No. 99661-0

Court of Appeals No. 54287-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

BRYAN MICHAEL ANEWEER, RESPONDENT

v.

AMBER MAE SMITHLIN, PETITIONER

PETITION FOR REVIEW

LAW OFFICE OF SOPHIA M. PALMER, P.L.L.C.

By
SOPHIA M. PALMER
Attorney at Law
WSBA No. 37799

615 Commerce ST, Ste 101
Tacoma, WA 98402
PH: (253) 777-4165

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I. IDENTITY OF PETITIONER AND SUMMARY

Petitioner, Amber Smithlin, ("Amber"), an incarcerated mother, and appellant below, asks this Court to accept review of Division Two's December 15, 2020 Court of Appeals decision, ("Decision") and subsequent March 15, 2021 Order Denying Reconsideration, terminating review, as specified in Part II.

Amber's appeal challenged a number of procedural irregularities in the proceedings in the trial court, the most egregious being the trial court's entry of a Final Parenting Plan, and Final Order and Findings on the day of trial, without any trial testimony, off the record and behind closed doors, that eliminated all contact between Amber and her six-year-old son, N.A., without a motion and order on default, unsupported by substantial evidence and in violation of RCW 26.09.002 and RCW 26.09.191(2)(m)(i).

Despite there being no court rule, statute or case law permitting such a procedure, the Court of Appeals agreed with the trial court that because Amber never appeared, a "default situation" had been created, and therefore the entry of the final orders with no finding on default, off the record and behind closed doors without consideration of what was in N.A.'s best interest was permissible.

Review is warranted because the Decision not only disregards a

number of significant procedural protections and endorses the trial court's *sua sponte* creation of a new mode of proceeding when court rules already specifically provide a course of proceeding, but more importantly, it affirms and approves of a trial court's entry of a Final Parenting Plan and Final Order and Findings, with no trial testimony, off the record and behind closed doors. Regardless of the outcome, decisions regarding the welfare of a child should not occur behind closed doors, especially when that decision is made without any analysis regarding what is in that child's best interest and eliminates an incarcerated mother, who was the child's primary parent, from having any contact whatsoever with her five-year-old son.

This issue raises an issue of substantial public interest because the Decision's ratification of the trial court's actions implicates incarcerated persons access to justice, interference with their parent/child relationship and our concept of open courts. In addition, it raises the question of what inquiry and findings must be made on the record by the trial court when the welfare of a child is at issue, whether orders are being entered by agreement or by default.

II. COURT OF APPEALS DECISION

The decision was filed December 15, 2020. App. A-1. Amber's Motion for Reconsideration was filed January 4, 2021. App. A-2. The

Court of Appeals called for a response on January 29, 2021. App A-3. Reconsideration was denied March 15, 2021. App. A-4.

The appeal challenged the trial court's refusal to vacate all final orders entered, including the Final Parenting Plan, and Final Order and Findings, based on multiple irregularities that worked to bypass statutory and procedural safeguards that deprived the incarcerated Amber a meaningful opportunity to participate in the proceedings and disregarded the trial court's obligation to conduct a hearing on the record and consider N.A.'s best interest.

The most egregious of these violations occurred when the trial court entered a Final Parenting Plan, and Final Order and Findings that made specific findings of fact that were not contained anywhere in the record, off the record and without any trial testimony, and without a motion and order on default and in violation of CR 52, CR 55 and RCW 26.09.191(2)(m)(i).

Other procedural violations included Respondent's ("Brian") failure to serve Amber with an Order Setting Case Schedule notifying her of the trial date and the trial courts routine policy and procedure of mailing notice to Amber without identifying where it was mailed, knowing she was incarcerated in the Pierce County Jail.

Without having received any responsive briefing from Brian, the

Decision affirmed the trial court's entry of the final orders, including the Final Parenting Plan and Final Order and Findings. The Decision incorrectly finds that Amber failed to designate the report of proceedings from the May 28, 2019, trial date thereby precluding review. Ultimately the Decision agreed with the trial court that a "default situation" had been created by Amber's failure to appear, permitting the trial court to enter final orders without a trial, and without an order on default.

The Court of Appeals ruling sets the precedent and ratifies the trial court's actions, that it is permissible for a trial court to not take any trial testimony, not find a party is in default, yet still enter final orders off the record. It further affirms that it is permissible for the trial court to include findings of fact that pertain to the welfare of a child, that are not contained in the record. And finally, permits the trial court to *sua sponte* create a new mode of proceeding, termed a "default situation" when an appropriate mode of proceeding is already set forth in CR 43, CR 52 and CR 55 .

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where on the day of trial, off the record, and behind closed doors, the trial court entered a Final Parenting Plan and Final Order and Findings that eliminated all residential time with an incarcerated parent without any trial testimony, and without analyzing on the record what is in the child's best interests?

2. Should this Court grant review where a trial court makes findings of fact without any trial testimony, and without an

order on default when none of those facts are contained in the record before it?

3. Should this Court grant review where the trial court *sua sponte* invented a mode of proceeding where one was specifically set out by court rule when it found there was a "default situation" that warranted entry of final orders?

4. Should this Court find the trial court has an obligation to inquire on the record, in every case a final parenting plan is being entered, to ensure the final parenting plan is in the child's best interest, in order to carry out the mandate set forth in RCW 26.09.002.

5. Should this Court find these question should be determined by the Supreme Court when the Decision is in conflict with this Court's ruling in In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644 (2014) requiring the trial court to impose restrictions only to the extent they are reasonably calculated to protect the child from harm? (RAP 13.4(b)(1).

6. Should this Court find these question should be determined by the Supreme Court when the Decision is in conflict with this Court's ruling in In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644 (2014) requiring the trial court identify the harm the child will suffer if the restriction is not imposed? (RAP 13.4(b)(1).

7. Should this Court find these questions should be determined by the Supreme Court when the Decision will set a precedent allowing a trial court to take action behind closed doors and off the record, make findings unsupported by substantial evidence with no finding of default that raises issues of substantial public interest that can have dire consequences for children, particularly for those children of parents who are incarcerated and may not be able to participate in the proceedings in a meaningful way? (RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

Additional facts and citations to the record are set forth in the Amber's merits brief, and motion for reconsideration to which the Court is respectfully directed[1].

On August 10, 2018, Brian filed a Petition to Change a Parenting Plan based on Amber's arrest for vehicular homicide, after she struck a vehicle, killing three passengers and injuring the parties (then) five-year-old son, N.A. CP 8-15, 4-7, CP 18-27, CP 21.

Prior to Amber's arrest and incarceration for vehicular homicide, she had been N.A.'s primary parent, as set out in the parties' 2016 Final Parenting Plan. CP 48, 142. Brian had RCW 29.09.191 findings entered against him. Amber had no RCW 26.09.191 findings or limitations entered against her. CP 44, 142. Amber had sole decision making for education and non-emergency health care. CP 50.

While in the Pierce County Jail, Amber was personally served with the Immediate Restraining Order and Hearing Notice, Summons, Petition

[1] The facts stated in the Decision must be viewed critically given its omissions and mistakes. As one example, the Decision found it could not consider Amber's argument regarding the trial court's failure to take trial testimony because the appellate court found Amber failed to designate the trial transcript from the May 28, 2019 trial date. However, the designated clerks' papers made it clear the trial court never went on the record and there was no such transcript to designate. *See* APP No. A1, Decision at Page 15, App No. A3, Motion for Reconsideration at Page 5, and App 2 and 3, attached thereto..

to Modify, Motion for Adequate Cause Decision and Proposed Parenting Plan on August 14, 2018. CP 62, 142.

Amber was never served with the Order Setting Case Schedule that contained the trial date, the Note for Commissioner's Calendar or Copy of Social Media Reports contained in the court file. CP 62, 142-143. In addition, all subsequent orders entered by the Court, including orders continuing the trial date, indicated they were sent to her “by mail” but did not indicate to what address they were sent. CP 142-143, CP 76, CP 77-78, CP 81-82.

At all times relevant to the underlying proceedings, Amber was incarcerated at the Pierce County Jail, and her location was known to both the court and to Brian. CP 59, 62, 73, 77, 82, 86, 126, 142.

On February 21, 2019, the trial date set by the original Order Setting Case Schedule, Brian appeared for trial. The trial court continued the modification trial until after Amber’s criminal case was concluded. The court issued a new Order Setting Case Schedule that set the new trial date for May 28, 2019. CP 80. The order indicates "copies mailed to" and identifies Amber as having been sent a copy "via mail". It does not indicate what category of mail was used or to what address it was sent. Id.

On May 28, 2019, Brian appeared for trial. CP 83-84. The trial court did not hold an evidentiary hearing, take any evidence and did not go

on the record. CP 83-84, 85-98, 99-121, 122-129. There is no verbatim report of proceedings from this proceeding. No Motion for Default was filed, and no Order on Default was granted. The case never proceeded to trial. The trial court signed Brian's Final Parenting Plan, Final Order and Findings, and Final Order of Child Support. Id.

Despite not having taken any testimony, the trial court made the following findings:

> Petitioner alleges as follows:
>
> **Mother was sentenced to 13 years + 2 months for driving under the influence** which resulted in the death of three people and serious physical injury to child **who had surgeries and continues to attend counseling. Mother has a history of substance abuse and alcohol issues which resulted in three other children being removed from her care. Petitioner has mental health history which includes hearing voices. Mother has had no contact since August 6, 2018.**

CP 123. (emphasis added). Since the trial court took no testimony, and didn't enter an order on default, the *only* evidence it had before it was what was contained in the court file. The facts in bold above are not contained anywhere in the court record.

