenses, 6 RP 564, 566-573, 618-620; 7 RP 762; Ex. 59: p. 1209, Ex. 102; CP 127-128, 155-160, 445, 470, including the \$9,000 remaining from this loan at the time of trial which he intended to use to pay his attorney’s fees. 6 RP 573-574; Ex. 123.

Similarly, there is nothing about his “continued personal and business expenditures after separation” to support a conclusion that “he does not require additional loans to meet his child support and maintenance obligations.”

The court also found, CP 396, that the parties

...had no credit card debt. They were paying all of their expenses out of cash flow generated by the market and the cab and managed to save enough money to pay for a second cab license.

Although *prior to separation*, the parties *may* have “had no credit card debt”, been “paying all of their expenses out of cash flow generated by the market and the cab”, and “managed to save enough money to pay for a second cab license”, although there is no evidence to support that proposition, Kassahun did have credit card debt at the time of trial. 6 RP 557.

C. The Trial Court Erred and Abused Its Discretion By Disregarding The Evidence And Calculating Kassahun’s Income By The Expenditures Alleged In The Parties’ Financial Declarations.

In *In re Marriage of Schnurman*, 178 Wash.App. at 639

When entering an order of child support, the trial court begins by setting the basic child support obligation. RCW 26.19.011(1); *Graham*, 159 Wash.2d at 627, 152 P.3d 1005.⁶ This obligation is determined from the statute’s economic table, which is based on the parents’ combined monthly net income, as well as the number and age of their children. RCW 26.19.011(1), 020. The economic table is presumptive for combined monthly net incomes of \$12,000 or less. RCW 26.19.020, .065.

The trial court next allocates the child support obligation between the parents based on each parent’s share of the combined monthly income. RCW 26.19.080(1). The court then determines the standard calculation, which is the presumptive amount of child

⁶ *State ex rel. M.M.G. v. Graham*, 159 Wash.2d 623, 152 P.3d 1005(2007)

support owed by the obligor parent to the obligee parent. RCW 26.19.011(8); *Graham*, 159 Wash.2d at 627, 152 P.3d 1005.

RCW 26.19.071, entitled “Standards for determination of income” states in pertinent part:

(1) **Consideration of all income.** All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent....

(2) **Verification of income.** Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

In *In re Marriage of Trichak*, 72 Wash.App. 21, 26-27, 863 P.2d 585 (1993), this Court rejected the use of financial affidavits or declarations to determine income, and re-affirmed the necessity to use tax returns to verify income, as required by RCW 26.09.071(2):

First, as Ms. Trichak argues, the \$2,000 figure listed on her financial affidavit was clearly marked as an estimate. In fact, the form comprising the financial affidavit recognizes that the figures listed may only be estimates. The form states: “These figures should, *to the extent possible*, reflect Washington State Child Support Schedule worksheets pursuant

to RCW 26.19.” Second, as required by RCW 26.19.071(2), Ms. Trichak provided her tax returns to verify the \$1,255 figure listed on her worksheets. Thus, for these reasons, we find that the trial court did not err in using the worksheet figure in determining the child support obligation.

In *In re Marriage of Bucklin*, 70 Wash.App. 837, 840, 855 P.2d

1197(1993), this Court re-affirmed RCW 26.09.071(2), holding:

Income shall be verified by tax returns from the preceding 2 years and current pay stubs; income not appearing on tax returns and pay stubs must be verified by “other sufficient verification”. RCW 26.19.071(2).

Unlike Mr. Bucklin, Kassahun did verify his income by producing his “tax returns from the preceding 2 years and current pay stubs”, as required by RCW 26.19.071(2). As previously indicated, that evidence established that Kassahun had a gross monthly income of approximately \$6,500, consisting of the following:

1. \$3,000 per month in W-2 wages from Abyssinia Market;
2. \$2,000 per month in income from two taxi licenses; and
3. Approximately \$1,500 per month where he used his business to cover personal expenses and the repayment of a shareholder loan.

Kassahun acknowledged and testified that, in addition to his salary of \$3,000 per month, he occasionally wrote checks to himself from his business, Ex. 55, 6 RP 538-540; included personal charges on his Sam's Club Discover Card, Ex. 49, 6 RP 546-554; and used his AAA Visa card to pay attorney fees, Ex. 56, 6 RP 554-558.⁷ But these items did not exceed the average of approximately \$1,200 to \$1,500 both Kassahun and Steven Kessler testified he took from the business each month to cover personal expenses and the repayment of a shareholder loan.

No evidence was presented which showed that Kassahun had any other income, or sources of income. Kassahun's gross monthly income of approximately \$6,500 per month was based upon the actual evidence in the record.

In addition, the evidence was undisputed that, after the court entered the temporary orders in August, 2012, Kassahun was compelled to borrow \$50,000 from Taketu Truneh to help him meet the additional financial obligations for maintenance and child support imposed upon him by the court, as well as his personal expenses. Exs 59, 102; 6 RP 566-578.

⁷ He also took a cash advance from his AAA Visa card, which was then deposited in his personal account, to pay the charges on that card. 6 RP 580.

But the trial judge disregarded that evidence. Instead the trial judge concocted two equally flawed methods, and made up facts which are not supported by substantial evidence, to reach the outcome it wanted to reach.

