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**COURT OF APPEALS  
DIVISION 1  
OF THE STATE OF WASHINGTON  
Case No. 69567-3-1**

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In re the Marriage of:

MASOOD ABAWI,  
Appellant/Petitioner

And

WALQUIRIA GUTIERREZ,  
Respondent/Respondent

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**RESPONDENT'S BRIEF**

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY -1 PM 2:25

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## **I. INTRODUCTION**

Most of the information before the trial court is unavailable to the appellate court because Mr. Abawi has only provided an excerpted record of proceedings which would make it impossible for this appellate court to know if evidence was presented on some of the issues named by Mr. Abawi. The standard to apply to the rulings of the trial court in this case is abuse of discretion and an incomplete record which excludes any of the evidence favorable to Ms. Gutierrez does not provide the court with the record needed to determine if there was an abuse of discretion. Ms. Gutierrez cannot provide a reference for the testimony which should be considered by the trial court due to Mr. Abawi's failure to provide a complete record and the trial court decision should be affirmed.

## **II RESTATEMENT OF THE ISSUES**

1. Is Mr. Abawi required to provide an adequate record for review, which would include the complete trial testimony, if the appeal involves disputed factual issues and discretionary decisions of the trial judge?
2. In the absence of a complete verbatim report of proceedings, including the testimony of the parties, are the trial court's findings verities on appeal?

3. Should the trial court's decision to exclude Mr. Abawi's witnesses be affirmed when Mr. Abawi failed to file a Witness List or Answer Interrogatories asking him to identify witnesses?
4. Should the trial court's decision to exclude Mr. Abawi's rebuttal witnesses be affirmed when Mr. Abawi failed to file a Witness List or Answer Interrogatories asking him to identify witnesses, and he attempted to use excluded witnesses as "rebuttal witnesses" to avoid the trial court's ruling on the Motion in Limine?
5. Should the trial court's decision to exclude evidence of the Snohomish County Case as a collateral matter be upheld as an appropriate exercise of discretion?
6. Was the evidence of the father's failure to seek employment, his demonstrated ability to work and earn income, and his spending habits notwithstanding his allegations of lack of income, sufficient to provide for the court's finding of imputed income when establishing child support?
7. Should the court's property distribution be affirmed when the court had evidence of the husband's wasting and misuse of the wife's separate assets, and the wife's assumption of debt to offset any award to the wife?

### **III RESTATEMENT OF THE CASE**

The parties have three children who, at the time of the trial, were twins age 4, and a boy age 2. Under the Temporary Parenting Plan, the mother was the primary residential parent.

The trial court entered a final Parenting Plan that included 26.09.191(3) restrictions as follows:

The father has neglected and substantially deferred parenting functions to his extended family and his mother in particular. The father has engaged in abusive use of conflict which creates a danger to the children's psychological development. His deliberate refusal to see his older daughter from another relationship is further evidence of these concerns. CP 131.

A Domestic Violence Assessment was ordered in this case and that report was entered into evidence at the trial. That report stated:

With respect to the father, FCS has concerns that his behaviors (calling the mother a prostitute, reporting his suspicions about her to federal authorities) and his allegations (that she uses drugs and abuses the children) could have serious implications for the wellbeing of the children in the future. Those behaviors are not only inappropriate for the children to witness, but could jeopardize their relationship and bond with the mother. If the behaviors persist they should be taken into consideration in a final parenting plan and could warrant a restriction for the father. CP 26.

In addition to the Domestic Violence Assessment, Mr. Greenleaf from Family Court Services performed a parenting evaluation. That report was entered into evidence as well. The report states:

FCS believes that this behavior by the father together with prior information should be the basis for concluding a discretionary RCW

29.09.191 restriction against the father was appropriate because of the history of lack of cooperation. FCS would add that with the conclusion regarding the father's abusive use of conflict, that sole decision-making for major decisions should be designated to the mother. CP 17.