Nonetheless, the trial court entered a Final Parenting Plan that allows for no contact, whatsoever, between N.A. and his mother. The trial

court admitted no evidence, took no testimony, did not weigh the child's best interests and did not consider whether Brian's requested restrictions were reasonably calculated to protect N.A. from harm.

In Amber's criminal case, charges against her relating to the injuries to N.A. were dropped, and no restraining order limiting her contact with him was entered. CP 143.

The trial court further found, with no evidence in the record to support same, Amber had neglected the child by refusing to perform his/her parenting duties, had an emotional or physical problem that gets in the way of her ability to parent, and a long-term problem with drugs, alcohol or other substance that gets in the way of her ability to parent. CP 107. None of these RCW 26.09.191 findings were included in the 2016 Final Parenting even though a GAL had been involved. CP 44.

On October 8, 2019, Amber, through counsel filed a Motion to Vacate the final Orders pursuant to CR 60(b)(1), CR 60(b)(6), CR 60(b)(11), and CR 55(c). CP 141-144. On November 22, 2019, the trial court denied the motion to vacate finding a "default situation" had occurred and therefore entry of the final orders, off the record, was permitted, despite there being no finding Amber was in default. CP 164-165.

Amber appealed and Division Two affirmed, agreeing with the

trial court's analysis that a "default situation" had occurred and therefore it was proper for the trial court to have entered final orders. CPJ 168-169, App No. A1.

Amber seeks review in this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under Const. art. 1, § 10, "[j]ustice in all cases shall be administered openly, and without unnecessary delay." The United States Supreme Court has said that "A trial is a public event. What transpires in the court room is public property." Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). Pursuant to RCW 26.09.002 the trial court is required to determine and allocate the parties' parental responsibilities based on the best interests of the child. The statute goes on to state that, "[f]urther, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." Id. RCW 26.09.191(2)(m)(i) provides:

> *The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time*. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse

> or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. *If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.*

(emphasis added).

In this case, Division Two's ruling undermines these mandates with irreparable consequences for N.A. by eliminating his parent/child relationship with Amber without requiring any inquiry or consideration on the record by the trial court into whether this elimination of all contact with Amber, who up until the accident had been his primary parent, was reasonably calculated to protect N.A. from future harm or abuse. The Decision ignores the requirement set forth in RCW 26.09.191(2)(m)(i) that the trial court *expressly find* based on the evidence that limitations on Amber's time with N.A. would not adequately protect him.

Preserving and maintaining a child's relationship with his/her parent in the midst of litigation is not only a matter of substantial public interest but is specifically mandated by a number of promulgated statutes, including those that give the trial court discretion to restrict or eliminate a parent's time with his/her child. Unfortunately, Division Two's ruling in

this case not only fails to protect young children of incarcerated parents who face the elimination of their residential time due to what appears to be a results-based ruling based on the egregiousness of their parent's crime, rather than a specific inquiry into the individual facts before the court, and the best interest standard, but it also sets a dangerous precedent permitting a trial court to simply concoct a basis for justification when it has not properly followed a course of proceeding required by rule or procedure. For these reasons, this case presents an issue of substantial public interest. RAP 13.4(b)(4)

1. REVIEW SHOULD BE GRANTED PER RAP 13.4(b)(1) AND RAP 13.4(b)(4) BECAUSE JUDGES CANNOT DECIDE A CHILD'S BEST INTERESTS OFF THE RECORD AND BEHIND CLOSED DOORS.

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute." CR 43(a)(1).

> When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

RCW 2.28.150. Statutes and court rules should be treated equally for the

purposes of RCW 2.28.150. In re Cross, 99 Wn.2d 373, 380–81, 662 P.2d 828 (1983).

In this case, the trial court decision, and the affirmance by Division Two, both fail to acknowledge the dangerous precedent set by the trial court's failure to follow CR 43(a)(1), CR 52 or CR 55. Instead, Division Two ratifies the trial court's creation of a new mode of proceeding, calling what occurred here a "default situation" that permits the entry of orders without a finding of default if the court believes a default *would* have been entered *had* such a motion been brought– a clear and dangerous violation of CR 55 and RCW 2.28.150. Because a clear mode of proceeding was already set forth in CR 43(a)(1), CR 52 and CR 55, the Decision permits the trial court to exceed its authority under RCW 2.28.150.

The Decision appears to be applying a harmless error analysis to the trial court's failure to adhere to the requirements set forth in CR 52 or CR 55. This author was unable to find any Washington case where harmless error was applied to a CR 52, CR 55 or CR 60 analysis.

The procedure on default is governed primarily by CR 55, and involves a two-step process: (1) securing the entry of an order of default under CR 55(a), and (2) securing entry of a default judgment against the defaulting party under CR 55(b). 4 Washington Practice, Rules Practice, CR 55 (6th ed. 2020) An order of default is the official recognition that a

party is in default and *is a prerequisite to the entry of judgment on that default*. The order is sought by motion. Id. Here, without any trial record, there is no way to know what facts the trial court considered when entering final orders under a "default situation[2]."

The Decision agrees with the trial court that a "default situation" was created and therefore the entry of final orders with no order on default was not an abuse of discretion. There is no legal authority for this position, and no case law that supports a *sua sponte* entry of final orders *without a motion and finding of default,* and without entry of an order on default.

Nonetheless, in four paragraphs, the Court of Appeals dismisses Amber's argument first by asserting, incorrectly, that because the verbatim report of proceedings was not designated[3] the record was insufficient for review. This holding is erroneous because there was no verbatim report of proceedings to designate. Amber filed a Motion for Reconsideration/Motion to Correct Opinion, asking Division Two to Reconsider, and if it didn't reconsider, to at least correct its opinion

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[2] This author was unable to locate any case law that refers to a circumstance where a party is in a "default situation" permitting a trial court, off the record, to enter final orders, without a proper motion, findings and order on default.

[3] Division Two's misapprehension of this fact is deeply concerning. Argument regarding the lack of a transcript from trial was made throughout Amber's opening brief. Even more concerning is Division Two's refusal to correct its opinion wherein it erroneously states a VRP was never designated.

regarding the omission of the verbatim report of proceedings. Division Two denied both requests[4].

Without any substantive analysis, the Decision next states Amber's argument regarding the trial court's failure to follow CR 43(a)(1), CR 52, CR 55, and failing to consider RCW 26.09.002, RCW 29.09.191(2)(m)(i) on the record, are errors of law that cannot addressed pursuant to CR 60(b). The Decision ignores the fact that these are *gross procedural irregularities* and not errors of law.

A number of appellate cases have identified that litigation involving the welfare of children is different than other civil litigation. In In re the Marriage of Studebaker, 36 Wn.App 815, 817, 677 P.2d 798 (1984), Division One held, "principals of collateral estoppel have no application in cases involving the custody and support of children." In In re the Marriage of Pennamen, 135 Wn.App. 790, 146 P.3d 466 (2006), Division One again, noted that cases involving children are different. There, the court was considering whether a trial court erred when it did *not* enter a default order. In finding the trial court did not err, it reasoned that "family law cases are different, many parties are *pro se*, procedural errors

[4] Allowing an opinion to stand that contains outright false information regarding what transpired below, particularly when it is identified as a basis to deny Amber's appeal, undermines the public's trust in the justice system. Division Two's refusal to correct its opinion is inexplicable.

are common, and the welfare of children is at stake." Id. at 799.

In In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644 (2014), this Court reviewed a parenting plan restriction under RCW 26.09.191—subsection (3)(g), which authorizes a court to impose restrictions if necessary to protect against "adverse [effect] to the child's best interests." Reading the statute in light of chapter 26.09 RCW's statement of policy, the Court concluded that "the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to 'protect the child from physical, mental, or emotional harm,' ... similar in severity to the harms posed by the [factors] specifically listed in RCW 26.09.191(3)(a)-(f)." Chandola, 180 Wn.2d at 648 (quoting RCW 26.09.002). Consistent with RCW 26.09.191 (2)(m)(i), this Court held that a trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such a harm. Id. It also held that a trial court must identify the harm that children will suffer if the restrictions are not imposed. Id. at 654.

Here, limitations were found against Amber under RCW 26.09.191 (2)(a), (3) (b), (c) and (g). Because the trial court never went on the record, and never took any trial testimony, it never stated on the record why the elimination of all contact between Amber and N.A. was reasonably calculated to protect him from harm, an abuse of its discretion identified in

Chandola and prohibited by RCW 26.09.191(2)(m)(i).

The Decision's fundamental error, and what makes this case of substantial public interest, is ignoring the egregious actions of the trial court, in conducting its business behind closed doors, and failing to consider and address N.A.'s best interests and ensuring any restrictions between N.A. and Amber were reasonably calculated to protect him from harm, while still fostering the parent/child relationship.