In the first method, the court used the expenditures alleged in the parties' financial declarations to calculate Kassahun's income. But the expenditures alleged on financial declarations are inherently even less reliable than the incomes the parties report to determine their incomes---which this Court rejected in *In re Marriage of Trichak, supra*. The monthly expenses shown in the financial declarations are generally "guesstimates" at best. They are often aspirational rather than actual expenses. Indeed, the "Monthly Expense Information" on the Financial Declaration, CP 263, states:

Expenses should be calculated for the future, after separation, based on the anticipated residential schedule for the children.

Accordingly, the use of the parties' alleged expenditures in their financial declarations to calculate Kassahun's income was error and an abuse of the court's discretion. It is not at all clear what the trial judge purportedly did when it stated:

The Court looked at the expenditures of the parties and eliminated duplications.

The Court added up the expense, minus Mr. Kassahun's housing and utilities, and reached a figure of about \$8,700.

It is not possible to reconstruct what the court actually did to arrive at its "figure of about \$8,700." There is simply no telling what expenditures the Court considered or what duplications it eliminated. The numbers simply do not add up.

Hence, this finding is not supported by substantial evidence.

1. The Parties Reported Expenditures Were Not Sufficiently Verified Or Supported By Substantial Evidence.

In addition, since apart from Ashagari's housing expenses, whatever alleged expenditures the trial court chose to construe as "income", do not appear on the parties' tax returns or pay stubs, they had to be "verified by 'other sufficient verification'. RCW 26.19.071(2)". *In re Marriage of Trichak, supra; In re Marriage of Bucklin, supra*. As this Court held in *In re Marriage of Bucklin*, 70 Wash.App. at 841, if a party's income cannot be verified by tax returns or pay stubs, that party's income must be verified by "*adequate independent records from which his income could be determined.*" [italics and emphasis provided by this Court].

No such independent records were ever produced.

Although Ashagari claimed in her financial declaration that

her monthly expenses were \$6,667.54, CP 305-310, she provided no independent records corroborating any of her claimed expenses, apart from the mortgage payment and the HELOC loan.

Since the expenditures alleged in the parties' financial declarations, with the exception of Ashagari's housing expenses, do not appear on the parties' tax returns or pay stubs, and were not "verified by 'other sufficient verification'", as required by RCW 26.19.071(2); they were not supported by substantial evidence.

In addition, in Section 5.1 of her Financial Declaration, she included the \$730.28 monthly payment for the HELOC loan which is paid by the Abyssinia Market. CP 307; 6 RP 536.

In Section 5.2 of her Financial Declaration, Utilities, she claimed \$110 for "Other", which she testified was for lawn care and a home security system, 5 RP 511---but provided no independent records as proof. *In re Marriage of Bucklin, supra*.

In Section 5.3 of her Financial Declaration, Food and Supplies, her expenses increased by \$225 from the Financial Declaration she filed at the inception of these proceedings. She also claimed \$225 under "Other" for which she provided no independent records as proof. *In re Marriage of Bucklin, supra*.

In Section 5.4 of her Financial Declaration, Children, she

claimed \$491 for "Other child-related expenses", but provided no explanation for these expenses---much less independent records as proof.

In Section 5.7 of her Financial Declaration, Personal Expenses, she claimed that she spent \$100 per month on "Gifts" for which she provided no explanation---much less independent records as proof.

For that matter, she provided no corroborating independent records to prove any of her claimed expenses, apart from the mortgage payment and the HELOC loan.

2. The Court Erred By Using What The Parties Had Been Able To Save Over Ten Years When The Parties Were Together To Calculate Kassahun's Income After The Parties Separated.

In calculating Kassahun's income, the court "determined that over ten years the parties were able to save \$187,000, \$181,000 of which was used to pay for the second cab license, which the Court finds is approximately \$1,500 a month".

But the money the parties saved over this ten year period, included Kassahun's separate property sale proceeds from the sale of the Texaco station and Star-Mart he owned before the parties married. 6 RP 623.

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 Kassahun had--- much less continued to have--- an additional \$1,500 each month in income to save was not supported by the evidence presented at trial---much less substantial evidence.

In this case, there was no evidence that the parties saved \$1,500 per month to acquire savings \$187,000 in the first place.

Moreover, in *In re Marriage of Scanlon and Witrak*, 109 Wash.App. 167, 178, 34 P.3d 877(2001), this Court held:

A court must determine support according to the current circumstances of the parties.

In this case, there was no evidence that the parties had been able to save any money after the second taxi cab license was purchased in March of 2011.

There was no evidence that the parties had been able to save any money after they separated on September 16, 2011.

And, even more significantly, there was no evidence that Kassahun had any ability to save any money, or did save any money---much less, \$1,500 per month--- at the time the Court entered its Order of Child Support in November of 2013, more than two years later. As this Court held in *Matter of Marriage of Payne*, 82

Wash. App. 147, 152, 916 P.2d 968 (1996):

When calculating the initial support obligation, a court may consider all relevant factors, including current and future income. Because the father's income changed, his past earnings were no longer of primary relevance, and the court made no determination of voluntary underemployment.

Finally, the lower court failed to acknowledge that instead of being able to save money, Kassahun had been compelled to borrow \$50,000 from Taketu Truneh to meet the additional obligations imposed upon him by the lower court, and his personal expenses.

D. The Court's Second Method Of Calculating Kassahun's Income Was Error And An Abuse of Discretion.

Quite frankly, it is unclear to what the court was referring when it set forth its second method of calculating Kassahun's gross monthly income.

