FILED
SUPREME COURT
STATE OF WASHINGTON
12/21/2018 2:19 PM
BY SUSAN L. CARLSON
CLERK

No. 96438-6

[Court of Appeals No. 49839-1-II]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

Marriage of:

JOHN MASON,

Respondent,

v.

TATYANA MASON,

Petitioner.

ANSWER TO PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

IDENTITY OF RESPONDENT, RELIEF REQUESTED & INTRODUCTION

Respondent John Mason asks this Court to deny Petitioner Tatyana Mason's Petition for Review of the Court of Appeals' unpublished decision in ***Marriage of Mason***, No. 49839-1-II (July 31, 2018) (***Mason II***) (attached as App. A). This is the second of three appeals[1] arising from the dissolution of John and Tatyana Mason's marriage in 2008.[2] In the first appeal, the Court of Appeals affirmed the trial court's 2013 determinations on John's motion to modify the parenting plan

> (a) that Tatyana abused the children, which CPS verified as "founded," justifying RCW 26.09.191 restrictions against her;
>
> (b) that Tatyana's repeated allegations of domestic violence against John were not supported by substantial evidence and that he posed no threat of future DV;
>
> (c) that John should have primary custody of the children; and
>
> (d) that Tatyana could be reunited with the children if she followed a supervised reunification plan (which she did not).

Marriage of Mason, No. 45835-7-II, slip op. at 4-5 (July 7, 2015) (attached as App. B) (***Mason I***).

---

[1] In the third appeal, Tatyana challenges later trial court decisions again rejecting her claims. Her opening brief is stayed pending the outcome here. App. C (order staying brief in ***Marriage of Mason***, No. 50009-4-II).

[2] We will use first names for convenience.

In this appeal, the Court of Appeals held that the 2017 trial court erred as a matter of law in granting Tatyana's motion to vacate the trial court's 2013 Child Support Order under CR 60(b)(11). ***Mason II*** at 1. The trial court had held a trial despite having denied Tatyana's motion to reconsider its order denying revision of its order denying reconsideration of its order denying her motion to vacate its 2013 Child Support Order, and despite Tatyana's having consented to and failed to appeal from the 2013 Child Support Order.[3] Since the only even marginally viable argument Tatyana raised was that the 2013 court erred in not considering an I-864 form John forgot he signed 20 years ago – a form Tatyana's counsel[4] did not call to the 2013 court's attention – the 2017 court could not use CR 60(b)(11) to correct the alleged legal error. Simply put, courts may not use the CR 60(b)(11) catchall to correct alleged, if unappealed, legal errors.

Tatyana fails to meet any of the RAP 13.4(b) criteria. Indeed, she does not directly address them. None applies. This Court should deny review and grant RAP 18.1(j) fees against Tatyana as a sanction payable to this Court.

---

[3] The almost absurd procedural history is fully detailed at BA 10-24.

[4] While Tatyana is allegedly *pro se* here (though she has had unnamed counsel assisting her) a lawyer appeared for her in the 2013 proceedings.

FACTS RELEVANT TO ANSWER

The facts are faithfully reported in ***Mason I*** & ***II***. The allegations in Tatyana's Petition are neither fair nor accurate. The record also does not support them. Her irrelevant scurrilous hyperbole regarding John and his counsel undoubtedly will be as unavailing here as is has been in the trial and appellate courts.

A short summary of the key facts: The parties married in 1999, divorced in 2008. The children disclosed Tatyana's child abuse in 2011. CPS verified their disclosures were "founded." John obtained full custody by 2013. Tatyana was offered opportunities to purge the .191s entered against her and to be reunited with the children. She failed to follow through. Her appeal also failed.

Tatyana brought a series of tardy motions, each of which was denied. But a new trial judge gave her a hearing and misused CR 60(b)(11) to "correct" Tatyana's own counsel's (perhaps tactical) decision not to bring forward the I-864 form during the 2013 proceedings. The Court of Appeals properly reversed based on a great deal of black letter law.

Review is as unjustified as it is unnecessary. No RAP 13.4(b) criterion is met. This Court should deny review. It should also award RAP 18.1(j) fees as a sanction payable to this Court.

GROUNDS FOR RELIEF & ARGUMENT

A. The standard of review is abuse of discretion, so no conflict with other decisions exists.

Tatyana argues the Court of Appeals failed to apply the correct standard of review, abuse of discretion. Pet. at 12 (citing ***Marriage of Jennings***, 138 Wn.2d 612, 980 P.2d 1248 (1999); ***Marriage of Flannagan***, 42 Wn. App. 214, 709 P.2d 1247 (1985)). But the Court of Appeals reviewed for an abuse of discretion. ***Mason II*** at 8-9 (citing ***Jones v. City of Seattle***, 179 Wn.2d 322, 360, 314 P.3d 380 (2013); ***Shandola v. Henry***, 198 Wn. App. 889, 896, 396 P.3d 395 (2017)). Of course, its review focuses on the trial court's decision on Tatyana's CR 60(b)(11) motion, not the underlying judgment. *See* ***Bjurstrom v. Campbell***, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980) (appeal from CR 60(b) motion "is limited to the propriety of the [ruling,] not the impropriety of the underlying judgment").

The appellate court applied this standard. No conflict exists.

B. No error occurred, and even if one had, that is not grounds for discretionary review in this Court.

Tatyana's actual argument concerns *how* the Court of Appeals applied the standard of review. This is simply an assertion of error. But as explained *infra*, no error occurred. And review would not lie in any event.

In arguing that the Court of Appeals failed to correctly apply the abuse of discretion standard, Tatyana relies on many of the same cases the Court of Appeals cited. *Compare* Pet. at 12-14 *with* ***Mason II*** at 8-9 (both citing, *inter alia*, ***Shandola***, *supra*; ***Marriage of Hammack***, 114 Wn. App. 805, 810-11, 60 P.3d 663 (2003); ***Marriage of Thurston***, 92 Wn. App. 494, 503-04, 963 P.2d 947 (1998)). But she ignores the controlling precedents that court also cited: ***Lane v. Brown & Haley***, 81 Wn. App. 102, 109, 912 P.2d 1040 (1996) (attorney negligence not sufficient to vacate judgment); ***Marriage of Burkey***, 36 Wn. App. 487, 488-90, 675 P.2d 619 (1984) (same); ***Marriage of Yearout***, 41 Wn. App. 897, 898, 902, 707 P.2d 1367 (1985) (lack of income to pay child support is not "extraordinary circumstances" under CR 60(b)(11))). Tatyana's silence on this controlling authority speaks volumes.

Simply put, courts may not use CR 60(b)(11) to correct alleged legal errors. ***Hurley v. Wilson***, 129 Wash. 567, 568, 225 P. 441 (1924) ("We have too often held that such a proceeding as this cannot be used as a means for the court to review and revise its own final judgment"). Rather, this catchall provision is confined to situations involving extraordinary circumstances not covered by any

other section of the rule. ***Union Bank, N.A. v. Vanderhoek Assocs.***, ***LLC***, 191 Wn. App. 836, 844, 365 P.3d 223 (2015).

Extraordinary circumstances are irregularities extraneous to the action or affecting the regularity of the proceedings. ***Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.***, 68 Wn.2d 756, 758, 415 P.2d 501 (1966); ***Tatham v. Rogers***, 170 Wn. App. 76, 100, 283 P.3d 583 (2012). And generally, extraordinary circumstances sufficient to afford CR 60(b)(11) relief are unusual circumstances not within a party's control. ***State v. Gamble***, 168 Wn.2d 161, 169, 225 P.3d 973 (2010).