Review should be granted because the *result* of the decisions of the trial court and the Court of Appeals is to permit closed door hearings where decisions regarding children are made without regard to what is in their best interests, a matter of substantial public interest, and in conflict with this Court's ruling in Chandola. Even in the case where a default is warranted, CR 55 is followed and a final parenting plan is being entered, a trial court should be required to conduct an analysis on the record and make findings that the final parenting plan being entered is in fact in the best interest of the child. Requiring a court to do so is the only way to protect children, the parent/child relationship and to give full effect and life to Chandola, and the mandates set forth in RCW 26.09.002 and RCW 26.09.191 (2)(m)(i).

VI. CONCLUSION

Trial court decisions limiting parental contact with children, even those made based on one parent's failure to appear, must be made in such a way to assure the protections afforded under the civil rules and standards under the Parenting Act are fulfilled, and addressed on the record – not behind closed doors. Trial courts are mandated by statute to determine and allocate parental responsibilities between the parties based on the best interest of the child standard. This is true whether the court is entering a final parenting plan by agreement of the parties, after a contested trial on the merits, or when a party has failed to appear or defend in the proceeding.

When a parenting plan restricts a parent's residential time, those restrictions are required to be reasonably calculated to protect the child from future harm or abuse. The only way to ensure that occurs is if the trial court conducts its business in the open, and on the record, every time.

Here, the case came before the court for trial, but the trial court did not take any testimony, never went on the record, and did not make a finding Amber was in default. In so doing, the trial court failed to follow CR 43, CR 53 and CR 55. These court rules are designed to guarantee certain procedural steps that ensure transparency and fairness – even if a party is in default. The trial court then rationalized its failure to adhere to

these rules by finding there was a "default situation", something the trial court seemingly made-up, as there is no court rule, statute or case law that describes or permits such a process. Even when the trial court is going to enter orders based on a default, certain procedural requirements must be met, and the trial court is still required to consider a motion and make findings before a default order can be entered.

For these reasons, Amber respectfully requests this Court take review and reverse the Court of Appeals and remand this case to Pierce County Superior Court for a trial on the merits.

DATED: April 13th 2021.

LAW OFFICE OF SOPHIA M. PALMER, PLLC

Sophia M. Palmer

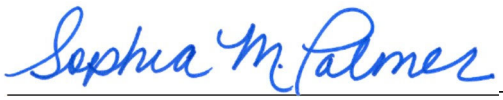
SOPHIA M. PALMER, WSBA No. 37799

CERTIFICATE OF SERVICE

I certify that I caused to be transmitted via U.S. Mail, postage prepaid, transmitted via the Appellate Court on-line portal, and/or emailed as designated below, a copy of the foregoing PETITION FOR REVIEW on the 13th day of April, 2021, to the following parties or counsel of record at the following address:

Mr. Bryan Aneweer
16524 Suntree CT SE
Yelm, WA
pangielaneweer1979@gmail.com

X U.S. Mail
X Appellate Court On-line Portal



SOPHIA M. PALMER, WSBA No. 37799
Attorney for Appellant/Mother

Filed
Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRYAN MICHAEL ANEWEER, Respondent, v. AMBER MAE SMITHLIN, Appellant.	No. 54287-1-II UNPUBLISHED OPINION

CRUSER, J. – Amber Mae Smithlin appeals the trial court's order denying her CR 60(b)(1) motion to vacate final parenting plan and child support orders due to irregularities in the proceedings. Smithlin fails to establish that the trial court abused its discretion. Accordingly, we affirm the order denying Smithlin's motion to vacate.

FACTS

I. 2016 PARENTING PLAN AND PRELIMINARY PROCEEDINGS

Smithlin and Bryan Aneweer are NA's parents. Under a 2016 parenting plan, Smithlin was NA's primary parent, and Aneweer had every-other weekend visitation.

On August 6, 2018, Smithlin was involved in a vehicle accident in which she struck another vehicle and killed three people. NA, who was five years old at the time, was seriously injured in the accident and was hospitalized. Smithlin was arrested and charged with vehicular homicide. Child Protective Services placed NA with Aneweer.

On August 10, Aneweer filed a "Petition to Change a Parenting Plan, Residential Schedule or Custody Order" based on Smithlin's arrest. Aneweer also filed a proposed parenting plan that prohibited contact between Smithlin and NA based on Smithlin's neglect, emotional or physical problems, substance abuse, and arrest.

That same day, the trial court issued an "Order Setting Case Schedule," a "Summons: Notice about Changing Parenting Plan, Residential Schedule or Custody Order," and an "Immediate Restraining Order (Ex Parte) and Hearing Notice." The Order Setting Case Schedule stated that the trial was set for February 21, 2019. The Summons advised Smithlin that if she did not serve her response to the motion on Aneweer or file a notice of appearance within 20 days of service of the summons, "[n]o one has to notify [her] about other hearings in this case, and . . . [t]he court may approve the requests in the Petition without hearing [her] side (called a default judgment)." Clerk's Papers (CP) at 16 (emphasis omitted). Smithlin never responded to the petition.

A deputy sheriff served Smithlin in jail. The return of service stated that Smithlin had been served with the following documents: (1) Immediate Restraining Order (Ex Parte) and Hearing Notice, (2) Summons: Notice about Changing Parenting Plan, Residential Schedule or Custody Order, (3) Petition to Change a Parenting Plan, Residential Schedule or Custody Order, (4) Motion for Adequate Cause Decision, and (5) Aneweer's proposed parenting plan. The return of service did not state that Smithlin was served with the August 10, 2018 Order Setting Case Schedule.

On September 10, Aneweer appeared for the adequate cause hearing. Smithlin did not appear. The trial court found adequate cause to hold a full hearing or trial on the motion to change the parenting plan and entered a "Temporary Family Law Order" designating Aneweer as NA's

"custodial parent." *Id.* at 65. The trial court did not reissue the restraining order and allowed Smithlin to have telephone contact with NA once a week if it could be arranged by the jail.

On January 29, 2019, the trial court held a status conference and entered an order scheduling the trial for February 21. Aneweer appeared at this hearing, but Smithlin, who was still incarcerated, did not.

On February 21, Aneweer appeared for trial. Smithlin did not appear. The trial court continued the trial date to accommodate Smithlin's criminal case. A new Order Setting Case Schedule stated that the trial was set for May 28. The new Order Setting Case Schedule included a notation stating that the court had copied the order to Smithlin "via mail." *Id.* at 82.

II. MAY 28, 2019 TRIAL AND RESULTING ORDERS

Aneweer appeared for the May 28 trial; Smithlin did not appear. The report of proceedings from the trial is not part of the appellate record.

In the "Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order" (Final Order), the trial court noted that it had held an "uncontested court hearing or trial" on May 28, and that Smithlin did not appear because she was incarcerated. CP at 120. The Final Order did not, however, state that it was a "default" order.

In the Final Order, the trial court "approve[d] a major change to the parenting/custody order" because "[t]he requested change is in the [child's] best interest," there had been a substantial change in the child's or the non-petitioning parent's situation, and the child's "current living situation is harmful to [his] physical, mental, or emotional health" to the extent "[i]t would be better for the [child] to change the parenting/custody order." *Id.* at 123-24. The court described how the situation had changed as follows:

> Petitioner alleges as follows: Mother was sentenced to 13 years + 2 [months] for driving under the influence which resulted in the death of 3 people & serious physical injury to child who had surgeries and continues to attend counseling. Mother has a history of substance abuse and alcohol issues which resulted in 3 other children being removed from her care. Petitioner [(sic)] has mental health history which includes hearing voices. Mother has had no contact since August 6, 2018.

Id. at 123.

The Final Order also stated that Smithlin's parenting time and participation was limited for reasons stated in the new parenting plan and found that Smithlin was "currently incarcerated." *Id.* at 124. The order further stated that there was no protection order requested and that any request for a restraining order had been withdrawn. A notation on the Final Order states that the court copied "both parties via mail." *Id.* at 120.

The trial court also entered a new parenting plan. The new parenting plan placed limitations on Smithlin under former RCW 26.09.191 (2017)[1] based on neglect and several other factors that could be detrimental to the child's best interests, including the fact Smithlin was now serving a lengthy prison sentence. The order required that Smithlin have no contact with NA. The new parenting plan noted that Smithlin had not appeared, but it did not state that it was a "default" order.

[1] Former RCW 26.09.191 establishes when a parenting plan can limit a parent's decision-making ability or residential time based on factors such as a parent's willful abandonment, abuse, history of domestic violence or sex offenses, or other factors that could adversely affect the child's best interests.

III. SMITHLIN'S MOTION TO VACATE

A. MOTION TO VACATE AND MEMORANDUM OF LAW

Approximately three months later, Smithlin moved to vacate the May 28 orders pursuant to CR 60(b)(1), (6), and (11), and CR 55(c).[2] In a supporting declaration, Smithlin stated that she had never been served with the August 10, 2018 Order Setting Case Schedule, the September 10, 2018 temporary order, the order granting adequate cause, the February 21, 2019 Order Setting Case Schedule, or any other notice of the May 28, 2019 trial date. She further asserted that the trial court made no best interest of the child findings; that the trial court's decision was "a 'default'" decision; and that "this hearing was not on the record, and no testimony was taken." *Id.* at 136. And she stated that because it was possible that she could be released from prison by the time NA was 15 years old, she did not believe it was in NA's best interest to have no contact with her. Other than her references to CR 55 and CR 60, Smithlin did not cite to any legal authority in either the motion to vacate or her supporting declaration.