The closest thing that comes to it is Ashagari's attorney's closing argument. But, closing arguments are not evidence.

State v. McKenzie, 157 Wash.2d 44, 57 fn. 3, 134 P.3d 221(2006).

In any event, Ashargari's attorney argued, 9 RP 888-889, that in the nine months from January of 2012 to September of 2012, Kassahun paid: (1) the expenses from the parties' joint account of

\$42,091; (2) the expenses from his personal account of \$22,582; (3) personal expenses on a business Costco American Express credit card of \$8,728; (4) the expenses on Ashagari's card of \$1,287; (5) personal expenses on a business Sam's Club Discover Card of \$14,824; and (6) \$6,750 for the HELOC. These items total \$96,262.

Ashagari's attorney then stated that she deducted \$334 for business expenses, which she had originally characterized as personal expenses, for ADT, Pemco and Vern Fonk Insurance, which resulted in a total of \$96,085.⁸ She then divided \$96,085 by nine months to assert that \$10,676 is "what Mr. Kassahun actually paid and was able to pay each month for expenses." 9 RP 889.

This analysis is so flawed that one hardly knows where to begin. First, while there was evidence that Kassahun did make some charges for personal expenses on his business credit cards, there was no evidence ---much less substantial evidence---that he charged \$8,728 for personal expenses on his Costco American Express card, or \$14,824 for personal expenses on his Sam's Club Discover Card.⁹

⁸ It would actually result in a total of \$95,928. In her trial brief, CP 343, to which she alluded to in her closing statement she alleged that these business expenses totaled \$3,034.91.

⁹ Since the trial court did not make these findings, it was not necessary to assign error to Ashagari's attorney's allegations. Even so, these allegations are not supported by

The expenses on Ashagari's card were paid from the joint account *before* Ashagari commenced these dissolution proceedings. Exs. 54, 221. Kassahun did not pay the expenses on Ashagari's card after she commenced these dissolution proceedings. 6 RP 545-546.

As previously noted, the evidence was undisputed the \$730.28 monthly payment for the HELOC loan was paid by the business, not the parties personally. CP 307; 6 RP 536. .

There was no evidence, much less substantial evidence to support the court's finding that "the Respondent has access to substantial amounts of cash that the Court estimates is, at a minimum, \$1,750 a month".

Nor, as previously discussed, was there any evidence, much less substantial evidence, to support the court's finding that "the Respondent has demonstrated the ability to save at least \$1,500 per month"---and certainly not at the time of trial.

In sum, there was no evidence, much less substantial evidence, that the "Petitioner's estimate of the Respondent's income is credible." Substantial evidence shows that the "Petitioner's estimate of the Respondent's income" was **not** credible.

Moreover the court's analysis ignores the fact that after the

substantial evidence.

Temporary Order and the Temporary Order of Child Support were entered on August 8, 2011, CP 116-122, which ordered Kassahun to continue to pay all of the household bills, which he had been doing prior to the entry of those orders, plus \$1,000 a month for maintenance and an additional \$2,111.26 per month in child support, CP 122-145, Kassahun had to borrow \$50,000 from Taketu Truneh to meet his additional obligations for child support and maintenance, as well as both parties' household expenses. 6 RP 564, 566-568, 619-620; 7 RP 762; Exs. 59: p. 1209, 102; CP 445, 470.

While the trial court was at liberty to disregard the testimony of Steven Kessler and of Kassahun, it did not have license to just make up numbers to reach a particular outcome. Yet, that is exactly what the trial court did here. 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, 125, 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....

Because it does not comport with the

evidence, the trial court's estimate of Stout's income is unreasonable and constitutes an abuse of discretion. We reverse the court's order and remand for recalculation of the support amount to conform to the evidence.

See also, *In re Marriage of Bucklin*, 70 Wash.App. at 841 (“Despite explicitly finding that it had neither the statutorily mandated verification of Mr. Bucklin's income, nor adequate independent records to determine it, the court exercised its discretion in an untenable and manifestly unreasonable way by essentially guessing at his income.”).

E. The Court’s Maintenance Award Did Not Evidence A Fair Consideration Of The Statutory Factors.

RCW 26.09.090(1) provides that the court may grant a maintenance order for either spouse, in an amount and for a period of time the court deems just, *without regard to misconduct*, after considering all relevant factors, including, in pertinent part:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, ...; and...

(f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

An award of maintenance is within the trial court's discretion. *In re Marriage of Mathews*, 70 Wash.App. 116, 123, 853 P.2d 462(1993).

An award of spousal maintenance that does not evidence a fair consideration of the statutory factors used in determining such an award constitutes an abuse of discretion. *Spreen v. Spreen*, 107 Wash.App. 341, 349, 28 P.3d 769(2001).

In this case, the court erred and abused its discretion by finding that Kassahun has an earning capacity and financial resources that greatly exceeds what he claims. No evidence, much less substantial evidence, supports this finding. The evidence establishes otherwise.

Likewise, the court below erred and abused its discretion by finding that Kassahun could pay maintenance of \$5,000 per month and still have the ability to meet his financial obligations while meeting those of his spouse. No evidence, much less substantial evidence, supports this finding.

Indeed, the evidence establishes that he cannot pay maintenance of \$5,000 per month and still have the ability to meet his financial obligations while meeting those of Ashagari.