Errors of law are not extraordinary circumstances correctable through CR 60(b)(11): direct appeal is the proper means of remedying legal errors. ***Union Bank***, 191 Wn. App. at 847; ***Marriage of Furrow***, 115 Wn. App. 661, 674, 63 P.3d 821 (2003) (quoting Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505, 515 (1960)); ***Hammack***, 114 Wn. App. at 810. Tatyana failed to appeal the 2013 support order.

Yet the "trial court vacated the 2013 child support order based on the parties' failure to inform the court of the I-864 affidavit when the court entered the child support order." ***Mason II*** at 10. Indeed, the trial court concluded that the affidavit was a "significant factor in this case"

and that imposing child support without considering it created an "unjust result." CP 124. The trial court's apparent rationale was that the I-864 affidavit was new evidence not previously considered. *Id*.

But the Court of Appeals held that the 2013 court's "failure" to consider the affidavit is not extraordinary circumstances for three reasons: (1) the I-864 would have had no practical effect in 2013, in light of Tatyana's agreed imputed income (which, even if incorrect, could have been corrected only via an appeal that Tatyana let pass); (2) even if John owed Tatyana money under the I-864, that would not absolve her of her independent child support obligation (citing ***Marriage of Khan***, 182 Wn. App. 795, 801, 332 P.3d 1016 (2014)); and (3) failing to produce evidence at trial is not extraordinary. ***Mason II*** at 11-13. Moreover, her counsel's failure to present evidence *at trial* also is not extraneous to the proceedings as a matter of law. *Id*. at 14. Tatyana challenges none of this.

Rather, Tatyana creates "findings" from whole cloth and misrepresents the findings the trial court actually made. Pet. at 1-12. While it is true that courts may use comments a court makes during colloquy to *interpret* the findings actually made – so long as those comments are consistent with the actual findings – that does not turn

everything a judge says during trial into a finding, as Tatyana appears to assume:

> It must be remembered that a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.

Ferree v. Doric Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963) (emphasis added) (citing numerous cases). Court orders – such as findings and conclusions – are interpreted like statutes or contracts. *See, e.g.*, ***Marriage of Thompson***, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). Even a trial court has no authority to modify its own order absent conditions justifying reopening a judgment. *Id*. Thus, Tatyana's attempt to use the trial court's oral statements to *add* findings to the trial court's order is unavailing.

The trial court's findings and conclusions are attached as App. D (CP 182-85). It entered eight findings. CP 183-84. None of them says that John lied. *Id*. While the trial court did say that Tatyana "was the victim of domestic violence," that finding is based on the 2007 DV order, but fails to account for the 2013 trial court's determination that John had committed no other DV and presented no risk of future DV. *Compare* CP 183 *with* ***Mason I*** at 4-5. In any event, this finding is

irrelevant to whether the trial court could vacate the 2013 Child Support Order. Its only purpose here is to prejudice this Court. That is not possible.

Tatyana nonetheless argues that Findings E, G, and H are extraordinary circumstances justifying vacating the 2013 Child Support Order. Pet. at 15. Aside from the irrelevant DV finding discussed *supra*, Finding E says *the parties* did not act to remove the conditions on Tatyana seeking permanent residential status. CP 183. This simply shows that Tatyana is at least equally at fault. That is not extraordinary. Tatyana cites no authority saying that these facts justify vacating a valid child support order. None exists.

Finding G notes that no prior court has considered the I-864, that Tatyana has trouble with English, that her prior lawyer did not obtain interpretive services for her in 2013, and that she has had an interpreter in these proceedings. CP 183. None of this is extraordinary. Tatyana's 2013 lawyer repeatedly failed to act. Ostensible attorney negligence does not justify vacating a valid court order. ***Lane***, 81 Wn. App. at 109; ***Burkey***, 36 Wn. App. at 488-90.

Finding H says that Tatyana is unable to work due to her immigration status and that her failure to pay child support "would likely prevent her from removing the conditions on her current

resident status and obtaining permanent residency in the United States." CP 183-84. These circumstances are hardly extraordinary – they are federal law. And again, Tatyana cites no authority for the doubtful proposition that U.S. immigration law presents an extraordinary circumstance justifying vacating a child support order.

Ultimately, the trial court's *conclusions* do not rely on these findings, but rather refer *solely* to Tatyana's counsel's failure to offer the I-864 affidavit during the 2013 trial (CP 184):

> The Order of Child Support entered November 25, 2013 should be vacated because the Court was not informed of the existence of the 1-864 affidavit at the time of the entry of the order.

This (arguable) attorney negligence is the sole ground on which the trial court rested its CR 60(b)(11) ruling. And Tatyana cited no authority to the trial court to support the other theories she first raised on appeal. The appellate court did not err.

And even if it had, mere error is no basis for review in this Court. RAP 13.4(b). While Tatyana cites (b)(1) & (2), she shows no conflict with Washington law. And as the Court of Appeals noted, her lawyer's failure to present the I-864 affidavit in 2013 is harmless negligence (so to say) because it cannot absolve her of her duty to pay child support. ***Mason II*** at 10-12. No error occurred.

C. The trial court made no credibility findings, so the Court of Appeals need not "defer" to them.

Tatyana argues that the appellate court failed to "defer" to the trial court's alleged "credibility determinations." Pet. at 17-20. Here, as throughout her Petition, Tatyana falsely claims that the trial court made a credibility *finding* against John. *Id*. But the Court will search in vain for such a finding. *See* App. D. While it is true the trial court questioned John's earlier *affidavit* in oral statements during trial, John did not deny signing the I-864 during trial, explaining the purported discrepancy: he simply forgot he signed it 19 years earlier. The trial court entered no credibility finding against John. *Id*.

The appellate court notes the absence of a trial court finding that John intentionally withheld the I-864. ***Mason II*** at 4, 13. But Tatyana argues instead that the trial court found John not credible, solely relying on the trial court's oral statements regarding CR 11 sanctions – colloquy the appellate court held insufficient to support even those sanctions. ***Mason II*** at 16-17. Tatyana does not challenge the appellate court's holding vacating the CR 11 order. The appellate court correctly held that the trial court did not find John knowingly withheld the I-864. *Id.* at 13. He did not.

D. This Court should award fees under RAP 18.1(j) as a sanction payable to this Court.

This Court should award John fees for answering Tatyana's Petition under RAP 18.1(j) as a sanction for Tatyana's unflagging disparagement of John and his counsel. John has been patient. Tatyana has libeled him and his counsel at every opportunity.

For his part, counsel has received several personally insulting emails from Tatyana that go far beyond the bounds of decent discourse. One such email from her following the Court of Appeals' reversal says this:

> You should be embarrassed and shamed for presenting false information to the court of appeals. I see you are overly aggressive and dishonest you are Поганный пидараз, мошеник...

The Court can no doubt obtain its own translation from the Russian, but suffice it to say here that, according to Google Translate, Tatyana spat out a homophobic slur while (again) calling counsel a liar – in Cyrillic!

Counsel has been called worse. But this sort of behavior – despite counsel's repeated warnings to refrain from sending vile emails – is beneath contempt. Awarding fees may send an appropriate message. Having them paid to this Court as a sanction under this Court's inherent authority would certainly do so.

CONCLUSION

No conflict exists with any appellate decision. This Court should deny review and order Tatyana to pay a sanction – perhaps in the amount of John's attorney fees for responding to this petition – to this Court.

RESPECTFULLY SUBMITTED this 21st day of December 2018.

MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

APPENDIX A

Marriage of Mason, No. 49839-1-II, slip op. (July 31, 2018)

Filed
Washington State
Court of Appeals
Division Two

July 31, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of JOHN ARTHUR MASON, Appellant, and TATYANA IVANOVNA MASON, Respondent.	No. 49839-1-II UNPUBLISHED OPINION

MAXA, C.J. – John Mason appeals the trial court's order vacating a 2013 order requiring his former wife Tatyana Mason to pay him child support. The trial court vacated the child support order under CR 60(b)(11) because in the 2013 proceeding the court had not been informed that John[1] had an obligation to support Tatyana based on an I-864 affidavit of support relating to Tatyana's immigration to the United States.

We hold that (1) the trial court erred in vacating the 2013 child support order because the failure of the parties to inform the court of the I-864 affidavit was not an extraordinary circumstance extraneous to the prior proceedings, (2) the trial court did not err in awarding Tatyana a portion of her expert witness fees under RCW 26.09.140, and (3) the trial court erred in imposing CR 11 sanctions against John without including specific findings supporting the award in its CR 11 order.

[1] To avoid confusion, we refer to the parties by their first names. We intend no disrespect.

Accordingly, we reverse the trial court's order vacating the 2013 child support order and a related order vacating an order that prospectively modified Tatyana's child support obligation. We affirm the trial court's award of expert fees to Tatyana under RCW 26.09.140. And we vacate the trial court's order imposing CR 11 sanctions on John and remand either for entry of specific findings supporting the award of CR 11 sanctions that are included or incorporated in the court's CR 11 order or a determination that CR 11 sanctions are not warranted.

FACTS

Marriage and Dissolution

Tatyana came to the United States in 1999 on a "fiancée visa" sponsored by John. At the time, Tatyana did not speak English, so John filled out her immigration paperwork. One of the forms that John signed was an affidavit of support, known as an I-864 affidavit, agreeing that he would provide financial support to Tatyana for a certain period of time.

The parties married in 1999 and later had two children. John filed a petition for dissolution in 2007. The trial court entered a decree of dissolution in 2008, which allocated residential time evenly and included a requirement that John make child support payments to Tatyana.

In 2011, John filed a petition to modify the parenting plan based on his allegation that Tatyana abused the children. The trial court held a trial on the modification, during which Tatyana was represented by counsel. The trial court granted John's petition to modify the parenting plan and entered a finding of abuse against Tatyana under RCW 26.09.191.

As part of its modification, the trial court entered an amended order of child support on November 25, 2013. The court imputed income to Tatyana on the basis that she was voluntarily unemployed. The previous year Tatyana had worked and been paid at an hourly rate of $12, and

she agreed that this level of income should be imputed to her. The court ordered that Tatyana pay $412.04 per month in child support. Neither party informed the court that John had signed an I-864 affidavit agreeing that he would provide financial support to Tatyana.

Tatyana appealed the trial court's order granting John's petition. *See In re Marriage of Mason*, No. 45835-7-II (Wash. Ct. App. July 7, 2015) (unpublished), http://www.courts.wa.gov/opinions/. She did not contest the trial court's imputation of income or its imposition of child support payments. *Id.* at 1. In July 2015, we affirmed the trial court's order. *Id.*

Motions to Dismiss Child Support

Shortly after we affirmed the trial court's modification, Tatyana filed a series of three motions in the trial court to dismiss her child support obligation.[2] She filed a motion in September 2015, arguing that it was error to impute income to her and that her unpaid child support was interfering with her immigration status. A superior court commissioner denied the motion. Tatyana did not appeal.

The same day that her first motion was denied, Tatyana filed a second motion requesting modification of her child support obligation and again contesting the imputation of income and child support. On October 13, 2015, a superior court commissioner granted Tatyana's motion in part. The commissioner entered an amended child support order ruling that Tatyana was unable to work and imposing monthly child support of $50 per child, the statutory minimum. However, the commissioner denied Tatyana's motion to vacate unpaid child support that already had accrued. Neither party appealed.

[2] The case procedure has been abbreviated at certain points for clarity.

Next, Tatyana filed a petition to modify the parenting plan and a motion to vacate the full amount of the child support order. The motion to vacate alleged various errors relating to the 2013 child support order. The motion also described Tatyana's precarious economic situation, including the allegation that she was unable to obtain employment because of her immigration status and unpaid child support. Tatyana did not reference John's I-864 affidavit by name, but stated, "I am asking for a maintains [sic] fee, since he brought me to here, promised to a government to support me 100%." Clerk's Papers (CP) at 1001.

A superior court commissioner denied Tatyana's petition to modify the parenting plan and motion to vacate the child support order. Tatyana moved to revise the commissioner's order. At an April 29, 2016 hearing, Tatyana argued that John had completed an I-864 affidavit of support as part of her initial visa application. Tatyana presented a copy of the affidavit, and John objected because it was not notarized or dated. The trial court continued the hearing to July 8 and directed Tatyana to have an official authenticate the immigration documents.

Before the July 8 hearing, John submitted a declaration stating that he did not remember what he signed during the immigration process in 1999 and did not remember filing the I-864 affidavit. He added, "[Tatyana] claims that I would have had to complete an I-864 as part of the fiancé's [sic] visa application but that is not true." CP at 403. He explained that the fiancée visa required a different form and that the I-864 affidavit was instead required for family-based immigration. John added that he had attempted to submit a Freedom of Information Act request for the documents he had submitted but he received a letter stating that he was not eligible to receive them unless Tatyana signed the request.

At the July 8 hearing, the trial court stated that it would treat Tatyana's motion to vacate the 2013 child support order as a motion to vacate under CR 60(b). In a subsequent letter ruling,

the court explained that because the parties had raised credibility issues, a trial was necessary to allow the parties to present testimony.

Trial and Ruling

At trial, Tatyana represented herself. She offered the testimony of Jay Gairson, an immigration attorney, as an expert witness. The trial court ruled that it would allow Gairson's testimony on immigration law to assist in understanding the issues and law in that area.

Gairson testified generally about immigration law, as well as about Tatyana's particular immigration situation. He stated that he had reviewed Tatyana's files and concluded that John had signed an I-864 affidavit. The affidavit imposed on John a financial obligation to Tatyana, requiring him to support her up to 125 percent of the federal poverty guideline. Gairson explained how the support requirement operated: "If you look at those guidelines for a . . . single individual, you take 125 percent of that amount and then you subtract any income that she would have earned from that year, and that will tell you how much Mr. Mason would have owed her." Report of Proceedings (RP) (Oct. 17, 2016) at 67.

The trial court entered an order granting the motion to vacate and provided written findings of fact and conclusions of law. The court found that John had signed an I-864 affidavit, but that there was no evidence that any other judge in the case had considered the affidavit. The trial court entered a conclusion of law that the I-864 affidavit created a continuing obligation on John to support Tatyana and that the obligation had not terminated. The court also concluded, "The I-864 affidavit is such a significant factor in this case that to set child support without its consideration creates an unjust result." CP at 124. In its oral ruling, the trial court explained that the I-864 affidavit would be considered "in the calculation of the child support and as to offsets." RP (Nov. 2, 2016) at 472.

The court ruled that CR 60(b)(11) was the appropriate basis to bring a motion to vacate and that the 2013 child support order should be vacated because the court was not informed of the I-864 affidavit when the order was entered.[3] On that basis, the court vacated the 2013 child support order as well as any remaining unpaid child support. The court stated that John could seek entry of a new child support order, and that the court would consider a request for expert fees at a later hearing.

The court subsequently entered an order in December 2016 vacating the amended child support order the commissioner entered on October 13, 2015, which the court inadvertently failed to include in its previous order.

Expert Witness Fees

The trial court held a hearing on the issue of expert witness fees. Tatyana requested the costs of Gairson's expert testimony, which he calculated to be $12,800, as well as sanctions under CR 11. The trial court awarded Tatyana costs equal to two-thirds of Gairson's fee based on the parties' relative financial positions.