More than a month later, and two days before the motion hearing, Smithlin filed a second declaration and a memorandum of law. In her memorandum of law, she argued that her lack of notice of the original or actual trial dates violated her due process rights.

She also asserted that the trial court had signed the May 28 orders "off the record" and "without conducting any independent analysis of what is in the child's best interest." *Id.* at 157. Smithlin further contended that the May 28 orders were "tantamount to a default" because the trial court did not take any evidence and "merely entered orders that were substantially similar to the proposed parenting plan filed by the father." *Id.* at 159. And, citing *In re Marriage of Murray*, 28

[2] CR 55(c) addresses motions to set aside default orders or judgments.

Wn. App. 187, 189, 622 P.2d 1288 (1981),[3] she also asserted that the trial court failed to consider the factors in RCW 26.09.187(3)[4] in reaching its decision.

B. MOTION HEARING

At the motion hearing,[5] Smithlin's counsel argued that because Smithlin was not served with the August 10, 2018 Order Setting Case Schedule, Smithlin had no "meaningful" notice of any pending court dates, "most importantly the trial." Verbatim Report of Proceedings (VRP) at 2-3. Counsel admitted, however, that the requirement that Smithlin be served with the Order Setting Case Schedule was rule-based and not constitutional, that Smithlin had notice of the action, and that she did not appear in the action at any time. Counsel did not, however, identify what rule she was referring to.

The trial court inquired as to whether "a default could have been taken." *Id.* at 3. Smithlin's counsel agreed that a default could have been taken, but she asserted that this was not what happened. The trial court stated that if Smithlin had responded to the petition in some way and then not appeared for trial because she did not receive a copy of the scheduling order, Smithlin's notice argument "would make sense." *Id.* at 4. But the court commented that "regardless of whether a default was taken or not," it was "struggling with the fact that [Smithlin] never appeared" despite

[3] The court in *Murray* held that the trial court must consider the statutory factors when making a child custody determination and could not rely solely on the "tender years doctrine." 28 Wn. App. at 189-91.

[4] RCW 26.09.187(3) sets out seven factors that the trial court "shall" consider when determining the child's residential provisions. These factors can be overridden by limitations imposed under former RCW 26.09.191.

[5] Aneweer represented himself at this hearing.

having notice of the proceedings. *Id.* The court then concluded that Smithlin's notice of the petition and her "failure to appear in any way in the lawsuit" precluded any due process argument. *Id.* at 5.

The court then commented that counsel's analogizing the May 28 orders to "a default" was a "fair" characterization because the court took no "testimony" at trial. *Id.* But the court asked Smithlin's counsel why she thought "there was something then deficient" about a default decision when the court could have issued a "default" order any time after 20 days since Smithlin did not respond to the petition. *Id.* Smithlin's counsel responded that the court's treating the matter like a default order was a "procedural irregularit[y]" because no motion for default was filed and there was no order of default. *Id.* at 6. Counsel further stated, however, that she thought "the bigger issue is the failure to apply the statute as it relates to any testimony being taken."[6] *Id.*

The trial court responded that counsel was "playing both sides of the street" because in a default action there would not be any testimony. *Id.* When the trial court asked counsel to clarify whether she was arguing that this was an improper default order or whether there were other irregularities in the proceedings, counsel responded that her argument was that the trial court had entered an improper default order.

The trial court then asked counsel what notice of a default proceeding was required when a party has not appeared in a matter and how treating the proceeding as a default proceeding was insufficient. Counsel responded that although Smithlin would not be entitled to notice of a default proceeding because she had not appeared, the trial court would still have had to consider the default factors to determine whether a default was appropriate. Counsel commented that "at least nearly

[6] Counsel did not specify what statute she was referring to.

from what [she could] tell on the record" there was no such consideration. *Id.* at 7. Counsel admitted that she did not know if the result would have been different had the trial court considered the default factors, but she argued that the trial court could not cure this error by considering these factors at the CR 60 motion hearing.

After discussing what prejudice Smithlin was alleging, Smithlin's counsel argued that there was no evidence in the record establishing that the final orders were default orders because there was no evidence that there was a motion for default, an order of default, or any findings regarding default. Smithlin asserted that if there was no default order, the trial court erred by not taking any testimony or allowing cross examination at trial. After clarifying with counsel that the only relief available would be some form of visitation because of Smithlin's continued incarceration, the trial court took the issue under advisement.

C. ORDER DENYING MOTION TO VACATE

The trial court issued the following order denying the motion to vacate:

> **THIS MATTER** came before the Court on Respondent Amber Mae Smithlin's motion to vacate the parenting plan entered on May 28, 2019. It should be noted that the motion contained no legal argument. There was a memorandum of law filed on November 13, 2019, only two days before the hearing. When reviewing this memorandum of law, it is clear that it was not in reply to the opposition filed by [Aneweer]. As such, this Court is under no obligation to consider it. But even if it was considered, [Smithlin's] arguments fail.
>
> First, regarding the claim of lack of due process, Ms. Smithlin was served with the petition and did not respond. She had adequate notice of the proceedings for due process purposes. Her allegation that she did not receive the case scheduling order as part of the service on her, even if true, is not a constitutional infirmity. Not getting the case scheduling order does not excuse her failing to appear in any way in the litigation. The second primary argument, that the court failed to take testimony and failed to follow RCW 26.09.187, including making findings regarding the statutory factors, also fails. While [Smithlin] cites to *Murray v. Murray*, 28 Wn. App. 187, 191 (1981), *Murray* involved a case in which testimony was presented by both sides at trial. By contrast, here, there was no trial because

> the mother failed to respond to the lawsuit or appear in any way. Moreover, RCW 26.09.181[(1)](d)[7] provides that "[a] party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section." While [Smithlin] points out that a specific motion for default was not made prior to trial, [Smithlin's] failure to appear for trial creates a default situation.
>
> The Court does not believe it erred when it entered the parenting plan on May 28, 2019. But even assuming, arguendo, that the Court did err, such error would have been an error of law. A CR 60 motion, however, is not the proper procedural vehicle for this type of error. "Errors of law may not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal." *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118, 122 (1990).

CP at 164-65.

Smithlin appeals the trial court's order denying her CR 60(b)(1) motion to vacate.

ANALYSIS

Smithlin argues that the trial court abused its discretion in denying her motion to vacate because (1) her lack of notice violated due process, CR 40(a)(1), and Pierce County Local Rule (PCLR) 3; (2) the trial court entered the equivalent of a default order without first finding that Smithlin was in default under CR 55 and failed to "tak[e] any substantive evidence as required by CR 40(a)(5)," Br. of Appellant at 17; and (3) the trial court's orders "exceed[ed] the relief initially plead by [Aneweer]," *id*. Smithlin also argues that several of the trial court's findings in its May 28, 2019 orders were not supported by any evidence because the trial court failed to hear testimony. These arguments either fail or we cannot consider them.

[7] RCW 26.09.181(1)(d) provides: "A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section."

I. LEGAL PRINCIPLES

We review a superior court's ruling on a motion to vacate a judgment under CR 60(b) for abuse of discretion. *In re Parenting & Support of C.T.*, 193 Wn. App. 427, 434, 378 P.3d 183 (2016). Our review of a CR 60(b) ruling is limited to the propriety of the denial of relief from judgment, not of the underlying judgment the party sought to vacate. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) (citing *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)).

A court abuses its discretion if its decision is "'manifestly unreasonable, based on untenable grounds, or based on untenable reasons.'" *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 821, 225 P.3d 280 (2009) (quoting *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)). Therefore, we will only overturn the superior court's decision if the decision "'rests on facts unsupported in the record or was reached by applying the wrong legal standard,'" or if the superior court applied the correct legal standard, but "adopt[ed] a view 'that no reasonable person would take.'" *Id.* at 822 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

CR 60(b)(1) provides that the trial court may relieve a party from a final judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." "Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner." *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). Irregularities "typically involve procedural defects unrelated to the merits" that put the integrity of

the proceedings into question. *Tang*, 57 Wn. App. at 654-65 (citing 4 LEWIS H. ORLAND, WASHINGTON PRACTICE: RULES PRACTICE § 5713, at 543 (3d ed. 1983)).

II. NOTICE ISSUE

Smithlin argues that the trial court's failure to provide her with the August 10, 2018 and February 21, 2019 Orders Setting Case Schedule were irregularities in obtaining the final judgment because the lack of notice of the trial dates deprived her of due process and violated CR 40(a)(1) and PCLR 3.

The trial court concluded that the lack of service of the scheduling orders did not constitute a due process violation because Smithlin was served with the pleadings, she had an opportunity to respond, and she failed to respond to the pleadings. Smithlin contends that without service of the scheduling orders, she had no actual notice of when the trial would occur. But Smithlin cites no legal authority establishing that additional notice is constitutionally required when a party has been served with the pleadings and had never appeared in the case. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Accordingly, Smithlin fails to show that the trial court abused its discretion on this basis.

Smithlin also asserts that the lack of notice of the hearing dates violated CR 40[8] and PCLR 3,[9] and that these rule violations are irregularities in the proceedings that supported her CR 60 motion. But Smithlin did not cite these rules in her CR 60 motion, in her memorandum of law, or at the CR 60 motion hearing, and a trial court does not abuse its discretion if it fails to address an argument that was not raised.[10] *See Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 303,

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[8] CR 40 addresses the assignment of cases. CR 40(a)(1) allows either party to bring a case to trial after serving notice of trial on the other party.