F. The Court's Calculation of Kassahun's Income Was Based On Bias, Fault, or Misconduct, Rather Than Evidence.

Since the trial court fabricated patently flawed methods to calculate Kassahun's income which have no legal basis, and made findings for which there is no evidence or evidentiary support, it is apparent that its rulings were based on bias, fault, or misconduct.

In making an award of maintenance, a court may not consider a party's "misconduct". RCW 26.09.090(1). Compare, *In re Marriage of Muhammad*, 153 Wash.2d 795, 108 P.3d 779 (2005).

But there are two other things which the court did on remand which confirms that its calculation of Kassahun's income, and the resulting awards of maintenance and child support, were based on bias, fault, or misconduct.

In the first instance, notwithstanding the fact that the court found on remand that Kassahun's gross monthly income had *decreased* by \$1,000 from its original calculation, the court re-calculated the manner in which it calculated Kassahun's taxes, *sua sponte*, so that it found that his monthly net income actually *increased* from \$4,814.34 to \$5,399.52. CP 399.

This was plain error and abuse of the court's discretion.

Secondly, even though the Order of Child Support following

remand was made effective as of November 13, 2013, CP 401-402, the court used the current ages of the children, CP 399, rather than the ages of the children when the original Order of Child Support was entered, CP 311. See also, RCW 26.19.020. Again, this was plain error and an abuse of the court's discretion.

Yet, when these plain errors were brought to the court's attention, CP 416-479, it refused to reconsider, CP 480, 508, thereby confirming that its calculation of Kassahun's income, and its resulting maintenance and child support awards, were improperly based on bias, fault, or misconduct.

G. The Trial Court Erred And Abused Its Discretion By Refusing To Impute Income To Ashagari.

The court is required to impute income to a voluntarily underemployed parent. Imputing income to a voluntarily unemployed or an underemployed parent is mandatory. RCW 26.19.071(6); *In re Custody of BJB*, 146 Wash.App. 11, 14-15, 89 P.3d 800(2008); *Goodell v. Goodell*, 130 Wash.App. 381, 389, 122 P.3d 929 (2005) ("A parent may not avoid his or her child support obligation by remaining voluntarily unemployed or underemployed."); *In re Marriage of Pollard*, 99 Wash.App. 48, 52-54, 991 P.2d 1201(2000); *In re Marriage of Brockopp*, 78

Wash.App. 441, 445, 898 P.2d 849(1995)

The trial court erred and abused its discretion by refusing to impute income to Ashagari, particularly after finding that “she could probably find a minimum wage job”,¹⁰ because it concluded that the cost of “childcare for three children I think it would be a net loss.” 10 RP 950.

In the first place, there is no evidence in the record as to what the cost of child care for the parties’ three children might be.¹¹

Secondly, when the children were much younger, and Ashagari worked at Absynnia Market, she left the children in the care of relatives, and did not use daycare. 5 RP 432.

Third, the children are in school and would not require daycare if their mother was working while they were in school. 5 RP 432-433.

And finally, even if the children were required to be in daycare while their mother was working, that is not a valid reason to refuse to

¹⁰ “In the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round, full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census.” RCW 26.19.071(6); *In re Custody of BJB, supra*.

¹¹ While “daycare expenses” are not included in the basic child support obligation or the economic table, RCW 26.19.020; R.C.W. 26.19.080(3) requires that daycare expenses “shall be shared by the parents in the same proportion as the basic child support obligation.” *Mattson v. Mattson*, 95 Wash.App. 592, 599-601, 976 P.2d 157(1999).

impute income to a parent who is voluntarily unemployed or an underemployed.

Thus, the court abused its discretion when it found that Ashasagari was voluntarily unemployed, and that “she could probably find a minimum wage job”, but refused to impute income to her, as required by RCW 26.19.071(6).

VII. CONCLUSION

This pattern of punishing Kassahun by imposing financial obligations on him based on Ashagari’s claims of domestic violence, but which are otherwise unsupported by the law or the evidence, which began at the commencement of these proceedings, continued through trial, and now on remand.

The court’s patently flawed methods for calculating Kassahun’s gross monthly income were error and constituted an abuse of the court’s discretion. The court disregarded the evidence in the record. Its findings are not supported by substantial evidence.

The trial court’s analysis of Kassahun’s income, coupled with its *sua sponte* recalculation of the manner in which his taxes were computed so that his net income increased even though his gross income decreased, its use of the current ages of the children rather than the ages of the children at the time the original child support was

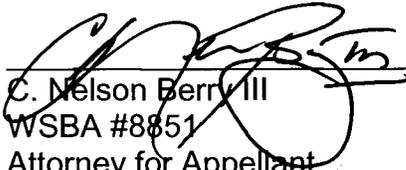
entered, and its refusal to impute income to Ashagari even though she was she was voluntarily unemployed, clearly show bias on the part of the trial judge based on its perception of fault or misconduct.

The trial court's maintenance award which was based on its fabricated calculations of Kassahun's income shows that its maintenance award was not based upon a fair consideration of the statutory factors, but rather was based on bias, and/or the court's perception of fault and/or misconduct.

The trial court's maintenance and child support orders following remand which were premised upon its finding that Mr. Kassahun has a gross monthly income of \$12,750, must be vacated and reversed. This case should be remanded to an impartial judge

with instructions that the trial court enter more specific findings on existing evidence regarding its calculation of Kassahun's gross monthly income. If necessary, the trial court should recalculate Kassahun's income and maintenance and support obligations.