The father has a daughter from a previous relationship, Sabrina Abawi who was at the time of the trial eleven years old and the subject of a separate court action in Snohomish County to modify the residential schedule in order to limit her time with the father. Ms. Gutierrez offered the minute entry from the Snohomish County court hearing in which the Commissioner Bedle found with respect to that child: "Petitioner Abawi's lack of insight and the fact that he will not even consider that there may be an issue in his household is of concern to the court. His actions in his dissolution are vindictive and inappropriate." Judge Doerty initially reserved ruling on the exhibit but, ultimately refused the exhibit. RP Vol. 1 3, RP Vol. 3 13. Ms. Gutierrez's counsel was able to elicit from Mr. Abawi on cross examination that, after supervised visits had been ordered, he had made no effort to visit with his older daughter for several months. Mr. Abawi was an evasive witness throughout. When Judge Doerty inquired about whether the father could see Sabrina outside his home under supervised visits, Mr. Abawi responded with his usual convoluted and evasive answer, suggesting that he had only supervised visits with his older daughter because her mother wanted to take her to Pakistan in 2010,

which would never be a reason for the father to have only supervised visits. RP Vol. 1 52-53. Mr. Abawi certainly would have had the court orders from Snohomish County regarding his older daughter, Sabrina, in his possession but he failed to make any attempt to offer them or to explain why he was only allowed supervised visits. RP Vol. 1 54. Under questioning he stated that he agreed to suspend Sabrina's visits to his home. RP Vol. 1 54. He agreed that Sabrina does not want to come to his home. RP Vol. 1 54.

Among other substantive reasons why the older daughter was afraid to visit with her father in his home, she had accused the father's brother, who lived with the father, of sexual molestation. That information had been provided to the parenting evaluator subsequent to his written evaluation, but prior to the trial. That information was addressed at trial in examination of the parenting evaluator, although the majority of the examination of the parenting evaluator is excluded from the excerpts of the report of proceeding supplied. This information led to the imposition of a restriction in the Parenting Plan under VI. Other Provisions on page 7: Until such time that the father's brother, Faquier Abawi, no longer resides in the father's residence, all visitations shall be supervised.

At no time or under any circumstances shall Faquier Abawi be allowed within 500 feet of the children. CP 135.

It is true that most of Mr. Abawi's witnesses were excluded, although he was allowed to call the parenting evaluator, Mr. Greenleaf, who also was not named by him. RP Vol. 1 26. Ms. Gutierrez filed a Motion in Limine to exclude Mr. Abawi's witnesses from testifying at trial. Interrogatories and Requests for Production had been served on Mr. Abawi but he refused to identify any witnesses in his Answers to the Interrogatories. No supplementation of those Answers was ever provided. Further, he failed to file a Witness List or disclose any witnesses pursuant to the KCLR 26(k) until September 5, 2012, the same day the trial was to begin, and one day before the assignment of the case for trial to the Honorable Judge Doerty which began on September 6, 2012. CP 78. The trial had originally been set for August 20, 2012 but was continued at Mr. Abawi's request. RP Vol. 1 4. Mr. Abawi was represented by counsel during the entire dissolution. The Clerk's Papers incorrectly identifies the Witness List filed on May 31, 2012 as from Petitioner, when it was Ms. Gutierrez's Witness List filed on that date. CP 1. The caption was inadvertently reversed on the pleading and she was incorrectly identified as the Petitioner. CP 1.

Interrogatories were served on Mr. Abawi and he prepared Answers and served them on Ms. Gutierrez's attorney. Interrogatory 119 asked "Do you intend to call any expert witness at the trial of this matter?"

Mr. Abawi responded: “Petitioner has not determined which expert witnesses, if any Petitioner intends to call at trial. If Petitioner elects to retain expert witnesses in the future, Petitioner will update its discovery responses if and as required by the Civil Rules.” No updates were provided.

Interrogatory 120 asked “Please state the names, addresses, and telephone numbers of all non-expert witnesses you might call at trial, and specify the subject matter of each such witness’ expected testimony.” Petitioner responded: Petitioner has not determined which witnesses, if any Petitioner intends to call at trial. If Petitioner elects to retain witnesses in the future, Petitioner will update its discovery responses if and as required by the Civil Rules.” CP 40-46. No updates were ever provided. CP 40-46.