The trial court awarded to Tatyana the remaining one-third of Gairson's fee as CR 11 sanctions. The court based its sanction award on John's declaration statements that because he was not required to file I-864 affidavit, he did not do so. The court reasoned,

> Those statements raise the issue of the existence of the I-864, which is what required this court to have a three-day trial over whether or not that document existed. Now, clearly clients are entitled to aggressive advocacy, but I believe the advocacy in this case presented an untrue presentation to the court which created unnecessary litigation.

RP (Dec. 9, 2016) at 18. However, the court did not enter any written findings regarding CR 11 and did not include the basis of its award in the CR 11 order.

[3] The trial court considered whether vacation would be appropriate under CR 60(b)(1), (2) and (3), but declined to apply those subsections.

Based on its rulings, the trial court entered an order awarding Tatyana $8,533 in costs under RCW 26.09.140 and $4,267 in sanctions under CR 11.

John appeals the trial court's order vacating the 2013 child support order and the order awarding expert fees and imposing CR 11 sanctions.

ANALYSIS

A. FORM I-864 AFFIDAVIT OF SUPPORT

This court previously reviewed the effect of an I-864 affidavit of support in *In re Marriage of Khan*, 182 Wn. App. 795, 798-99, 332 P.3d 1016 (2014). As the court explained, a family-sponsored applicant for permanent residency in the United States must prove that he or she is unlikely to become a public charge. *See* 8 U.S.C. § 1182(a)(4). To that end, the applicant's family sponsor may be required to execute and submit an affidavit of support on Form I-864. 8 U.S.C. §§ 1182(a)(4)(C)(ii), 1183a(a)(1). The sponsor must agree "to provide support to maintain the sponsored [immigrant] at an annual income that is not less than 125 percent of the [f]ederal poverty line during the period in which the affidavit is enforceable." 8 U.S.C. § 1183a(a)(1)(A).

The I-864 support obligation continues indefinitely until it is terminated. *Khan*, 182 Wn. App. at 799. Termination occurs when the sponsored immigrant (1) becomes a United States citizen, (2) has worked or is credited with 40 qualifying quarters of coverage (as defined by the Social Security Act, 42 U.S.C. § 413), (3) no longer has lawful permanent resident status and departs the United States, (4) becomes subject to removal but obtains a new grant of adjustment of status as relief from removal, or (5) either the sponsor or the sponsored immigrant dies. 8 U.S.C. § 1183a(a)(2)-(3); 8 C.F.R. § 213a.2(e)(2). The support obligation continues after

dissolution of the marriage between the sponsor and the sponsored immigrant. *Khan*, 182 Wn. App. at 799.

The I-864 affidavit creates a binding contract between the sponsor and the federal government, and establishes the sponsored immigrant as a third-party beneficiary. *Id.* The immigrant can enforce the support obligation against his or her sponsor. 8 U.S.C. § 1183a(a)(1)(B); *Khan*, 182 Wn. App. at 799, 803-04.

B. APPLICATION OF CR 60(b)(11)

John argues that the trial court erred in applying CR 60(b)(11) to vacate the 2013 child support order.[4] We agree.

1. Legal Principles

Under CR 60(b), a trial court may relieve a party from a final judgment, order, or proceeding for one of 11 stated reasons. A catch-all provision under CR 60(b)(11) states that the court may grant relief from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment." That provision is "intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies." *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). CR 60(b)(11) applies to "extraordinary circumstances involving irregularities extraneous to the proceeding." *Shandola*, 198 Wn. App. at 895.

The trial court has discretion in deciding whether to grant or deny a motion to vacate under CR 60(b). *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Therefore,

[4] Initially, John argues that Tatyana's motion was barred by collateral estoppel because she already appealed the child support order and the order was affirmed. Br. of App. at 25-28. We decline to consider this argument because John did not raise it in the trial court. RAP 2.5(a). As an aside, we note that RCW 26.09.170(5)(a) expressly states that a party owing child support may file a petition to amend "at any time."

we review CR 60(b) orders for abuse of discretion. *Shandola*, 198 Wn. App. at 896. A trial court has abused its discretion when its decision is based on untenable grounds or is made for untenable reasons. *Id.*

For the purpose of this court's review, any unchallenged findings of fact included in the trial court's order are verities on appeal. *Rush v. Blackburn*, 190 Wn. App. 945, 956, 361 P.3d 217 (2015).

2. Extraordinary Circumstances

a. Legal Background

A trial court may vacate a judgment under CR 60(b)(11) only when the case involves "extraordinary circumstances." *Shandola*, 198 Wn. App. at 903. Courts considering motions to vacate orders in a dissolution have found circumstances to be sufficiently extraordinary when they materially frustrate the purpose of the relevant order. *See, e.g.*, *In re Marriage of Hammack*, 114 Wn. App. 805, 810-11, 60 P.3d 663 (2003); *In re Marriage of Thurston*, 92 Wn. App. 494, 503-04, 963 P.2d 947 (1998).

The court in *Hammack* considered a separation agreement that exempted one party from child support payments in exchange for the other party receiving a larger share of the couple's property. 114 Wn. App. at 807. The court concluded that the agreement waiving child support was against public policy, making it void and unenforceable. *Id.* at 811. A settlement based on a void agreement was an extraordinary circumstance sufficient to vacate the settlement. *Id.*

In *Thurston*, the court vacated a dissolution decree when one party refused to transfer a partnership interest as required in the decree. 92 Wn. App. at 496-97. Because failure of the transfer would "throw the whole settlement out," it was a material condition of the settlement and presented an extraordinary circumstance supporting vacation. *Id.* at 503-04 (quotation marks

omitted); *see also In re Marriage of Knies*, 96 Wn. App. 243, 250-51, 979 P.2d 482 (1999) (holding that transition of the obligor's income from pension to disability allowed the obligor to circumvent property settlement and constituted an extraordinary circumstance).

But an attorney's error, erroneous advice, or negligence are not sufficient grounds for vacating a judgment. *Lane v. Brown & Haley*, 81 Wn. App. 102, 109, 912 P.2d 1040 (1996). Similarly, an unfair result, even when caused by poor representation, is insufficient grounds to vacate. *See In re Marriage of Burkey*, 36 Wn. App. 487, 488-90, 675 P.2d 619 (1984).

In *Burkey*, Ms. Burkey discovered that she had received inadequate representation and moved to vacate a decree of dissolution based on her allegation that Mr. Burkey had failed to inform her of the value of all of their property. *Id.* at 488. The court held that vacation of the dissolution decree was improper. *Id.* at 489-90. The court stated that the parties knew of all the property, there was no fraud between Mr. Burkey and Ms. Burkey's attorney, and Mr. Burkey was not responsible for the quality of Ms. Burkey's representation. *Id.*

In addition, in *In re Marriage of Yearout*, this court held that extraordinary circumstances did not exist when an obligor lost 25 percent of his income, allegedly making it impossible to meet his child support and other obligations. 41 Wn. App. 897, 898, 902, 707 P.2d 1367 (1985).

b. Extraordinary Circumstances Analysis

Here, the trial court vacated the 2013 child support order based on the parties' failure to inform the court of the I-864 affidavit when the court entered the child support order. The trial court stated that the affidavit was a "significant factor" and that imposing child support without considering it created an "unjust result." CP at 124. It appears that the trial court's rationale was that the I-864 affidavit was new evidence not previously considered. But we hold that the

court's failure to consider the I-864 affidavit in the 2013 proceeding is not the type of extraordinary circumstance required by CR 60(b)(11).