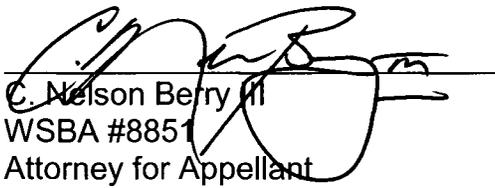
Respectfully submitted this 31st day of August, 2016.


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Certificate of Service

I certify that on the 31st day of August, 2016, 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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)
FANAYE ASHAGARI,)
Respondent,)
and)
ZELEKE KASSAHUN,)
Appellant.)

No. 71295-1-I
DIVISION ONE
UNPUBLISHED OPINION
FILED: March 23, 2015

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 23 AM 11:30

TRICKEY, J. — Zeleke Kassahun appeals from the decree of dissolution, parenting plan, findings of fact and conclusions of law, and several related orders entered following trial. Because the record supports the trial court's finding that Kassahun's assault on his wife "was not an isolated incident" of domestic violence, we affirm the RCW 26.09.191 restrictions in the parenting plan. We also affirm the entry of a permanent protection order as there is a reasonable likelihood of the resumption of domestic violence. However, we agree with Kassahun's contention that the trial court did not adequately explain its method in calculating his gross monthly income for purposes of establishing the child support and maintenance awards. On this ground, we remand to the trial court for further findings concerning Kassahun's gross monthly income.

FACTS

Kassahun was born in Ethiopia. In 1986, he moved to Seattle to live with his former wife to whom he was married between 1980 and 1989. He found work driving a taxicab until he purchased a Texaco gas station in 1991.

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Fanaye Ashagari was also born in Ethiopia and completed high school there. She came to the United States in March 1995 and found work at a fast food restaurant. In January 1996, Ashagari married her former husband. They divorced in January 1997. Shortly after her divorce, Kassahun hired her to work at his gas station as a cashier. They began a romantic relationship and, in January 1998, they were married. The parties have three children. Ashagari did not return to work outside the home after their first child was born in 2001.

Kassahun was the sole provider for the family and controlled Ashagari's spending. He did not permit Ashagari to have money except for small amounts for personal expenses. One month before they married, they opened a joint bank account. Ashagari had no access to the account, however. Only after 2006 did Kassahun allow Ashagari to write checks from the account to pay the bills. Kassahun did not permit Ashagari to open a bill unless he needed her to sign it, in which case he required her to sign the document in his presence.

The parties bought a home together in 1999. They purchased a taxicab license in 2000. In 2002, they acquired the Abyssinia Market, which Kassahun operates. They purchased several cars throughout the marriage, including luxury cars such as a Lexus and Mercedes-Benz. Over the years they were able to save a large sum of money. In 2011, unbeknown to Ashagari, Kassahun withdrew \$187,000 from the joint bank account and invested \$180,000 in another taxicab license.

Kassahun paid himself a modest salary from his work at the Abyssinia Market. His tax returns reflected the paychecks he wrote to himself from the business account as well as his income from one of the taxicabs. He reported an income from the taxicab

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licenses of less than \$1,000 a year. But at trial, Kassahun claimed to receive \$1,000 each month per taxicab, paid in cash. He provided no documented proof of this income and stated that he does not keep records of the income.

Kassahun paid some of the family's personal expenses from the Abyssinia Market business account. He issued checks to himself from the business's bank account, which he either deposited in the joint bank account or his personal account, or cashed. Kassahun used his business's credit cards for personal expenses and paid thousands of dollars each month on the running balances. In addition, Kassahun withdrew cash from the business account and from unrecorded cash sales to pay personal expenses.

Kassahun and Ashagari separated on September 16, 2011. Kassahun continued to pay the household expenses. On July 5, 2012, Ashagari filed a petition for dissolution, a petition for an ex parte restraining order, and a petition for order of protection. Kassahun ceased paying the household expenses once Ashagari filed these petitions. The trial court subsequently entered an ex parte restraining order and a temporary protection order.

Jennifer Bercot of Family Court Services conducted an extensive parenting plan evaluation. Based on her evaluation, she recommended parenting restrictions under RCW 26.09.191 due to Kassahun's history of domestic violence and long-term impairment resulting from his alcohol abuse. Bercot interviewed Kassahun, Ashagari, and several of their collateral contacts.

In Bercot's interview with Ashagari, Ashagari reported that Kassahun would occasionally stay up all night drinking at their house. Ashagari feared that he would kill

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her, and she continued to be fearful of Kassahun even after their separation. When asked to describe the last incident of physical force, Ashagari replied that at the end of 2010, on New Year's Eve, Kassahun was intoxicated and attempted to hit her with a bottle. When their son intervened, Kassahun acted aggressively toward him. Ashagari went between the two of them and Kassahun began to hit her on the face. Ashagari described several more occasions in which Kassahun was physically abusive toward her.

In addition, according to Ashagari, Kassahun threatened to kill her numerous times throughout their marriage. He would point his arm at Ashagari like he was shooting a gun at her tell her that he wished to kill her. On one occasion, while she was videotaping him, Kassahun said to her, "you deserve to be fried with a bullet."¹ Kassahun admitted that he made this threat to Ashagari.

Moreover, Ashagari's brother, who had lived with the family for some time, told Bercot that Ashagari was scared of Kassahun because Kassahun had hurt her and because Kassahun "gets so crazy when he's drinking."² Ashagari's sister reported that there were times when Ashagari would take the children to her house because Kassahun threatened to kill Ashagari and she was frightened of him.