During the trial Mr. Abawi then attempted to call the exact same witnesses who were excluded in the ruling on the Motion in Limine as “rebuttal witnesses”. RP Vol. 2 11, 12, 16, 17. Upon objection by Ms. Gutierrez’s attorney that designating the excluded witnesses as “rebuttal witnesses” was an attempt to circumvent the Order on the Motion in Limine, the court agreed with Ms. Gutierrez and continued to exclude the witnesses. RP Vol. 2 11, 12, 16, 17. Judge Doerty took the matter under advisement, independently researched the issue, and noted that the

parenting evaluator and domestic violence assessment evaluator had already interviewed the family members and other witnesses that Mr. Abawi wanted to call as rebuttal witnesses, and he balanced the need for their testimony against the weight that he was assigning to the matters they were being called to rebut and determined that it was unnecessary. RP Vol. 2 16, 17. He determined that he did not need any additional evidence in the Snohomish County matter as it was largely a collateral matter. RP Vol 2, 16, 17. Certainly if Mr. Abawi wanted the court to have additional evidence, he could have at minimum offered the court orders, the report from the Guardian Litem in that case, and explained the basis for his failure to visit his daughter once his visits were supervised. He did none of the above.

While it is true that the trial court indicated that it would not place a great deal of reliance on the allegations regarding the sexual abuse of the father's older daughter by his brother in adopting a residential schedule, it did lead to restrictions on the brother's contact with the children, but not the father's contact with the children. CP 129-136. In fact, the court did not enter into restrictions on the father's time with the children such as requiring supervised visits although there were concerns about his failure to protect the children from abuse. CP 129-136. The father's refusal to visit his older daughter was noted in the RCW 26.09.191 restrictions. CP

130. This refusal to visit his daughter was elicited by his own testimony. Additional evidence with respect to the Snohomish County case by Mr. Abawi's proposed witnesses would not have altered the residential schedule in any respect had they been allowed to testify as rebuttal witnesses. RP Vol. 2, 14; CP 129-136.

While the Family Court Services domestic violence evaluator, Nicole Bynum, was not specifically named on the mother's Witness List, a different Family Court Services employee was identified as testifying with respect to the Domestic Violence Assessment, and Ms. Bynum's report had been received by Mr. Abawi months prior to the trial date. CP 3. There was no element of surprise in calling the FCS worker. The father's counsel had objected to the FCS evaluator originally named by FCS, and listed by Ms. Gutierrez, and an alternate was appointed. Judge Doerty had initially reserved the issue as to whether he would allow testimony by Ms. Bynum, until after Mr. Greenleaf had testified, but due to the difficulty of scheduling Mr. Greenleaf, Ms. Bynum was allowed to proceed first. RP Vol. 1, 25. Mr. Greenleaf had attached the risk assessment of Ms. Bynum to his report, and to the extent that he considered its findings in forming his opinions, the testimony of Ms. Bynum was crucial to the findings in the parenting evaluation. CP 5-29.

Mr. Greenleaf, was permitted to testify by the trial court as requested by Mr. Abawi although he was not identified as a witness either in Interrogatory Answers or in a Witness List. CP 40-46. Mr. Greenleaf learned that Mr. Abawi's older daughter, Sabrina, asserted that she had been molested by Mr. Abawi's brother who lived in the same home only after he had issued a written report but before the trial and provided testimony on this issue, although it is not included in the excerpts provided by Mr. Abawi.

Evidence of two years of unemployment was presented by Mr. Abawi. He presented no evidence of any diligent search for employment although he had four children to support. He expected the mother to provide for the children instead. The mother, who worked hard at all times to support her family at a relatively low paying job at Sprint, presented evidence of unusual deposits in his bank accounts, frequent travels overseas, and an unusual lack of effort to find employment, particularly for a man with four children to support. His prior history of employment was taken into account and imputed income was attributed to him. The father waited until after the trial before finding a low paying position at a relative's store and moved for reconsideration of the ruling to take into account his then actual wages. CP 149. That Motion for Reconsideration was denied. CP 184.

The award of a money judgment was to compensate the mother for the evidence that the father drained the mother's retirement account during the marriage, leaving her with a substantial loan to repay, in the amount of \$350 per paycheck, or over \$700 per month. RP Vol. 2 4, 5. The evidence showed that prior to marriage the mother owned her own townhome, had retirement savings, and long term employment with Sprint. During the marriage the mother had to sell her townhome and gave the proceeds to her husband. She took out a substantial loan from her 401k to fund the father's activities. The mother's need for low cost transportation was in evidence and the court's distribution of property took that fact into account when it awarded her the Honda automobile. RP Vol. 2 8.