First, it is questionable whether the I-864 affidavit would have impacted Tatyana's child support obligation even if it had been presented to the court in 2013. During the 2013 proceedings, the court found that Tatyana was voluntarily unemployed and the parties agreed to impute income of $2,080 per month to her. The court used Tatyana's imputed income to calculate her child support obligation, and that obligation applied regardless of her actual income. *See In re Marriage of Goodell*, 130 Wn. App. 381, 389-90, 122 P.3d 929 (2005) (stating that a parent cannot avoid child support by remaining voluntarily unemployed or underemployed).

The I-864 affidavit would not have changed Tatyana's income for purposes of the child support calculation. The I-864 affidavit required John to provide payments to Tatyana only when her income was below 125 percent of the federal poverty guideline. *See Khan*, 182 Wn. App. at 798-99. At the time of the 2013 child support order, this income level was $1,197 per month.[5] But even if John was required to pay that amount to Tatyana, her child support obligation would not decrease because her *imputed* income for child support was significantly greater. Therefore, even if the trial court had considered the I-864 affidavit in 2013, the affidavit would have had no practical effect.

In her earlier motions to avoid her child support obligations, Tatyana argued that the trial court erred in imputing income to her. But a revelation that Tatyana may be entitled to I-864 payments is not a reason to question the validity of the court's 2013 ruling that she was

[5] The child support schedule attached to the 2013 order listed $1,197 as 125 percent of federal poverty guideline, to serve as a "Self-Support Reserve." CP at 20.

voluntarily unemployed. Tatyana's entitlement to payments under the I-864 affidavit is a separate issue from whether she was voluntarily unemployed. And even if the imputation of income to her was error, legal errors cannot be the basis for a CR 60(b) motion; they must be corrected on appeal. *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990). Tatyana did not appeal the court's 2013 calculation of child support payments.

Second, the fact that John's I-864 obligation might be relevant as an offset for Tatyana's child support obligation[6] does not constitute an extraordinary circumstance. Even if John owed money to Tatyana, that amount would not affect the amount of Tatyana's child support obligation. The trial court's calculation under RCW 26.19.065 and .071 determines the amount of child support based on actual or imputed income. And Washington dissolution law and a spouse's I-864 obligations are independent of each other. *Khan*, 182 Wn. App. at 801. "Nothing in the federal statutes or regulations provides that an I-864 obligation must . . . be enforced in a dissolution action." *Id.*[7]

Third, there is reason to be cautious about vacating an order in circumstances like this one, where a party has merely presented new evidence that was previously available but not identified. CR 60(b)(11) does not relieve a party from a final judgment simply because some important evidence was not produced at trial. Reducing the threshold for what qualifies as an extraordinary circumstance also cuts against judicial values of preservation of resources and finality. *See Guardado v. Guardado*, 200 Wn. App. 237, 244, 402 P.3d 357 (2017) (recognizing

[6] The trial court explained, "[I]f a court was entering a child support order, it would take into account whether or not the person receiving child support was also paying spousal maintenance." RP (Nov. 2, 2016) at 472.

[7] However, as this court noted in *Kahn*, Tatyana can enforce the I-864 support obligation against John in a separate action. 182 Wn. App. at 803-04.

value of preserving resources); *Shandola*, 198 Wn. App. at 895 (stating that finality of judgments is "a central value in the legal system").

Tatyana's primary argument seems to be that extraordinary circumstances exist because she lacked the resources to meet her past child support obligations. But to the extent that her argument is that the 2013 child support order is too burdensome, an unfair result does not amount to extraordinary circumstances as required by CR 60(b)(11). *See Yearout*, 41 Wn. App. at 902.

Tatyana also argues that extraordinary circumstances are present because her situation when she first arrived in the United States allowed John to take advantage of her. She points out that she did not know English, did not have friends or family, and did not have any money. Her limitations on arriving to the United States may explain why Tatyana was previously unaware of the I-864 affidavit. But Tatyana's limitations in 1999 do not demonstrate extraordinary circumstances to justify vacating the 2013 child support order. Whether her discovery of the I-864 affidavit is an extraordinary circumstance depends on how it impacts the validity of that order.

Finally, Tatyana argues that extraordinary circumstances exist because John knowingly withheld the I-864 affidavit from the court in the 2013 proceedings. But there is no evidence to support her argument. John testified that he was unaware that he had completed or filed the form. The I-864 affidavit Tatyana produced at the CR 60(b)(11) trial was signed in 1999, over a decade before any of the relevant proceedings began. John stated in multiple declarations that he did not remember filling out the I-864 affidavit, and added that he did not believe he was required to do so based on Tatyana's type of visa. The trial court made no factual finding that John knowingly withheld the affidavit from her.

3. Extraneous to the Proceedings

To vacate an order under CR 60(b)(11), any extraordinary circumstances must either be an irregularity extraneous to the court's action or go to the question of the regularity of the proceedings. *Tatham v. Rogers*, 170 Wn. App. 76, 100, 283 P.3d 583 (2012). The extraordinary circumstance must demonstrate a " 'fundamental wrong' " or a " 'substantial deviation from procedure.' " *In re Marriage of Furrow*, 115 Wn. App. 661, 674, 63 P.3d 821 (2003) (quoting Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505, 515 (1960)).

For example, an irregularity extraneous to the court's action occurs when a trial court fails to disqualify itself as required by the controlling judicial code. *See Tatham*, 170 Wn. App. at 100-01. An irregularity is also extraneous to the proceedings when there has been a change in the law, *Union Bank, NA v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 845, 365 P.3d 223 (2015), or when an unforeseen event occurs after proceedings conclude. *See Knies*, 96 Wn. App. at 250-51 (applying CR 60(b)(11) when obligor's source of income changed, circumventing property settlement agreement).

Here, Tatyana's failure to submit the I-864 affidavit to the court previously was not an event extraneous to the 2013 proceedings that resulted in entry of the child support order. No event outside of the proceedings impacted that order. Rather, Tatyana identified evidence that should have been presented in the earlier proceedings but was not. But presentation of evidence regarding the parties' income was specifically at issue in the proceedings leading up to the 2013 child support order.

4. Summary

We hold that Tatyana's motion did not identify an event that was either an extraordinary circumstance or extraneous to the 2013 proceedings resulting in entry of the child support order. Accordingly, we hold that the trial court abused its discretion in vacating the 2013 child support order under CR 60(b)(11).[8]

C. AWARD OF EXPERT WITNESS FEE

John argues that the trial court erred in awarding to Tatyana a portion of Gairson's expert witness fee. We disagree.

1. Award of Costs

Under RCW 26.09.140, the trial court in a dissolution action "after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding." This statute authorizes an award of costs on a motion to vacate filed in a dissolution action. *In re Marriage of Moody*, 137 Wn.2d 979, 993-94, 976 P.2d 1240 (1999). An award of costs under RCW 26.09.140 is not necessarily limited to the prevailing party. *In re Marriage of Rideout*, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003).

In determining whether to award costs, the trial court compares each party's relative need and ability to pay. *In re Marriage of Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (2001). We review a trial court's decision regarding an award under RCW 26.09.140 for abuse of discretion. *In re Marriage of Obaidi*, 154 Wn. App. 609, 617, 226 P.3d 787 (2010).

[8] John also argues that Tatyana's CR 60(b) motion was not filed within a reasonable time as that rule requires. Because we reverse on other grounds, we do not address this argument.

Here, the trial court awarded Tatyana costs of $8,533, based on its calculation of two-thirds of Gairson's expert witness fee for preparing and testifying. The trial court stated that it considered the parties' relative assets, including that Tatyana was "essentially unemployed and homeless" and that John earned roughly $4,500 per month. RP (Dec. 9, 2017) at 17. The trial court recognized that Gairson spent more time on this case than was typical. But the trial court concluded that the fee was reasonable based on Tatyana's language barriers, her lack of familiarity with the law, and the complicated nature of the case.