At trial, Ashagari related several additional incidents in which Kassahun became physically and verbally abusive toward her throughout their marriage. For example, prior to their marriage in 1998, Kassahun assaulted her after she told him about her abusive relationship with her former husband. Soon after they were married, Kassahun began to drink more. On one occasion, Kassahun was angry and hit and broke a glass

¹ Exhibit (Ex.) 1 at 7.

² Ex. 1 at 18; 2 Report of Proceedings (RP) at 124.

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shelf with his hand. Ashagari became fearful of him after this incident. On another occasion in 2000, Kassahun was upset at Ashagari and pushed her down a flight of stairs.

In May 2011, at a birthday party at Siefudin Hassen's house, Kassahun lunged at Ashagari, choked her, and pushed her to the ground. Hassen described the incident at trial. He recalled Kassahun shouting at and insulting Ashagari. Hassen said he and other people attempted to pull Kassahun away from Ashagari when Kassahun attacked her. Ashagari testified that she was afraid of him that night and spent the night with her children at her mother's house. Ashagari added that she was and continued to be fearful of Kassahun because of his threats to kill her and his violent behavior toward her.

Furthermore, when asked about the lethality assessment, Bercot explained that "the lethality risk factors that were present included: [c]hoking, stalking, substance abuse, violence in the presence of the children, violence towards the child, a history of violence. The severity of the violence or the frequency for duration was significant, sort of obsessive types of behaviors, threats to kill the mother."³ Kassahun's therapist at Wellspring Family Services' domestic violence treatment program testified that based on Kassahun's self-report and work he does in the program, it was probable that Kassahun had battered Ashagari.

The trial court concluded that RCW 26.09.191 restrictions were appropriate based on Kassahun's history of acts of domestic violence. The trial court ordered Kassahun to pay maintenance for a period of four years and \$1,347.72 in monthly child

³ 2 RP at 133.

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support. The trial court additionally entered a permanent order of protection, identifying Ashagari as the protected party.

Kassahun appeals.

ANALYSIS

Parenting Plan

Kassahun contends the trial court misapplied the legal requirements of RCW 26.09.191(1)(c) because, he asserts, its finding that he engaged in “a history of acts of domestic violence,” as required by the statute, was based on only one act of domestic violence. We disagree.

We review a trial court's rulings on the provisions of a parenting plan for abuse of discretion.⁴ In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion if its decision is (1) manifestly unreasonable, (2) based on untenable grounds, or (3) based on untenable reasons. Littlefield, 133 Wn.2d at 46-47. “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” Littlefield, 133 Wn.2d at 47. A court’s decision is based on untenable grounds if the record does not support the factual findings. Littlefield, 133 Wn.2d at 47. Finally, a court’s decision is based on untenable reasons if it is “based on an incorrect standard or the facts do not meet the requirements of the correct standard.” Littlefield, 133 Wn.2d at 47.

⁴ Kassahun does not identify any standard of review in his briefing to this court. Nor does he set forth the reason—e.g., a manifestly unreasonable decision—for the alleged abuse of discretion. Kassahun does not argue that the evidence in the record does not support the trial court’s findings of fact or that those findings, in turn, do not support the trial court’s conclusions of law. His briefing suggests that he argues that the trial court abused its discretion by deciding the terms of the parenting plan on untenable reasons.

RCW 26.09.191(1) and (2) are mandatory provisions requiring the trial court to restrict a parent's time with his or her child and prohibit mutual decision-making if the court finds that a parent has engaged in a history of acts of domestic violence or an assault that "causes grievous bodily harm or the fear of such harm." RCW 26.09.191.191(1)(c), (2)(a)(iii).

"Domestic violence," as defined in RCW 26.50.010(1)(a), 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.

Although RCW 26.09.191 does not define "a history of acts of domestic violence," the phrase excludes "isolated, de minimus incidents which could technically be defined as domestic violence." In re Marriage of C.M.C., 87 Wn. App. 84, 88, 940 P.2d 669 (1997) (quoting former RCW 26.50.010(1) (1987)). "Mere accusations, without proof, are not sufficient to invoke the restrictions under [RCW 26.09.191.]" Caven v. Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998).

Here, the trial court found:

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

The father had the mother followed, and monitored her phone records. The court finds that 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.^[5]

Kassahun contends that the trial court erroneously relied on a single act of domestic violence, rather than more than one act as required by RCW 26.09.191(1)(c)

⁵ Clerk's Papers (CP) at 472 (emphasis added).

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and (2)(a)(iii) (requiring “a history of acts of domestic violence”) (emphasis added). He argues that the trial court’s reference to only one act of domestic violence—the birthday party incident—is legally insufficient to meet the statutory requirement and that, therefore, the trial court applied an incorrect legal standard. But the trial court did not misapply the law. It found that there were additional incidents of domestic violence by noting that the birthday party incident was “not an isolated” one.⁶

Nevertheless, relying on Katare v. Katare, 125 Wn. App. 813, 105 P.3d 44 (2004), and In re LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986), Kassahun argues that the trial court erred by failing to make sufficiently specific findings to support its determination that the birthday party assault “was not an isolated incident” of domestic abuse.⁷ We disagree.