[9] PCLR 3(d) provides in part:

> In every newly initiated family law case or modification proceeding, the petitioner shall serve a copy of the [Order Setting Case Schedule] on the respondent along with the initial pleadings; provided that if the initial pleading is served prior to filing, the petitioner shall within five (5) court days of filing serve the applicable order. . . . When the applicable order is served pursuant to this section, it may be served by regular mail with proof of mailing/service to be filed promptly in the form required by these rules, see PCLR 5.

And PCLR 3(e) provides in part:

> **Amendment of Case Schedule.** The court, either on motion of a party or on its own initiative, may modify any date in the Order Setting Case Schedule for good cause . . . . If an Order Setting Case Schedule is modified . . ., the court shall prepare and file the Order Amending Case Schedule and promptly mail or provide it to the attorneys and self-represented parties.

[10] Furthermore, even if we addressed these arguments, they would fail. First, CR 40 is not relevant because it applies when the parties, not the trial court, set the matter for trial, which is not what occurred here. *Swan v. Landgren*, 6 Wn. App. 713, 716, 495 P.2d 1044 (1972) ("When the court does not directly exercise this power, a party, by making the proper application of the court rules, is provided the procedural means to move the case through the various steps toward ultimate determination.") (citing RCW 4.44.020; CR 40(a)(1), (2), and (5)).

Second, even if Smithlin had previously relied on PCLR 3(d), the failure to serve the August 10, 2018 setting order could not amount to an irregularity in obtaining the judgment or order when the original February 21, 2019 trial date noted in that order was reset for May 18.

And third, Smithlin would not be able to show noncompliance with PCLR 3(e). The February 21, 2019 setting order was an amendment of the case schedule, so PCLR 3(e) applies. PCLR 3(e) does not require service of that order; it merely requires that the order be mailed to the attorneys or self-represented parties, without specifying any particular type of mailing. And the record shows that the February 21, 2019 order was mailed to Smithlin.

253 P.3d 470 (2011) ("[W]e do not consider theories not presented below.") (citing *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

Accordingly, these arguments fail to show that the trial court abused its discretion when it denied Smithlin's CR 60 motion.

III. "DEFAULT"

Smithlin next argues that the trial court erred by assuming that "default" would have been granted under CR 55 and that the court was therefore not required to take any evidence before entering the final orders. Smithlin contends the trial court's entry of the final orders without either finding that Smithlin was in default under CR 55 and entering an order of default or, in the absence of a default order, taking evidence was an irregularity in obtaining the final orders. This argument fails.[11]

In its order denying the CR 60 motion, the trial court concluded that although Smithlin had "point[ed] out that a specific motion for default was not made prior to trial," her failure to appear "create[d] a default situation" that allowed the court to adopt Aneweer's proposed parenting plan under RCW 26.09.181(1)(d). CP at 165. RCW 26.09.181(1)(d) provides, "A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section."

Smithlin's argument relies on CR 55. But she does not address or acknowledge RCW 26.09.181(d) or cite any authority demonstrating that the trial court erred in ignoring CR 55.

[11] In light of this conclusion, we do not address Smithlin's CR 52 argument.

Because Smithlin does not adequately brief this issue, she fails to show that the trial court abused its discretion in concluding that the final orders were properly issued under RCW 26.09.181(d).

IV. EXCESS RELIEF

Smithlin also argues that the trial court erred when it entered the final orders without having served Smithlin with a financial declaration or the proposed child support worksheets, thereby "exceeding the relief initially plead by the father." Br. of Appellant at 17. But Smithlin did not make this argument in her CR 60 motion, in her memorandum of law, or at the hearing on the CR 60 motion, and a trial court does not abuse its discretion if it fails to address an argument that was not raised. *See Wilson & Son Ranch, LLC*, 162 Wn. App. at 303 (citing *Doe*, 117 Wn.2d at 780). Accordingly, this argument does not establish that the trial court abused its discretion when it denied her CR 60 motion.

V. CHALLENGES TO BEST INTEREST FINDINGS AND PARENTAL CONDUCT RESTRICTIONS

Finally, Smithlin also challenges several of the trial court's findings in its May 28, 2019 orders regarding NA's best interests and the parental conduct restrictions imposed on Smithlin. We assume that Smithlin is asserting that the trial court abused its discretion by failing to consider these arguments when considering Smithlin's CR 60 motion.

Smithlin contends that because the trial court did not consider any "substantive testimony" at the trial, there is no evidence supporting any findings and that the trial court failed to consider the statutory factors required when evaluating a child's best interests. Br. of Appellant at 23. Smithlin further argues that the trial court did not apply the rules of evidence, engage in the proper analysis on the record, or apply the correct standard of proof when it considered the parental

conduct restrictions under RCW 26.09.187(3). There are three significant problems with these arguments.

First, we do not have an adequate record to review what evidence the trial court considered or the analysis it may have engaged in because the May 28, 2019 transcript was not designated as part of the record. As the party seeking review, Smithlin has the burden to perfect the record so we can consider all of the evidence relevant to the issues presented. RAP 9.2(b). "An insufficient appellate record precludes review of the alleged errors." *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012).

Second, Smithlin is arguing that the trial court committed errors of law, which we do not address under CR 60(b).[12] *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986) (CR 60 motions are not a means of correcting errors of law; insufficiency of the evidence is an error of law). And third, we do not consider challenges to the underlying judgment when determining whether the trial court abused its discretion in denying a CR 60 motion. *Gaut*, 111 Wn. App. at 881. Thus, these arguments do not demonstrate that the trial court abused its discretion when it denied the CR 60 motion.

[12] We note that Smithlin argues that the trial court misapplied *Tang* in the order denying the CR 60 motion. But Smithlin does not argue that the specific errors we address in this section are not errors of law.

CONCLUSION

Smithlin does not show that the trial court abused its discretion when it denied her CR 60(b)(1) motion to vacate. Accordingly, we affirm the order denying the motion to vacate.[13]

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.

CRUSER, J.

We concur:

WORSWICK, P.J.

GLASGOW, J.

[13] We note that this decision in no way restrains Smithlin from moving for any appropriate modification to the parenting plan to allow for visitation.

IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION II

BRYAN MICHAEL ANEWEER, Respondent and AMBER MAE SMITHLIN Appellant.	NO. 54287-1-II APPELLANT'S MOTION FOR RECONSIDERATION

APPELLANT'S MOTION FOR RECONSIDERATION

SOPHIA M PALMER
FAMILY LAW
615 COMMERCE ST. STE 101
TACOMA, WA 98402
PH 253.777.4165 | FX 253.777.4168
SOPHIAPALMERLAW.COM

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I. IDENTITIY OF MOVING PARTY AND CITATION TO THE COURT OF APPEALS' DECISION

Pursuant to Washington Rule of Appellate Procedure 12.4, appellant Amber Rae Smithlin (hereinafter referred to as "Smithlin") hereby moves for reconsideration and correction of the issues described below pertaining to the Court's unpublished opinion in this matter, *Aneweer v. Smithlin*, 2020 WL 7365806 (2020). Appx. 1 (hereinafter referred to as "Opinion").

II. ISSUES PRESENTED FOR REVIEW

1. Should the Court reconsider it's December 15, 2020 opinion finding the trial court's failure to adhere to CR 52 or CR 55 did not constitute and abuse of discretion or an irregularity when the trial court *sua sponte* entered final orders finding a "default situation" when there is no authority that permits the Court to *sua sponte* enter final orders without properly following either CR 52 or CR 55 or to enter final orders in a "default situation" without a motion requesting entry of same?

2. Should this Court reconsider its December 15, 2020 ruling finding that the trial court was permitted to enter final orders based on a "default situation", permitted by RCW 26.09.181(d) when the moving party never sought a default order as permitted by RCW 26.09.181(d)?

3. Should this Court reconsider its December 15, 2020 ruling finding the trial court was permitted to enter final orders based on a "default situation" when there is no verbatim report of proceedings from the day of trial to determine what evidence the trial court considered that amounted to a "default situation"?

4. Should this Court correct its opinion when it ruled the

appellant failed to designate a verbatim report of proceedings from the May 29, 2019 trial date when the trial court never went on the record and there is no transcript to designate?

III. STANDARD OF REVIEW

Washington Rule of Appellate Procedure 12.4 allows a party to move for reconsideration of a "decision terminating review". RAP 12.4(a). A decision terminating review includes any "opinion" of the appellate court that renders a "decision on the merits" RAP 12.3(a).

A motion for reconsideration should describe with particularity the point of law or fact that the moving party contends the court overlooked or misapprehended, together with a brief argument on the point raised. RAP 12.4(c).

Courts grant motions for reconsideration and modify opinions for a number of reasons. See Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 885–86, 691 P.2d 524 (1984) (granting motion for reconsideration and modifying prior decision regarding complex issue of public importance); Culpepper v. Snohomish Cnty. Dep't of Planning & Cmty. Dev., Cmty. Dev. Div., 59 Wn. App. 166, 174, 796 P.2d 1285, 1290 (1990) (inviting parties to move for reconsideration regarding issue identified by court but "not briefed or argued by the parties"); State v. Leffler, 142 Wn. App. 175,

185, fn. 5, 178 P.3d 1042 (2007) (granting reconsideration based on meritorious argument that was consistent with logic of opening brief, though not expressly stated therein). If a motion for reconsideration is granted, the court may modify the decision without new argument, call for new argument, or take any other appropriate action. RAP 12.4(g).