The court evaluated the amount of Gairson's fee and considered the parties' respective abilities to pay. Accordingly, we hold that the trial court did not abuse its discretion in awarding Tatyana these costs.

D. AWARD OF CR 11 SANCTIONS

John argues that the trial court erred in imposing sanctions against him under CR 11 without adequate written findings supporting the sanctions. We agree.

CR 11(a) requires every pleading, motion, and legal memorandum of a party represented by an attorney to be signed and dated by an attorney of record. The attorney's signature certifies that, to the best of the attorney's knowledge and based on an inquiry reasonable under the circumstances, the pleading, motion, or legal memorandum was not filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11(a)(3).

CR 11(a) authorizes the imposition of an appropriate sanction for a violation of the rule, including reasonable attorney fees and litigation expenses. *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 190, 244 P.3d 447 (2010). We review imposition of CR 11 sanctions for abuse of discretion. *In re Marriage of Lee*, 176 Wn. App. 678, 690, 310 P.3d 845 (2013).

When the trial court imposes CR 11 sanctions, it must state the basis for the sanctions in its CR 11 order. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). In *Biggs*, the Supreme Court stated:

> [I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct *in its order*. The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.

Id. (emphasis added) (additional emphasis omitted). The court remanded because there were no such findings. *Id.* at 201-02.

This court cited *Biggs* in requiring findings supporting the imposition of sanctions in the trial court's CR 11 order:

> [T]he court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11. The court must specify the sanctionable conduct in its order.

N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). Written findings are not necessarily required as long as comprehensive oral findings are expressly incorporated into the court's CR 11 order. *Johnson v. Mermis*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998).

Here, the trial court explained its ruling orally, stating that John improperly represented facts regarding filing the I-864 affidavit in a declaration statement. But the court's order imposing sanctions did not state the basis for the sanction or incorporate its oral ruling. Therefore, the trial court's sanction award was insufficient under *Biggs* and *North Coast Electric* and we vacate the trial court's CR 11 order.

E. ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal. John requests fees based on Tatyana's alleged intransigence. Tatyana requests attorney fees and costs under RCW 26.09.140 based on

her financial need and because John's appeal is frivolous. We decline to award attorney fees to either party.

CONCLUSION

We reverse the trial court's order vacating the 2013 child support order, reverse the trial court's December 2016 order vacating the October 13, 2015 order that prospectively modified Tatyana's child support obligation, and reinstate the October 13, 2015 order. We affirm the trial court's award of expert fees to Tatyana under RCW 26.09.140. And we vacate the trial court's order imposing CR 11 sanctions on John and remand either for entry of specific findings supporting the award of CR 11 sanctions that are included or incorporated in the court's CR 11 order or a determination that CR 11 sanctions are not warranted.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, C.J.

We concur:

WORSWICK, J.

LEE, J.

APPENDIX B

Marriage of Mason, No. 45835-7-II, slip op. (July 7, 2015)

FILED
COURT OF APPEALS
DIVISION II

2015 JUL -7 AM 8:45

STATE OF WASHINGTON

BY_____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re the Matter of the Marriage of JOHN ARTHUR MASON, Respondent, and TATYANA IVANOVNA MASON, Appellant.	No. 45835-7-II UNPUBLISHED OPINION

JOHANSON, C.J. — Tatyana Mason appeals from a trial court order modifying a parenting plan in which the trial court ordered that John Mason assume responsibility as the primary parent of the parties' children. Tatyana[1] argues that (1) the trial court's ruling was not based on substantial evidence, (2) the trial court erred by denying her motion for reconsideration based on the existence of new evidence, (3) this court should reverse the trial court's entry of the restraining order, and (4) this court should award her attorney fees. We hold that substantial evidence supports the trial court's ruling, the trial court did not err by denying Tatyana's motion for reconsideration nor by entering the restraining order, and neither party is awarded attorney fees. We affirm.

[1] We refer to the Masons by their first names for clarity, intending no disrespect.

FACTS

I. BACKGROUND

John and Tatyana married in 1999. They had two children, G.M. and D.M. John filed for divorce in 2007, and the parties engaged in mediation, agreeing upon final orders including a parenting plan. The orders specified that John and Tatyana would share custody of their children. Contemporaneously with John's 2007 dissolution filing, Tatyana filed a petition for a domestic violence protection order. A court commissioner granted the petition.

After the dissolution, G.M. and D.M. participated in counseling with social worker Stephen Wilson. During this time, John became concerned about Wilson's treatment of G.M. following an incident in which G.M. hit his younger brother. When the parties could not agree on a new counselor, John filed a motion to the trial court to appoint one. The court appointed Sandra Hurd to assume responsibility for the Mason family's counseling needs. The court also ordered both John and Tatyana to undergo counseling with Hurd, which they each did initially.

In February 2011, G.M. made disclosures to John alleging physical and emotional abuse by Tatyana. D.M. corroborated G.M.'s allegations. John responded by taking the children to Hurd and by contacting Child Protective Services (CPS). The Mason children again made disclosures of abuse. G.M. and D.M. also expressed fear about returning to their mother's care.

John then filed a petition to modify the parenting plan, obtaining an emergency order granting custody of G.M. and D.M. in his favor in the meantime. The order limited Tatyana's time with the children to professionally supervised visits. The trial court also appointed Ralph Smith to serve as guardian ad litem (GAL).

Smith conducted an investigation into the children's allegations and generated a report of his findings. Smith concluded that Tatyana used fear and physical force against G.M. and that her actions rose to the level of abuse. Smith recommended that the children remain with John and that Tatyana maintain her supervised visitation. Smith also recommended that Tatyana undergo a parenting evaluation regarding her "tendency for violence." Ex. 12 at 9.

Tatyana initially complied with the supervised visit requirement, but later ceased attending the visits for extended periods of time. Following a number of reported incidents during the visitations, Hurd composed a recommendation letter in which she determined that the visits were stressful for G.M. and D.M. Smith then filed a motion urging the court to suspend Tatyana's visitation rights until she obtained the recommended parenting evaluation.

Rather than suspending Tatyana's visitation rights entirely, the trial court ordered that Tatyana's visits be therapeutic in nature, but Tatyana never arranged or coordinated such visits. Tatyana claimed she could not afford to pay for the therapeutic visits or other supervised visitation time because she had lost her home and she had no income.[2]

Tatyana also failed to obtain the recommended parenting evaluation, instead filing a motion asking the trial court to order an evaluation for both parents. Tatyana and John agreed that Dr. Loren McCollom would conduct the evaluation, but Tatyana did not inform John when she began the evaluation process. In light of Tatyana's domestic violence allegations and when he became

[2] Tatyana was generally uncooperative when asked about her finances or her living arrangement at the time of the hearing. She admitted that she was living with a person with whom she was in a relationship, but refused to tell the court where she was living.

aware of the court's order to evaluate both parents, Dr. McCollom suspended the evaluation process.

II. PROCEDURE

The parties proceeded to trial on the modification petition absent Dr. McCollom's report. There, John urged the court to adopt a modified parenting plan according to which he would have sole custody of the children with therapeutic visitation sessions for Tatyana. The basis of John's proposed modification was Tatyana's physical and emotional abuse of G.M. and D.M.

Tatyana opposed the modification at least insofar as the trial court would grant John's request without first obtaining Dr. McCollom's evaluation report. The trial court heard testimony from John, Tatyana, Hurd, Dr. McCollom, and Smith, among others. The trial court found credible the testimony regarding Tatyana's abuse of the children. Notwithstanding that determination, however, the trial court granted Tatyana's request to continue the hearing so that the parties could complete the parenting evaluation with Dr. McCollom. The trial court ordered John and Tatyana to share the cost of the evaluation.