Mr. Abawi states that it is unclear from the record whether the court properly considered Mr. Abawi's current income in its support determination. Because Mr. Abawi did not provide a complete record of the proceedings the record may be unclear to him, but the court denied the Motion for Reconsideration which addressed the current income based on the evidence submitted at trial. CP 145. Additionally, the court is clear that it considered the worksheets submitted by the father with the knowledge that the figures were based on the anticipated income from the job he interviewed for. RP Vol. 3 10. The court reviewed the temporary order of child support and questioned the source of that income. RP Vol. 3

10. He then examined the worksheets proposed by the mother and adopted those worksheets which he knew imputed income to the father. RP Vol. 3 11.

Again, it may be unclear to Mr. Abawi from the incomplete record what evidence the court heard that led to the property distribution. A complete record would provide that information.

#### **IV. STANDARD OF REVIEW**

As Mr. Abawi concedes in each section of his brief, the standard for review is abuse of discretion by the trial court.

#### **V. ARGUMENT**

##### **A. FAILURE TO PROVIDE A VERBATIM REPORT OF PROCEEDINGS RENDERS TRIAL COURT'S FINDINGS A VERITY ON APPEAL**

The Mr. Abawi has the burden to perfect the record so the appellate court has before it all the evidence relevant to an issue. In re Marriage of Haugh, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). Mr. Abawi has only provided excerpts of the report of proceedings to Ms. Gutierrez's counsel, apparently those excerpts that support his theories. There is a general principle that the failure to provide a verbatim report of proceedings renders the trial court's findings verities on appeal. Morris v.

Woodside, 101 Wn. 2d 812, 814, 682 P.2d 905 (1984). For that reason alone, his challenge to the court's rulings should fail.

**B. MR. ABAWI HAS FAILED TO DEMONSTRATE ERRORS  
IN THE PARENTING PLAN ENTERED BY THE TRIAL COURT**

**1. No Good Cause Demonstrated by Mr. Abawi for His  
Failure to Identify Witnesses**

Ms. Gutierrez filed a Motion in Limine to exclude Mr. Abawi's witnesses from testifying at trial. CP 40-46. Interrogatories and Requests for Production had been served on Mr. Abawi but he refused to identify any witnesses in his Answers to the Interrogatories. CP 40-46. No supplementation of those Answers was ever provided. CP 40-46. Further, he failed to file a Witness List or disclose any witnesses pursuant to the KCLR 26(k) until September 5, 2012 one day prior to the assignment of the case for trial to the Honorable Judge Doerty. CP 78. The Clerk's Papers incorrectly identifies the Witness List filed on May 31, 2012 as from Petitioner, when it was the Respondent, Ms. Gutierrez's Witness List filed on that date. CP 1.

Interrogatories were served on the Mr. Abawi and he prepared Answers and served them on Ms. Gutierrez's attorney. CP 40-46. Interrogatory 119 asked "Do you intend to call any expert witness at the trial of this matter?" Mr. Abawi responded: "Petitioner has not

determined which expert witnesses, if any Petitioner intends to call at trial. CP 40-46. If Petitioner elects to retain expert witnesses in the future, Petitioner will update its discovery responses if and as required by the Civil Rules.” No updates were ever provided. CP 40-46.

Interrogatory 120 asked “Please state the names, addresses, and telephone numbers of all non-expert witnesses you might call at trial, and specify the subject matter of each such witness’ expected testimony.” CP 40-46. Petitioner responded: “Petitioner has not determined which witnesses, if any Petitioner intends to call at trial. If Petitioner elects to retain witnesses in the future, Petitioner will update its discovery responses if and as required by the Civil Rules.” CP 40-46. No updates were ever provided. CP 40-46.

The Court of Appeals has held that CR 26(e)1 places a duty to reasonably supplement responses to interrogatories. Rupert v. Gunter, 31 Wn. App. 27 at 32, 640 P.2d 36 (1982).