The trial court may not impose restrictions in a parenting plan without making express findings under RCW 26.09.191. Katare, 125 Wn. App. at 826. “Generally, where findings are required, they must be sufficiently specific to permit meaningful review.” LaBelle, 107 Wn.2d at 218. The findings must sufficiently indicate the factual bases for the trial court’s ultimate conclusions. LaBelle, 107 Wn.2d at 218. “The purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.” LaBelle, 107 Wn.2d at 218-19 (internal quotation marks omitted) (quoting State v. Agee, 89 Wn.2d 416, 421, 573 P.2d 355 (1977)). “The degree of particularity of the findings will depend on the circumstances of the particular

⁶ CP at 472.

⁷ CP at 472.

case.” LaBelle, 107 Wn.2d at 220. But a trial court need not make findings on all matters about which there is evidence in the record; rather, the trial court must only make findings that “establish the existence or nonexistence of determinative factual matters.” LaBelle, 107 Wn.2d at 219.

Kassahun’s reliance on Katare and LeBelle is unavailing. Contrary to Kassahun’s contention, these decisions do not compel a trial court to enumerate every specific act of domestic violence that forms the basis of its finding. Indeed, here, the trial court expressly found and sufficiently indicated the basis to impose restrictions pursuant to RCW 26.09.191—namely, it determined that Kassahun engaged in a history of acts of domestic violence. The court also referenced evidence from the record in support of its finding that there was a history of acts of domestic violence or that Kassahun assaulted Ashagari. Specifically, the court noted, “The father had the mother followed, and monitored her phone records. The court finds that father assaulted the mother at the birthday party in 2011, and that this was not an isolated incident.”⁸ The trial court did not abuse its discretion by omitting mention of specific events that constituted individual acts of domestic violence.⁹

Moreover, even if the trial court had only considered the birthday party incident, that incident constitutes an act of assault sufficient to meet the statutory requirement under RCW 26.09.191. Pursuant to these subsections, parenting limitations are mandatory if a parent has conducted “an assault or sexual assault which causes

⁸ CP at 472.

⁹ Furthermore, to the extent Kassahun argues to the contrary, the record amply supports the finding that the birthday party incident was not the sole act of domestic violence engaged in by Kassahun. Ashagari presented abundant evidence—including her own testimony and that of others—of incidents of domestic violence in addition to the birthday party altercation, as well as evidence that Kassahun inflicted fear of imminent physical harm on Ashagari.

grievous bodily harm or the fear of such harm.” RCW 26.09.191(1)(c), (2)(a)(iii). Ashagari testified that she was fearful of her husband after the assault at the birthday party and, as a result, she spent the night at her mother's house. She also provided ample testimony describing her ongoing fear of Kassahun.

The trial court did not abuse its discretion in finding that Kassahun engaged in a pattern of acts of domestic violence or assaulted Ashagari. Accordingly, the trial court did not err in imposing parenting restrictions under RCW 26.09.191.

Permanent Protection Order

Kassahun contends that the trial court erred by entering a permanent protection order because, he argues, there was no evidence that there was a present likelihood of recurrence of imminent harm. We disagree.

This court reviews a decision to grant, modify, renew, or terminate a protection order for abuse of discretion. In re Marriage of Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010) (quoting RCW 26.50.060(2), (3), .130(1)).

At its oral ruling, the trial court found that “acts of domestic violence are likely to resume.”¹⁰ Kassahun appears to argue that no evidence supported the trial court's finding that he is likely to resume acts of domestic violence. Kassahun asserts that Ashagari continued to live with him after the assault at the birthday party in May 2011, and that there were no alleged incidents of domestic violence after the parties separated. But the record belies Kassahun's contention.

If the trial court “finds that the respondent is likely to resume acts of domestic violence against the petitioner,” the court has discretion to enter a permanent protection

¹⁰ 10 RP at 954.

order. RCW 26.50.060(2). The petitioner need not show a recent act of domestic violence; a trial court may issue a permanent protection order if the present likelihood of a recurrence is reasonable. Freeman, 169 Wn.2d at 674-75 (citing Spence v. Kaminski, 103 Wn. App. 325, 333, 12 P.3d 1030 (2000); Barber v. Barber, 136 Wn. App. 512, 513, 516, 150 P.3d 124 (2007)). Ashagari made such a showing here. As our Supreme Court in Freeman pointed out, in Spence and Barber, Court of Appeals decisions that upheld permanent protection orders, the victims had ongoing relationships with their abusers. Freeman, 169 Wn.2d at 675. Here, the parties' relationship with one another will continue after the dissolution as they deal with custody issues. The evidence demonstrated a likelihood that Kassahun would resume acts of domestic violence against Ashagari without a protection order in place.

Next, Kassahun contends that the trial court's finding that "[t]he domestic violence [o]rder for [p]rotection signed by the court on this date shall be permanent," is legally insufficient.¹¹ But under LaBelle, this finding may "be supplemented by the trial court's oral decision or statements in the record." 107 Wn.2d at 219. Here, the trial court's oral ruling—namely, "that acts of domestic violence are likely to resume"—sufficiently explained the basis for entry of the permanent order of protection.¹² Furthermore, RCW 26.50.060 does not require any particular wording in the protection order. Spence, 103 Wn. App. at 331 (citing Seattle v. Edwards, 87 Wn. App. 305, 310, 941 P.2d 697 (1997)). "Beyond specifying the types of relief provided, the order is required only to specify the date it expires (if at all), the type and date of service of process used, and a notice of the criminal penalties resulting from violation of the

¹¹ CP at 471.

¹² 10 RP at 954.