Dr. McCollom conducted the parenting evaluation. John complied with the court's order and paid his portion of the evaluation cost, but because Tatyana did not do so, Dr. McCollom would not release the report, so the trial court again continued the hearing on two additional occasions. By October 2013, Tatyana still had not remitted payment, but the trial court refused to continue the matter further.

The trial court heard additional testimony and considered new evidence, including a CPS report finding that the allegations of abuse by Tatyana were "founded." The court made an oral ruling during which it noted that there had been a previous finding of domestic violence against

John, but concluded that there was no evidence to support an additional finding to that effect and, in the court's view, there were no concerns about future domestic violence from John.

The trial court entered findings of abuse by Tatyana pursuant to RCW 26.09.191 and granted John's request to modify the parenting plan under RCW 26.09.260. The court expressed concern that Tatyana had not exercised all of her visitation rights pursuant to the former court orders and that at one time, she let nearly one year pass without contacting the children.

As part of its order, the court also remarked that the goal of the modified final orders was to establish a system whereby Tatyana and the children can develop a healthy relationship through the development and implementation of a reunification plan with a new counselor. The court assigned a case coordinator to make sure that the reunification plan progressed satisfactorily. The trial court also entered a restraining order, enjoining Tatyana from contacting G.M. and D.M. at their school or day care.

Following the entry of the modified parenting plan, Tatyana entered into a payment agreement with Dr. McCollom so that she could obtain the parenting evaluation report. Tatyana then filed a motion for reconsideration. The trial court declined to reconsider its earlier ruling. Tatyana appeals the trial court's order modifying the parenting plan and its order denying Tatyana's motion for reconsideration.

ANALYSIS

I. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S MODIFICATION ORDER

Tatyana contends that the trial court erred by entering the order granting John's motion to modify the parenting plan because the trial court's findings of fact were not supported by substantial evidence and because the court did not rule on "sufficient information." Br. of Appellant at 20-23. Because the trial court heard ample testimony, which it found credible, from various professionals who determined that Tatyana abused G.M. and D.M., we conclude substantial evidence supports the trial court's parenting plan decision.

Generally, we review a trial court's rulings on a parenting plan for abuse of discretion. *In re Marriage of Christel*, 101 Wn. App. 13, 20-21, 1 P.3d 600 (2000) (citing *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996)). We do not reverse a trial court's decision to modify a parenting plan under RCW 26.09.260 unless the trial court exercised its discretion in an untenable or manifestly unreasonable way. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

Specifically, we review a trial court's findings of fact to determine whether substantial evidence supports the findings and whether those findings of fact support the conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014). "Substantial evidence" is the quantum of evidence "sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

We make all reasonable inferences from the facts in John's favor as the prevailing party below. *Scott's Excavating*, 176 Wn. App. at 342. And we do not "disturb findings of fact

supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). We defer to the trial judge on issues of witness credibility and persuasiveness of the evidence. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

RCW 26.09.260 governs modifications of parenting plans. It provides in pertinent part,

> (1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. . . .
>
> (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
>
> . . . .
>
> (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

Here, in support of its decision that modification of the parenting plan was in the children's best interest, the trial court found that the children's environment under the then-existing plan was detrimental to their physical, mental, or emotional health. The court found further that CPS had conducted an investigation resulting in a determination that abuse was "founded." Clerk's Papers at 207.

The trial court heard testimony from Hurd, who discussed G.M.'s disclosures that Tatyana had been abusing him physically for an extended period of time and that she did not always feed him enough. Hurd found these disclosures credible. Hurd also observed bruises on G.M. And D.M. made disclosures that corroborated G.M.'s version of the events.

The trial court also heard testimony from Smith in his role as the GAL. Smith agreed that Tatyana's action instilled a fear of harm in the children and noted that although G.M. and D.M. wanted to see their mother, they only wished to do so with supervised visits. Smith had no concerns about the children living with John and recommended that they continue to do so. The trial court found these aspects of Hurd's and Smith's testimony credible.

Tatyana takes issue with the trial court's reference to the findings and recommendations of a previous GAL in 2008 in support of what appears to be a claim that the trial court erred by relying on an outdated report. But the trial court simply mentioned that it had also reviewed [the GAL's] report from 2008. Tatyana cites no authority to support the proposition that a trial court cannot, on its own initiative, look into related material filed by an officer of the court in an earlier stage of a concomitant proceeding. And as described above, the evidence absent any mention of the earlier GAL report supports the trial court's findings.

Accordingly, we hold that substantial evidence supports the trial court's findings that modification of the parenting plan was in the best interests of the children because the existing arrangement was detrimental to their health. Therefore, we hold further that the trial court necessarily did not abuse its discretion by ordering modification.

II. RECONSIDERATION

Tatyana asserts that the trial court abused its discretion by denying her motion for reconsideration because she obtained Dr. McCollom's evaluation report, which constitutes new evidence for the purpose of a CR 59 motion. But with reasonable diligence, Tatyana could have produced the McCollom report at trial, thus it is not new evidence. Therefore, the trial court did not abuse its discretion in denying the reconsideration motion.

We review a trial court's decision granting or denying a motion for reconsideration for abuse of discretion. *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301 P.3d 45, *review denied*, 178 Wn.2d 1020 (2013). CR 59 governs motions for reconsideration and provides in relevant part,

> (a) **Grounds for New Trial or Reconsideration**. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:
>
> . . . .
>
> (4) Newly discovered evidence, material for the party making the application, *which the party could not with reasonable diligence have discovered and produced at the trial.*

(Emphasis added.)

Here, Tatyana contends that the trial court abused its discretion because the McCollom report was newly discovered evidence previously unavailable at the time the court made its decision. But to the extent that the report was unavailable before the presentation of the final orders, this was so only because of Tatyana's failure to contribute to the cost of the evaluation per the earlier court order.

The parties were well aware that the evaluation report existed at the time of trial and the court continued the matter for nearly a year to allow Dr. McCollom to complete the evaluation and to give the parties an opportunity to present their case in light of its conclusions. Tatyana would have been able to present the evaluation report had she used reasonable diligence to satisfy her

payment obligations in the months before the hearing concluded. Moreover, any argument to the contrary is undermined by the fact that Tatyana ostensibly secured some kind of agreeable payment arrangement almost immediately following the entry of final orders, such that she could file a timely motion for reconsideration.

Significantly, Tatyana failed to inform the trial court in her motion for reconsideration how the McCollom report would change the trial court's determination that modification of the parenting plan was warranted in light of substantially changed circumstances. Nor does she make such an argument to this court.[3] *See Fishburn v. Pierce County Planning & Land Servs. Dep't*, 161 Wn. App. 452, 473, 250 P.3d 146 (2011). Accordingly, we hold that the trial court did not abuse its discretion by denying Tatyana's motion for reconsideration.[4]

III. ATTORNEY FEES

RCW 26.09.140 permits this court to award appellate attorney fees on a discretionary basis. Based on the record here, we decline to award fees to either party.

[3] The McCollom report's conclusions and recommendations are markedly similar to the conditions contained in the trial court's modified orders. There is nothing in the report that would cast doubt on the relief that the trial court granted John or that is particularly favorable to Tatyana.

[4] Tatyana also argues that this court should vacate the restraining order entered against her in conjunction with the modified parenting plan. But as explained, there was substantial evidence to support the court's ruling modifying the parenting plan. The restraining order precludes Tatyana from contacting G.M. and D.M. at their schools or home, which is entirely consistent with the parenting plan's requirement that Tatyana have only supervised visits.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Maxa, J.
MAXA, J.