KCLR 26(k)(4) states that “Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” That rule requires disclosure of witnesses “no later than the date for disclosure designated in the case schedule.” KCLR 26(k)(1)(2). Lancaster v. Perry, 127 Wn.App. 826, 828 (2005) ruled that

“Under King County Local Rule 26(f), witnesses not timely disclosed may not testify at trial, absent a showing of good cause.” The trial court’s action in excluding witnesses is reviewed under the standard that the abuse of discretion which must be “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Burnett v. Spokane Ambulance. 131, 484, 494, 933 P.2d 1036 (1997), Lancaster v. Perry, supra.

During the trial Mr. Abawi attempted to call as “rebuttal witnesses” the same witnesses which were excluded in the ruling on the Motion in Limine. RP Vol. 2 11, 12, 16, 17. Upon objection by Ms. Gutierrez’s attorney that designating the excluded witnesses as “rebuttal witnesses” was an attempt to circumvent the Order on the Motion in Limine, the court agreed with Ms. Gutierrez and continued to exclude the witnesses. RP Vol. 2 11, 12, 16, 17.

Mr. Abawi cites Snediger v. Hodderson, 53 Wn. App. 476,487, 768 P.2d 1 (1980) for the proposition that the court should consider lesser sanctions. The court in that case addresses the need to consider a sanction less harsh than outright dismissal of the case. They held that when the most severe sanction of default or dismissal is imposed, the trial court should explicitly consider whether lesser sanctions would probably cure

the improper behavior. This is not a case where the trial court dismissed Mr. Abawi's case and the case is inapposite.

Mr. Abawi cites a series of cases to suggest that sanctions other than exclusion of testimony should be applied, culminating with a cite to Burnett, supra. Yet Lancaster v. Perry, supra, addresses this violation of KCLR 26(f) directly and specifically concludes that Burnett does not apply. It distinguishes that case in part by explaining that the specific name of the witness had been disclosed prior to the Burnett trial, whereas, as in this case, no witness was identified in Lancaster v. Perry, id. at 832. As Lancaster v. Perry concludes at page 833 ; "Requiring parties to disclose witnesses allows the opposing party to prepare for trial." Mr. Abawi was represented by an attorney at all times during the dissolution action and there has been no good cause demonstrated for the failure to disclose witnesses and the court did not abuse its discretion in excluding witnesses.

**2. The Trial Court Properly Exercised Discretion in Excluding Certain Evidence With Respect to Father's Older Daughter, Sabrina Abawi, and The Trial Court's Entry of RCW 26.09.191 Restrictions Were Supported by the Evidence**

The court entered a final Parenting Plan that included 26.09.191(3) restrictions as follows:

The father has neglected and substantially deferred parenting functions to his extended family and his mother in particular. The father has engaged in abusive use of conflict which creates a danger to the children's psychological development. His deliberate refusal to see his older daughter from another relationship is further evidence of these concerns. CP 131

A Domestic Violence Assessment was ordered in this case and that report was entered into evidence at the trial. That report stated:

With respect to the father, FCS has concerns that his behaviors (calling the mother a prostitute, reporting his suspicions about her to federal authorities) and his allegations (that she uses drugs and abuses the children) could have serious implications for the wellbeing of the children in the future. Those behaviors are not only inappropriate for the children to witness, but could jeopardize their relationship and bond with the mother. If the behaviors persist they should be taken into consideration in a final parenting plan and could warrant a restriction for the father. CP 26.

In addition to the Domestic Violence Assessment, Mr. Greenleaf from Family Court Services performed a parenting evaluation. That report was entered into evidence as well. The report states:

FCS believes that this behavior by the father together with prior information should be the basis for concluding a discretionary RCW 29.09.191 restriction against the father was appropriate because of the history of lack of cooperation. FCS would add that with the conclusion regarding the father's abusive use of conflict, that sole decision-making for major decisions should be designated to the mother. CP 17.

The father has a daughter from a previous relationship, Sabrina Abawi, then age 11, that was the subject of a separate court action in Snohomish County. Ms. Gutierrez offered the minute entry from the Snohomish County court hearing in which the Commissioner Bedle found

with respect to that child: “Petitioner Abawi’s lack of insight and the fact that he will not even consider that there may be an issue in his household is of concern to the court. His actions in his dissolution are vindictive and inappropriate.” Judge Doerty initially reserved ruling on the exhibit but, ultimately excluded the exhibit. RP Vol. 1 3, RP Vol. 3 13. Ms. Gutierrez’s counsel was able to elicit from Mr. Abawi on cross examination that, after supervised visits had been ordered, he had made no effort to visit with his older daughter for over three months.