IV. STATEMENT OF THE CASE

Under a 2016 Final Parenting Plan, Smithlin was NA's primary parent. Opinion at 1; CP 48, 142. On August 6, 2018, Smithlin was involved in a vehicle accident where three people were killed, and NA was seriously injured. Id. Smithlin was subsequently charged and incarcerated based on this incident.

Aneweer filed a Petition to Modify the Parenting Plan and obtained a temporary order placing NA in his primary custody. Opinion at 2.

The case proceeded to trial on May 28, 2019. Opinion at 3. Without going on the record, and without taking any substantive testimony, final orders and findings were entered. Appx 2 (previously designated as CP 128-129); Appx 3.

No motion for default was made, no order of default was entered, and RCW 26.09.181(d) and CR 55 procedures were not

followed by the trial court.

Smithlin subsequently filed a Motion to Vacate, pursuant to CR 60(b)(6), CR 60(b)(11) and CR 55(c).

The trial court denied Smithlin's motion.

Smithlin appealed. She assigned numerous errors to the procedural irregularities below, as well as the trial court's failure to address RCW 26.09.187.

This Court affirmed the trial court's denial of Smithlin's Motion to Vacate.

V. ARGUMENT

The appellant, Amber Smithlin respectfully requests that the Court of Appeals reconsider and modify its conclusion that the trial court did not abuse its discretion, and its actions did not constitute an irregularity, when it failed to take any substantive testimony, failed to adhere to CR 52 or CR 55, and found a "default situation" occurred permitting entry of a final parenting plan.

This author could locate no published or unpublished opinion in Washington that addressed the entry of final orders in a "default situation" where final orders were entered with no testimony as to either the merits of the underlying request for entry, pursuant to CR 52, or the legal basis upon which entry of the default orders would be

permissible, pursuant to CR 55. It is appellant's position this is an issue of first impression in Washington.

The Opinion states, "The report of proceedings from the trial is not part of the appellate record." Opinion at 3. This Court misapprehended or overlooked the fact that the trial court never went on the record on the day of trial. Appellant did not fail to designate the record from the day of trial – it does not exist as demonstrate in the Memorandum of Journal Entry from May 28, 2019, previously designated as CP 128-129. This is another in a series of irregularities that occurred in this case.

The Opinion points out Smithlin did not brief the applicability of RCW 26.09.181 (d). Smithlin did not brief the applicability of RCW 26.09.181 (d) because that statute simply permits the moving party to seek a motion for default – triggering a CR 55 analysis- which *was* briefed by appellant. The analysis is the same whether RCW 26.09.181(d) applies, or not, because this statute indicates the *moving party may* move the trial court for a default order. It does not however, permit the court to enter default orders *sua sponte* and does not permit the trial court to simply ignore the requirements of CR 55 that a motion be filed.

This Court appears to be applying a harmless error analysis to

the trial court's failure to adhere to the requirements set forth in CR 52 or CR 55. This author was unable to find any Washington case where harmless error was applied to a CR 52, CR 55 or CR 60 analysis.

The Opinion concludes that since the trial court believed it could have entered a default judgment had a motion for default been filed, it is not an abuse of discretion that the trial court entered final orders, despite not having been presented with a proper motion requesting an of default. There is no legal authority to support such a conclusion.

a. There was no legal or factual basis for entry of a default order.

A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds, or exercised for untenable reasons. Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 684, 132 P.3d 115 (2006). A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" *if the trial court relies on unsupported facts* or applies the wrong legal standard; the court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. Id.

An order vacating a default judgment will be given considerable deference, while an order refusing to vacate a default judgment will be examined with greater scrutiny. See, e.g., Yeck v. Department of Labor

and Industries, 27 Wn. 2d 92, 176 P.2d 359 (1947).

Default judgments are normally appropriate only when the adversary process has been halted because of an essentially unresponsive party, and courts are particularly reluctant to reverse a trial court's decision not to enter a default judgment in child custody disputes where many parties are pro se, procedural errors are common, and the welfare of children is at stake. In re Marriage of Pennamen, 135 Wn. App. 790, 146 P.3d 466 (2006).

The procedure on default is governed primarily by CR 55, and involves a two-step process: (1) securing the entry of an order of default under CR 55(a), and (2) securing entry of a default judgment against the defaulting party under CR 55(b). 4 Washington Practice, Rules Practice, CR 55 (6th ed. 2020). An order of default is the official recognition that a party is in default and *is a prerequisite to the entry of judgment on that default*. The order is sought by motion. Id.

Here, without any trial record, there is no way to know what facts the trial court considered when entering final orders under a "default situatio[1]n."

[1] This author was unable to locate any case law that refers to a circumstance where a party is in a "default situation" permitting a trial court, off the record, to enter final orders without a proper motion, findings and order on default.

If the orders were entered were in fact based on a "default situation", then the Court was required to make findings that supported the entry of such orders and entered an order on default. The court would have been required to make the following findings:

1. That Smithlin did not file a response to the Petition.

2. That Smithlin was not entitled to notice, based on a failure to file a response *and having not appeared in the action in any other way.*

3. That a valid proof of service was filed in the Court file.

4. That service was proper and timely (in person and less than one year ago).

5. That venue was proper and the trial court had jurisdiction to enter the final orders.

6. That the other party was not covered by the federal Servicemembers Civil Relief Act.

By entering final orders, and characterizing it as a "default situation", the trial court relied on facts, presumably to make the above conclusions, for which there was no support in the record, an abuse of discretion pursuant to Mayer, 156 Wash.2d 677; See also Appx 4 and Appx 5.

The Opinion agrees with the trial court that a "default situation" was created and therefore the entry of final orders with no order on default was not an abuse of discretion. There is no legal authority for this position, and no case law that supports a *sua sponte* entry of final orders *without a*

motion and finding of default, and without entry of an order on default.

Division III has held that the trial court may not on its own initiative raise an objection to the entry of a default judgment. J-U-B Engineers, Inc. v. Routsen, 69 Wn. App. 148, 848 P.2d 733 (1993). Just as it was improper for the trial court in J-U-B to *sua sponte* object to the entry of a default judgment, it was improper for the trial court here to *sua sponte* find a "default situation" where no such motion had been made to the Court.

The CR 55 requirements are specific, and necessary to ensure that even if the non-responding party did not formally appear, they did not informally appear – something the trial court could not flesh out without considering a motion and declaration in support of such a request.

VI. CONCLUSION

For the reasons set forth above, appellant respectfully requests that the Court:

1. Grant this motion for reconsideration;
2. Reconsider its determination that the entry of default orders in this case was not an abuse of discretion;
3. Reconsider is determination that the failure to go on the record and take evidence, or to entertain a properly filed Motion for

Default was not an irregularity pursuant to CR 60;

4. Correct the Opinion to state Smithlin did not fail to designate the trial record when the trial court never went on the record for trial or at the time final orders were signed and entered;

5. Modify the Opinion to find the trial court abused its discretion by entering final orders without taking testimony or a proper motion for default.

DATED: January 4, 2021.

LAW OFFICE OF SOPHIA M. PALMER, PLLC

Sophia M. Palmer

SOPHIA M. PALMER, WSBA No. 37799

CERTIFICATE OF SERVICE

I certify that I caused to be transmitted via U.S. Mail, postage prepaid, transmitted via the Appellate Court on-line portal, and/or emailed as designated below, a copy of the foregoing MOTION TO CORRECT OPINION/MOTION FOR RECONSIDERATION on the 4TH day of January 2021 to the following parties or counsel of record at the following address:

Mr. Bryan Aneweer
16524 Suntree CT SE
Yelm, WA
pangielaneweer1979@gmail.com

__X__ U.S. Mail
__X__ Appellate Court On-line Portal

APPENDIX NO. 1

Unpublished Opinion*, Aneweer v. Smithlin,* 2020 WL 7365806 (2020).

Filed
Washington State
Court of Appeals
Division Two

December 15, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRYAN MICHAEL ANEWEER, Respondent, v. AMBER MAE SMITHLIN, Appellant.	No. 54287-1-II UNPUBLISHED OPINION

CRUSER, J. – Amber Mae Smithlin appeals the trial court's order denying her CR 60(b)(1) motion to vacate final parenting plan and child support orders due to irregularities in the proceedings. Smithlin fails to establish that the trial court abused its discretion. Accordingly, we affirm the order denying Smithlin's motion to vacate.

FACTS

I. 2016 PARENTING PLAN AND PRELIMINARY PROCEEDINGS

Smithlin and Bryan Aneweer are NA's parents. Under a 2016 parenting plan, Smithlin was NA's primary parent, and Aneweer had every-other weekend visitation.

On August 6, 2018, Smithlin was involved in a vehicle accident in which she struck another vehicle and killed three people. NA, who was five years old at the time, was seriously injured in the accident and was hospitalized. Smithlin was arrested and charged with vehicular homicide. Child Protective Services placed NA with Aneweer.

On August 10, Aneweer filed a "Petition to Change a Parenting Plan, Residential Schedule or Custody Order" based on Smithlin's arrest. Aneweer also filed a proposed parenting plan that prohibited contact between Smithlin and NA based on Smithlin's neglect, emotional or physical problems, substance abuse, and arrest.