APPENDIX C

Marriage of Mason, No. 50009-4-II, stay order (October 31, 2018)

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

October 31, 2018

Kenneth Wendell Masters
Masters Law Group PLLC
241 Madison Ave N
Bainbridge Island, WA 98110-1811
ken@appeal-law.com

Tatyana Ivanovna Mason
PO BOX6441
Olympia, WA 98507
Tatyanam377@gmail.com

Laurie Gail Robertson
Washington Family Law Group, PLLC
10700 Meridian Ave N Ste 107
Seattle, WA 98133-9008
laurier@washingtonstateattorneys.com

RE: CASE #: 50009-4-II: John Mason v Tatyana Mason

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The due date for Appellant's brief is stayed pending the Supreme Court's decision on the petition for review in 96438-6. The Appellant will inform this court when that decision has been issued.

Very truly yours,

Derek M. Byrne
Court Clerk

APPENDIX D

Order: Granting Motion to Vacate (OR)
Order of Child Support. CP 182-85.

[ ] EXPEDITE
[ ] No hearing set
[X] Hearing is set
Date: November 21, 2016
Time: 1:30 p.m.
Judge/Calendar: Family Law

Superior Court of Washington, County of THURSTON

In re: Petitioner: JOHN MASON And Respondent: TATYANA MASON	No. 07-03-00848-0 Order: Granting Motion to Vacate (OR) Order of Child Support

Order: Granting Motion to Vacate

1. The Respondent made a *Motion to Order to Vacate full amount of Child Support Urgently* to vacate the Order of Child Support entered November 25, 2013, by the Hon. Anne Hirsch. After various motions and hearings, the court set Respondent's motion for oral testimony.

2. The Court heard testimony and argument from both the Petitioner and Respondent on October 17, 18 and November 2, 2016.

3. The Court has considered the *Motion*, oral testimony, exhibits entered with the court and argument of both parties.

Law Offices of Jason S. Newcombe
1218 Third Ave, Ste 500
Seattle, WA 98101
206-624-3644
fax 206-971-1661

The Court makes the following FINDINGS:

A. This Motion was brought pursuant to CR 60 as a Motion to Vacate a final order. Respondent has requested the court vacate the Order of Child Support entered by the Hon. Anne Hirsch on November 25, 2013.

B. The basis of Respondent's motion was that in setting the child support in 2013, the court was not made aware of the I-864 Affidavit regarding continuing support which had been signed by the Petitioner in 1999 as part of his sponsorship of Respondent's immigration to this country.

C. The Respondent came to the United States under a fiancé visa. The parties were married August 19, 1999. The Petitioner signed an I-864 Affidavit shortly after the parties' marriage as part of the process to convert the visa to a permanent residency.

D. The parties had two years following issuance of documents granting Respondent conditional residence status within which to remove the conditions.

E. The parties did not act to remove the conditions; shortly after the issuance of the conditional residence status to Respondent, Respondent was the victim of domestic violence from Petitioner and Petitioner lost his incentive to support permanent residency for Respondent.

F. The parties separated July 18, 2007. The divorce was final June 24, 2008. The parties have two minor children.

G. There is no evidence that any other court has considered the I-864 Affidavit in the proceedings in this case. Respondent has not had interpretative services in this case prior to this evidentiary hearing. The Court is persuaded that Respondent has difficulty understanding and communicating in English. During this hearing she clearly benefited from the provision of interpretive services.

H. Respondent is not able to work due to her current immigration status. Further, the arrears which have accrued under the 2013 Order of Child Support would likely prevent

Law Offices of Jason S. Newcombe
1218 Third Ave, Ste 500
Seattle, WA 98101
206-624-3644
fax 206-971-1661

her from removing the conditions on her current resident status and obtaining permanent residency in the United States.

Having entered the above Findings of Fact, the Court makes the following Conclusions of Law:

A. The I-864 affidavit created a continuing obligation of Petitioner to support Respondent.

B. The obligation terminates on the occurrence of any of the following: (1) death of the sponsor; (2) the person being sponsored becoming a US citizen; (3) the sponsored immigrant being credited with 40 quarters of gainful employment in excess of 125% of the federal poverty level; (4) the permanent departure of the sponsored individual from the country.

C. None of the terminating events have occurred.

D. Respondent has earned sufficient income for one quarter during the marriage; Petitioner's earnings during the marriage could provide an additional 29 quarters of qualifying employment. These earnings do not meet the requirement of 40 quarters such as would terminate the obligation.

E. Although Respondent did leave the country, it was to attend her mother's funeral and was for two weeks, after which she returned.

F. Although *Khan v Khan*, 182 Wn App 795 (2014), does not require a Court determining spousal maintenance to enforce the obligation created by the I-864 affidavit, it recognizes the appropriateness of the trial court's consideration of the affidavit.

G. The 1-864 affidavit is such a significant factor in this case that to set child support without its consideration creates an unjust result.

H. A Motion to Vacate under CR 60 is an appropriate method to raise the issue of the failure of the court setting child support to consider the affidavit.

I. CR 60 (b) (11) will allow the motion to be filed later than one year from the date of entry of the Order of Child Support. It is therefore an appropriate basis under which to bring a motion to vacate in this case.

J. The Order of Child Support entered November 25, 2013 should be vacated because the Court was not informed of the existence of the I-864 affidavit at the time of the entry of the order.

//

//

Law Offices of Jason S. Newcombe
1218 Third Ave, Ste 500
Seattle, WA 98101
206-624-3644
fax 206-971-1661

Now, Therefore, It Is Hereby Ordered:

The Order of Child Support entered by the Hon. Anne Hirsch on November 25, 2013, is vacated. Any remaining arrears due and owing under that order are likewise vacated.

Petitioner may seek entry of a new order to replace the order of November 25, 2013.

The court will consider the request for expert fees on November 21, 2016.

11 | 23 | 16
Date

Chris Wickham, Superior Court Judge

Petitioner and Respondent or their lawyers fill out below.

This order:
Is presented by me

32521
Petitioner lawyer signs here + WSBA #

This order:

Respondent signs

Laurie G. Robertson
Print Name

Tatyana Mason
Print Name

Law Offices of Jason S. Newcombe
1218 Third Ave, Ste 500
Seattle, WA 98101
206-624-3644
fax 206-971-1661

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 21st day of December 2018 as follows:

Co-counsel for Respondent

Laurie G. Robertson
Washington Family Law Group, PLLC
10700 Meridian Avenue N, Suite 107
Seattle, WA 98133
laurier@washingtonstateattorneys.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Petitioner, Pro Se

Tatyana Mason
P.O. Box 6441
Olympia, WA 98507
tatyanam377@gmail.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Kenneth W. Masters, WSBA 22278
Attorney for Respondent

MASTERS LAW GROUP

December 21, 2018 - 2:19 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96438-6
Appellate Court Case Title:	In the Matter of the Marriage of John Mason and Tatyana Mason
Superior Court Case Number:	07-3-00848-0

The following documents have been uploaded:

- 964386_Answer_Reply_20181221141750SC934889_1151.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- laurier@washingtonstateattorneys.com
- tatyanam377@gmail.com

Comments:

Sender Name: Tami Cole - Email: paralegal@appeal-law.com
Filing on Behalf of: Kenneth Wendell Masters - Email: ken@appeal-law.com (Alternate Email: paralegal@appeal-law.com)

Address:
241 Madison Ave. North
Bainbridge Island, WA, 98110
Phone: (206) 780-5033

Note: The Filing Id is 20181221141750SC934889