The trial court’s refusal to admit a declaration from a sheriff’s detective was appropriate under hearsay rules, and would have added nothing useful to the evidence. ER 801,802. Judge Doerty made it clear that the Snohomish County case was collateral to the facts of the case before him and he did not restrict Mr. Abawi’s residential time as a result of that case. RP 2 14. CP 126-136. Mr. Abawi’s goal was to re-direct the court’s attention from the facts.

Among other substantive reasons why she was afraid to visit with her father in his home, the older daughter had accused the father’s brother, who lived with the father, of sexual molestation. That information had been provided to the parenting evaluator subsequent to his written evaluation, but prior to the trial. That information was addressed at trial in examination of the parenting evaluator and of Mr. Abawi, although that

testimony is not supplied in the excerpts of the report of the proceeding. This information led to the imposition of a restriction in the Parenting Plan under VI. Other Provisions on page 7:

Until such time that the father's brother, Faquier Abawi, no longer resides in the father's residence, all visitations shall be supervised. At no time or under any circumstances shall Faquier Abawi be allowed within 500 feet of the children. CP 135.

Mr. Abawi has failed to demonstrate that the trial court abused its discretion in making that provision a part of the Parenting Plan. While the trial court indicated that it would not place a great deal of reliance on the allegations regarding the sexual abuse of the father's older daughter by his brother in adopting a residential schedule, it did, naturally, impact other provisions in the Parenting Plan and led to the restriction which prevented his brother from coming within 500 feet of the children. RP 2 14. CP 126-136. Standard restraining orders routinely contain such provisions. The fact that investigation of the allegations by his daughter had not been completed by the time of trial does not lead to the conclusion that it should be ignored. To the extent that the Mr. Abawi complains of the court's ruling, he repeatedly declined opportunities to support his challenge to the evidence. Mr. Abawi made no attempt to offer any exhibits to refute the claims. There was no offer of a letter from CPS that they had made a determination that the allegation was "unfounded". Ms.

Gutierrez would have no access to the CPS investigation. There was no attempt to introduce documentation that would show that the police had dismissed their investigation. There was no offer of the Guardian ad Litem's report from the proceeding addressing his older child. There was no attempt to present any court order which might have been entered in Snohomish County which discounted these concerns. There is only a suggestion by Mr. Abawi that if his family had been allowed to testify, the court would have been satisfied with their testimony and allowed the brother unrestricted access to his very young children. Mr. Abawi complains that there is no FCS recommendation, but the parenting evaluator only learned of the issue subsequent to filing his report. Mr. Abawi has some obligation to make a record on his objection.

Mr. Abawi attempts to suggest that the court's ruling was unduly harsh in its impact but Mr. Abawi's only complaint seems to be that this provision will impose a logistical burden on him and his family. The court is then then asked to be concerned about the fact that this alleged child molester will not have a relationship with the mother's very young children. Mr. Abawi appears to believe that he is somehow the victim of the inconvenience required to protect those young children. He already failed to protect his older child.

**C. MR. ABAWI'S FAILURE TO SEEK EMPLOYMENT, HIS DEMONSTRATED ABILITY TO WORK AND EARN INCOME, AND HIS SPENDING HABITS NOTWITHSTANDING HIS ALLEGATIONS OF LACK OF INCOME WERE SUFFICIENT TO PROVIDE FOR THE COURT'S FINDING OF IMPUTED INCOME.**

Evidence of two years of unemployment was presented by Mr. Abawi. The mother, however, presented evidence of unusual deposits in his bank accounts, frequent travels overseas, and an unusual lack of effort to find employment, particularly for a man with four children to support. His prior history of employment was taken into account and imputed income was attributed to him. The father waited until after the trial before finding a low paying position at a relative's store and moved for reconsideration of the ruling to take into account his then actual wages. CP 145. That Motion for Reconsideration was denied. CP 184.

Mr. Abawi claims that it is unclear from the record whether the court properly considered Mr. Abawi's current income in its support determination. Because the Mr. Abawi did not provide a complete record of the proceedings the record may be unclear to him, but the court denied the Motion for Reconsideration which addressed the current income based on the evidence submitted at trial. CP 184.