That same day, the trial court issued an "Order Setting Case Schedule," a "Summons: Notice about Changing Parenting Plan, Residential Schedule or Custody Order," and an "Immediate Restraining Order (Ex Parte) and Hearing Notice." The Order Setting Case Schedule stated that the trial was set for February 21, 2019. The Summons advised Smithlin that if she did not serve her response to the motion on Aneweer or file a notice of appearance within 20 days of service of the summons, "[n]o one has to notify [her] about other hearings in this case, and . . . [t]he court may approve the requests in the Petition without hearing [her] side (called a default judgment)." Clerk's Papers (CP) at 16 (emphasis omitted). Smithlin never responded to the petition.

A deputy sheriff served Smithlin in jail. The return of service stated that Smithlin had been served with the following documents: (1) Immediate Restraining Order (Ex Parte) and Hearing Notice, (2) Summons: Notice about Changing Parenting Plan, Residential Schedule or Custody Order, (3) Petition to Change a Parenting Plan, Residential Schedule or Custody Order, (4) Motion for Adequate Cause Decision, and (5) Aneweer's proposed parenting plan. The return of service did not state that Smithlin was served with the August 10, 2018 Order Setting Case Schedule.

On September 10, Aneweer appeared for the adequate cause hearing. Smithlin did not appear. The trial court found adequate cause to hold a full hearing or trial on the motion to change the parenting plan and entered a "Temporary Family Law Order" designating Aneweer as NA's

"custodial parent." *Id.* at 65. The trial court did not reissue the restraining order and allowed Smithlin to have telephone contact with NA once a week if it could be arranged by the jail.

On January 29, 2019, the trial court held a status conference and entered an order scheduling the trial for February 21. Aneweer appeared at this hearing, but Smithlin, who was still incarcerated, did not.

On February 21, Aneweer appeared for trial. Smithlin did not appear. The trial court continued the trial date to accommodate Smithlin's criminal case. A new Order Setting Case Schedule stated that the trial was set for May 28. The new Order Setting Case Schedule included a notation stating that the court had copied the order to Smithlin "via mail." *Id.* at 82.

II. MAY 28, 2019 TRIAL AND RESULTING ORDERS

Aneweer appeared for the May 28 trial; Smithlin did not appear. The report of proceedings from the trial is not part of the appellate record.

In the "Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order" (Final Order), the trial court noted that it had held an "uncontested court hearing or trial" on May 28, and that Smithlin did not appear because she was incarcerated. CP at 120. The Final Order did not, however, state that it was a "default" order.

In the Final Order, the trial court "approve[d] a major change to the parenting/custody order" because "[t]he requested change is in the [child's] best interest," there had been a substantial change in the child's or the non-petitioning parent's situation, and the child's "current living situation is harmful to [his] physical, mental, or emotional health" to the extent "[i]t would be better for the [child] to change the parenting/custody order." *Id.* at 123-24. The court described how the situation had changed as follows:

> Petitioner alleges as follows: Mother was sentenced to 13 years + 2 [months] for driving under the influence which resulted in the death of 3 people & serious physical injury to child who had surgeries and continues to attend counseling. Mother has a history of substance abuse and alcohol issues which resulted in 3 other children being removed from her care. Petitioner [(sic)] has mental health history which includes hearing voices. Mother has had no contact since August 6, 2018.

Id. at 123.

The Final Order also stated that Smithlin's parenting time and participation was limited for reasons stated in the new parenting plan and found that Smithlin was "currently incarcerated." *Id.* at 124. The order further stated that there was no protection order requested and that any request for a restraining order had been withdrawn. A notation on the Final Order states that the court copied "both parties via mail." *Id.* at 120.

The trial court also entered a new parenting plan. The new parenting plan placed limitations on Smithlin under former RCW 26.09.191 (2017)[1] based on neglect and several other factors that could be detrimental to the child's best interests, including the fact Smithlin was now serving a lengthy prison sentence. The order required that Smithlin have no contact with NA. The new parenting plan noted that Smithlin had not appeared, but it did not state that it was a "default" order.

[1] Former RCW 26.09.191 establishes when a parenting plan can limit a parent's decision-making ability or residential time based on factors such as a parent's willful abandonment, abuse, history of domestic violence or sex offenses, or other factors that could adversely affect the child's best interests.

III. SMITHLIN'S MOTION TO VACATE

A. MOTION TO VACATE AND MEMORANDUM OF LAW

Approximately three months later, Smithlin moved to vacate the May 28 orders pursuant to CR 60(b)(1), (6), and (11), and CR 55(c).[2] In a supporting declaration, Smithlin stated that she had never been served with the August 10, 2018 Order Setting Case Schedule, the September 10, 2018 temporary order, the order granting adequate cause, the February 21, 2019 Order Setting Case Schedule, or any other notice of the May 28, 2019 trial date. She further asserted that the trial court made no best interest of the child findings; that the trial court's decision was "a 'default'" decision; and that "this hearing was not on the record, and no testimony was taken." *Id.* at 136. And she stated that because it was possible that she could be released from prison by the time NA was 15 years old, she did not believe it was in NA's best interest to have no contact with her. Other than her references to CR 55 and CR 60, Smithlin did not cite to any legal authority in either the motion to vacate or her supporting declaration.

More than a month later, and two days before the motion hearing, Smithlin filed a second declaration and a memorandum of law. In her memorandum of law, she argued that her lack of notice of the original or actual trial dates violated her due process rights.

She also asserted that the trial court had signed the May 28 orders "off the record" and "without conducting any independent analysis of what is in the child's best interest." *Id.* at 157. Smithlin further contended that the May 28 orders were "tantamount to a default" because the trial court did not take any evidence and "merely entered orders that were substantially similar to the proposed parenting plan filed by the father." *Id.* at 159. And, citing *In re Marriage of Murray*, 28

[2] CR 55(c) addresses motions to set aside default orders or judgments.

Wn. App. 187, 189, 622 P.2d 1288 (1981),[3] she also asserted that the trial court failed to consider the factors in RCW 26.09.187(3)[4] in reaching its decision.

B. MOTION HEARING

At the motion hearing,[5] Smithlin's counsel argued that because Smithlin was not served with the August 10, 2018 Order Setting Case Schedule, Smithlin had no "meaningful" notice of any pending court dates, "most importantly the trial." Verbatim Report of Proceedings (VRP) at 2-3. Counsel admitted, however, that the requirement that Smithlin be served with the Order Setting Case Schedule was rule-based and not constitutional, that Smithlin had notice of the action, and that she did not appear in the action at any time. Counsel did not, however, identify what rule she was referring to.

The trial court inquired as to whether "a default could have been taken." *Id.* at 3. Smithlin's counsel agreed that a default could have been taken, but she asserted that this was not what happened. The trial court stated that if Smithlin had responded to the petition in some way and then not appeared for trial because she did not receive a copy of the scheduling order, Smithlin's notice argument "would make sense." *Id.* at 4. But the court commented that "regardless of whether a default was taken or not," it was "struggling with the fact that [Smithlin] never appeared" despite

[3] The court in *Murray* held that the trial court must consider the statutory factors when making a child custody determination and could not rely solely on the "tender years doctrine." 28 Wn. App. at 189-91.

[4] RCW 26.09.187(3) sets out seven factors that the trial court "shall" consider when determining the child's residential provisions. These factors can be overridden by limitations imposed under former RCW 26.09.191.

[5] Aneweer represented himself at this hearing.

having notice of the proceedings. *Id.* The court then concluded that Smithlin's notice of the petition and her "failure to appear in any way in the lawsuit" precluded any due process argument. *Id.* at 5.

The court then commented that counsel's analogizing the May 28 orders to "a default" was a "fair" characterization because the court took no "testimony" at trial. *Id.* But the court asked Smithlin's counsel why she thought "there was something then deficient" about a default decision when the court could have issued a "default" order any time after 20 days since Smithlin did not respond to the petition. *Id.* Smithlin's counsel responded that the court's treating the matter like a default order was a "procedural irregularit[y]" because no motion for default was filed and there was no order of default. *Id.* at 6. Counsel further stated, however, that she thought "the bigger issue is the failure to apply the statute as it relates to any testimony being taken."[6] *Id.*

The trial court responded that counsel was "playing both sides of the street" because in a default action there would not be any testimony. *Id.* When the trial court asked counsel to clarify whether she was arguing that this was an improper default order or whether there were other irregularities in the proceedings, counsel responded that her argument was that the trial court had entered an improper default order.

The trial court then asked counsel what notice of a default proceeding was required when a party has not appeared in a matter and how treating the proceeding as a default proceeding was insufficient. Counsel responded that although Smithlin would not be entitled to notice of a default proceeding because she had not appeared, the trial court would still have had to consider the default factors to determine whether a default was appropriate. Counsel commented that "at least nearly

[6] Counsel did not specify what statute she was referring to.

from what [she could] tell on the record" there was no such consideration. *Id.* at 7. Counsel admitted that she did not know if the result would have been different had the trial court considered the default factors, but she argued that the trial court could not cure this error by considering these factors at the CR 60 motion hearing.

After discussing what prejudice Smithlin was alleging, Smithlin's counsel argued that there was no evidence in the record establishing that the final orders were default orders because there was no evidence that there was a motion for default, an order of default, or any findings regarding default. Smithlin asserted that if there was no default order, the trial court erred by not taking any testimony or allowing cross examination at trial. After clarifying with counsel that the only relief available would be some form of visitation because of Smithlin's continued incarceration, the trial court took the issue under advisement.