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order.” Spence, 103 Wn. App. at 331. The trial court complied with the statutory requirements here. Its finding that Kassahun is likely to resume acts of domestic violence is sufficient under the statute.

Child Support and Maintenance

Kassahun challenges the trial court’s calculation of his monthly gross income for purposes of the child support and maintenance awards. He contends that the trial court’s finding on his gross monthly income was not supported by substantial evidence.

We review a trial court’s dissolution orders, including orders awarding child support and maintenance, for abuse of discretion. In re Marriage of MacDonald, 104 Wn.2d 745, 751, 709 P.2d 1196 (1985).

“RCW 26.19.071(1) does not require that the court make a precise determination of income. Instead, the court is required to consider all income and resources of each parent’s household.” In re Marriage of Marzetta, 129 Wn. App. 607, 623, 120 P.3d 75 (2005), abrogated on another ground by In re Marriage of McCausland, 159 Wn.2d 607, 619, 152 P.3d 1013 (2007). “We must presume that the court considered all evidence before it in fashioning the order.” In re Marriage of Kelly, 85 Wn. App. 785, 793, 934 P.2d 1218 (1997).

“All income and resources of each parent’s household shall be disclosed and considered by the court when the court determines the child support obligation of each parent.” RCW 26.19.071(1). “[M]onthly gross income shall include income from any source,” including salaries, wages, deferred compensation, dividends, interest, bonuses, income from a business. RCW 26.19.071(3).

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Here, even though Ashagari never argued that Kassahun's gross annual income was greater than \$11,000, the trial court found that Kassahun earned a gross monthly income of \$13,750.

The parties presented a significant number of exhibits and documents in the record to prove their financial status over recent years. The evidence included financial declarations by both parties, bank account statements, credit card statements, copies of checks issued from Abyssinia Market's bank account, and tax returns.

The trial court did not rely on the tax returns in its attempt to calculate Kassahun's gross monthly income. The court found that those documents were not credible because, compared to the significant expenses each month, it was not possible Kassahun earned this relatively small amount. But the court's oral ruling explaining its method in determining Kassahun's gross monthly income is unclear. And we are unable to arrive at this numerical finding based on the record before us, even when discounting the evidence the trial court found not credible. Because we cannot discern the basis on which the trial court calculated Kassahun's monthly gross income, we are unable to determine whether substantial evidence supported this finding. See In re LaBelle, 107 Wn.2d at 218 ("Generally, where findings are required, they must be sufficiently specific to permit meaningful review.").

Kassahun additionally assigns error to the trial court's maintenance award, arguing that the court failed to weigh the statutory factors set forth in RCW 26.09.090. Specifically, Kassahun argues that substantial evidence did not support the court's findings that he (1) "has an earning capacity and financial resources that greatly exceed

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what he claims and which is sufficient to support Ms. Ashagari," and (2) has the ability "to meet his financial obligations while meeting those of the spouse."¹³

The trial court has broad discretion to award spousal maintenance. Bulicek v. Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). Maintenance not based on a fair consideration of the statutory factors constitutes an abuse of discretion. In re Marriage of Crosetto, 82 Wn. App. 545, 558, 918 P.2d 954 (1996). The nonexclusive list of statutory factors includes the parties' postdissolution financial resources; the ability of one spouse to pay maintenance to the other; the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed to acquire education necessary to obtain employment. RCW 26.09.090(1); In re Marriage of Vander Veen, 62 Wn. App. 861, 867, 815 P.2d 843 (1991).

With regard to Kassahun's challenge to the child support award, we are unable to determine whether substantial evidence supported the disputed findings without adequate findings concerning Kassahun's gross monthly income.

We remand with instructions that the trial court enter more specific findings on existing evidence regarding its calculation of Kassahun's gross monthly income. If necessary, the trial court should recalculate Kassahun's income and maintenance and support obligations.

Attorney Fees

Citing to RCW 26.09.140, Ashagari requests an award of attorney fees on appeal for defending against Kassahun's claims relating to the parenting restrictions and the

¹³ CP at 471.

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permanent protection order. Ashagari is represented by the Northwest Justice Project, a nonprofit, publically funded legal services provider. Ashagari has received legal services free of charge, and has agreed to assign any attorney fees recovered on appeal to the Northwest Justice Project. A nonprofit legal services corporation that successfully wins an appeal on behalf of an appellant is entitled to attorney fees, even where the represented party has not incurred any expenses in the litigation. Tofte v. Dep't of Soc. & Health Servs., 85 Wn.2d 161, 531 P.2d 808 (1975). RCW 26.09.140 provides for fees on appeal. Under this statute, the court may order a party to pay a "reasonable amount" of the costs and attorney fees of the other party "after considering the financial resources of both parties." RCW 26.09.140.

In exercising our discretion under the statute, we consider the arguable merit of the issues on appeal and the parties' financial resources. C.M.C., 87 Wn. App. at 89. Having done so, we grant Ashagari attorney fees and costs on appeal under RCW 26.09.140.

CONCLUSION

We remand to the trial court for further findings on the calculation of Kassahun's gross monthly income. In all other respects, we affirm. We grant Ashagari's request for attorney fees on appeal.¹⁴

Trickey, J

WE CONCUR:

[Signature]

[Signature]

¹⁴ Kassahun submitted a motion to this court to permit the trial court to vacate a provision of the maintenance order rendering the maintenance award "non-modifiable." Because we remand to the trial court for supplemental findings, we reserve this issue to the discretion of the trial court.