Additionally, the excerpted report of proceedings makes it obvious that the court was carefully considering the different bases for determining Mr. Abawi's income. The court addresses the three worksheets before it directly. RP Vol. 3 10, 11. It considered the worksheets submitted by the father with the knowledge that the figures were based on the anticipated income from the job he interviewed for. RP Vol. 3, 10. The court also reviewed the temporary order of child support and questioned the source of that income which was identified as unemployment income. RP Vol. 3 10, 11 He then examined the worksheets proposed by the mother and adopted those worksheets which he knew imputed income to the father. RP Vol. 3 11.

To succeed on appeal, the appellant must show that the trial court's decision was manifestly unreasonable, or was based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). RCW 26.19.035(3) requires the application of a child support schedule and the completion of worksheets in a proceeding where child support is determined. RCW 26.19.071(6) requires the court to impute income to a voluntarily underemployed parent. A court makes this determination based on that parent's work history, education, health, age, and other relevant factors. RCW 26.19.071(6). Under RCW 26.19.071(6), income is imputed based on the median income established

by the U.S. Census Bureau in the absence of information to the contrary. Mr. Abawi's willful failure to seek employment for two years for the purpose of avoiding support obligations left him unable to adequately demonstrate his earning capacity which caused the court to use the median income figures. The immediate employment after entry of the order at a low paying job in an attempt to establish a lower income was another obvious tactic to lower his support obligation and increase the burden on Ms. Gutierrez for supporting the children.

**D. MR. ABAWI HAS FAILED TO DEMONSTRATE ERRORS IN THE PROPERTY DISTRIBUTION ENTERED BY THE TRIAL COURT**

The award of a money judgment was to compensate the mother for fact that the father drained the mother's retirement account during the marriage, leaving her with a substantial loan to repay, in the amount of \$350 per paycheck, or over \$700 per month. RP Vol. 2 4, 5 The evidence showed that prior to marriage the mother owned her own townhome, had retirement savings, and long term employment with Sprint although most of this evidence has been excluded from the excerpted report of proceeding. During the marriage the mother had to sell her townhome and gave the proceeds to her husband, although most of this evidence has been excluded from the excerpted report of proceeding. She took out a

substantial loan from her 401k to fund the father's activities although most of this evidence has been excluded from the excerpted report of proceeding. RP Vol. 2 8. The mother's need for low cost transportation was in evidence and the court's distribution of property took that fact into account when it awarded her the Honda automobile.

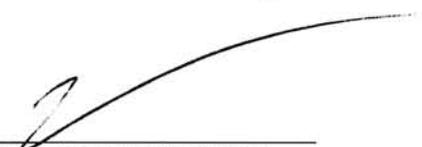
The court heard evidence of the husband's wasting of the wife's separate assets she brought into the marriage although most of this evidence has been excluded from the excerpted report of proceeding.. For purposes of dividing property in a dissolution action under RCW 26.09.080, the Washington courts have broad discretion and will not single out a particular factor and require as a matter of law that it be given greater weight than other relevant factors, since the applicable statute requires the trial court to weigh all factors, within the context of particular circumstances of the parties, to come to a fair, just and equitable division of the property. Under the statute, the division of property is controlled not by the character as separate or community but rather by what is just and equitable, taking into account the economic circumstances of the parties Washburn v. Washburn, 101 Wash.2d 168, 677 P.2d 152 (1984).

Under appropriate circumstances, a trial court in a dissolution proceeding need not divide community property equally and it need not award separate property to its owner. The court can exercise its discretion to

make a just and equitable settlement. White v. White, 105 Wash app. 545, 20 P.3d 481 (2001).

## VI. CONCLUSION

Judge Doerty's Orders are comprehensive and resolve all matters. They should be affirmed on the grounds stated by Judge Doerty, or on other grounds suggested in this Brief. The trial court may be affirmed on any basis supported by the record, even if the trial court did not consider the argument. LaMon v. Butler, 112 Wn.2d 193,200-01, 770 P.2d 1027 (1989). On the basis of the forgoing, the Ms. Gutierrez respectfully requests that this court dismiss the appeal and affirm the ruling below.



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