C. ORDER DENYING MOTION TO VACATE

The trial court issued the following order denying the motion to vacate:

> **THIS MATTER** came before the Court on Respondent Amber Mae Smithlin's motion to vacate the parenting plan entered on May 28, 2019. It should be noted that the motion contained no legal argument. There was a memorandum of law filed on November 13, 2019, only two days before the hearing. When reviewing this memorandum of law, it is clear that it was not in reply to the opposition filed by [Aneweer]. As such, this Court is under no obligation to consider it. But even if it was considered, [Smithlin's] arguments fail.
>
> First, regarding the claim of lack of due process, Ms. Smithlin was served with the petition and did not respond. She had adequate notice of the proceedings for due process purposes. Her allegation that she did not receive the case scheduling order as part of the service on her, even if true, is not a constitutional infirmity. Not getting the case scheduling order does not excuse her failing to appear in any way in the litigation. The second primary argument, that the court failed to take testimony and failed to follow RCW 26.09.187, including making findings regarding the statutory factors, also fails. While [Smithlin] cites to *Murray v. Murray*, 28 Wn. App. 187, 191 (1981), *Murray* involved a case in which testimony was presented by both sides at trial. By contrast, here, there was no trial because

> the mother failed to respond to the lawsuit or appear in any way. Moreover, RCW 26.09.181[(1)](d)[7] provides that "[a] party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section." While [Smithlin] points out that a specific motion for default was not made prior to trial, [Smithlin's] failure to appear for trial creates a default situation.
>
> The Court does not believe it erred when it entered the parenting plan on May 28, 2019. But even assuming, arguendo, that the Court did err, such error would have been an error of law. A CR 60 motion, however, is not the proper procedural vehicle for this type of error. "Errors of law may not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal." *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118, 122 (1990).

CP at 164-65.

Smithlin appeals the trial court's order denying her CR 60(b)(1) motion to vacate.

ANALYSIS

Smithlin argues that the trial court abused its discretion in denying her motion to vacate because (1) her lack of notice violated due process, CR 40(a)(1), and Pierce County Local Rule (PCLR) 3; (2) the trial court entered the equivalent of a default order without first finding that Smithlin was in default under CR 55 and failed to "tak[e] any substantive evidence as required by CR 40(a)(5)," Br. of Appellant at 17; and (3) the trial court's orders "exceed[ed] the relief initially plead by [Aneweer]," *id*. Smithlin also argues that several of the trial court's findings in its May 28, 2019 orders were not supported by any evidence because the trial court failed to hear testimony. These arguments either fail or we cannot consider them.

[7] RCW 26.09.181(1)(d) provides: "A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section."

I. LEGAL PRINCIPLES

We review a superior court's ruling on a motion to vacate a judgment under CR 60(b) for abuse of discretion. *In re Parenting & Support of C.T.*, 193 Wn. App. 427, 434, 378 P.3d 183 (2016). Our review of a CR 60(b) ruling is limited to the propriety of the denial of relief from judgment, not of the underlying judgment the party sought to vacate. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) (citing *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)).

A court abuses its discretion if its decision is "'manifestly unreasonable, based on untenable grounds, or based on untenable reasons.'" *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 821, 225 P.3d 280 (2009) (quoting *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)). Therefore, we will only overturn the superior court's decision if the decision "'rests on facts unsupported in the record or was reached by applying the wrong legal standard,'" or if the superior court applied the correct legal standard, but "adopt[ed] a view 'that no reasonable person would take.'" *Id.* at 822 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

CR 60(b)(1) provides that the trial court may relieve a party from a final judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." "Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner." *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). Irregularities "typically involve procedural defects unrelated to the merits" that put the integrity of

the proceedings into question. *Tang*, 57 Wn. App. at 654-65 (citing 4 LEWIS H. ORLAND, WASHINGTON PRACTICE: RULES PRACTICE § 5713, at 543 (3d ed. 1983)).

II. NOTICE ISSUE

Smithlin argues that the trial court's failure to provide her with the August 10, 2018 and February 21, 2019 Orders Setting Case Schedule were irregularities in obtaining the final judgment because the lack of notice of the trial dates deprived her of due process and violated CR 40(a)(1) and PCLR 3.

The trial court concluded that the lack of service of the scheduling orders did not constitute a due process violation because Smithlin was served with the pleadings, she had an opportunity to respond, and she failed to respond to the pleadings. Smithlin contends that without service of the scheduling orders, she had no actual notice of when the trial would occur. But Smithlin cites no legal authority establishing that additional notice is constitutionally required when a party has been served with the pleadings and had never appeared in the case. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Accordingly, Smithlin fails to show that the trial court abused its discretion on this basis.

Smithlin also asserts that the lack of notice of the hearing dates violated CR 40[8] and PCLR 3,[9] and that these rule violations are irregularities in the proceedings that supported her CR 60 motion. But Smithlin did not cite these rules in her CR 60 motion, in her memorandum of law, or at the CR 60 motion hearing, and a trial court does not abuse its discretion if it fails to address an argument that was not raised.[10] *See Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 303,

[8] CR 40 addresses the assignment of cases. CR 40(a)(1) allows either party to bring a case to trial after serving notice of trial on the other party.

[9] PCLR 3(d) provides in part:

> In every newly initiated family law case or modification proceeding, the petitioner shall serve a copy of the [Order Setting Case Schedule] on the respondent along with the initial pleadings; provided that if the initial pleading is served prior to filing, the petitioner shall within five (5) court days of filing serve the applicable order. . . . When the applicable order is served pursuant to this section, it may be served by regular mail with proof of mailing/service to be filed promptly in the form required by these rules, see PCLR 5.

And PCLR 3(e) provides in part:

> **Amendment of Case Schedule.** The court, either on motion of a party or on its own initiative, may modify any date in the Order Setting Case Schedule for good cause . . . . If an Order Setting Case Schedule is modified . . ., the court shall prepare and file the Order Amending Case Schedule and promptly mail or provide it to the attorneys and self-represented parties.

[10] Furthermore, even if we addressed these arguments, they would fail. First, CR 40 is not relevant because it applies when the parties, not the trial court, set the matter for trial, which is not what occurred here. *Swan v. Landgren*, 6 Wn. App. 713, 716, 495 P.2d 1044 (1972) ("When the court does not directly exercise this power, a party, by making the proper application of the court rules, is provided the procedural means to move the case through the various steps toward ultimate determination.") (citing RCW 4.44.020; CR 40(a)(1), (2), and (5)).

Second, even if Smithlin had previously relied on PCLR 3(d), the failure to serve the August 10, 2018 setting order could not amount to an irregularity in obtaining the judgment or order when the original February 21, 2019 trial date noted in that order was reset for May 18.

And third, Smithlin would not be able to show noncompliance with PCLR 3(e). The February 21, 2019 setting order was an amendment of the case schedule, so PCLR 3(e) applies. PCLR 3(e) does not require service of that order; it merely requires that the order be mailed to the attorneys or self-represented parties, without specifying any particular type of mailing. And the record shows that the February 21, 2019 order was mailed to Smithlin.

253 P.3d 470 (2011) ("[W]e do not consider theories not presented below.") (citing *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

Accordingly, these arguments fail to show that the trial court abused its discretion when it denied Smithlin's CR 60 motion.

III. "DEFAULT"

Smithlin next argues that the trial court erred by assuming that "default" would have been granted under CR 55 and that the court was therefore not required to take any evidence before entering the final orders. Smithlin contends the trial court's entry of the final orders without either finding that Smithlin was in default under CR 55 and entering an order of default or, in the absence of a default order, taking evidence was an irregularity in obtaining the final orders. This argument fails.[11]

In its order denying the CR 60 motion, the trial court concluded that although Smithlin had "point[ed] out that a specific motion for default was not made prior to trial," her failure to appear "create[d] a default situation" that allowed the court to adopt Aneweer's proposed parenting plan under RCW 26.09.181(1)(d). CP at 165. RCW 26.09.181(1)(d) provides, "A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section."

Smithlin's argument relies on CR 55. But she does not address or acknowledge RCW 26.09.181(d) or cite any authority demonstrating that the trial court erred in ignoring CR 55.

[11] In light of this conclusion, we do not address Smithlin's CR 52 argument.

Because Smithlin does not adequately brief this issue, she fails to show that the trial court abused its discretion in concluding that the final orders were properly issued under RCW 26.09.181(d).

IV. EXCESS RELIEF

Smithlin also argues that the trial court erred when it entered the final orders without having served Smithlin with a financial declaration or the proposed child support worksheets, thereby "exceeding the relief initially plead by the father." Br. of Appellant at 17. But Smithlin did not make this argument in her CR 60 motion, in her memorandum of law, or at the hearing on the CR 60 motion, and a trial court does not abuse its discretion if it fails to address an argument that was not raised. *See Wilson & Son Ranch, LLC*, 162 Wn. App. at 303 (citing *Doe*, 117 Wn.2d at 780). Accordingly, this argument does not establish that the trial court abused its discretion when it denied her CR 60 motion.

V. CHALLENGES TO BEST INTEREST FINDINGS AND PARENTAL CONDUCT RESTRICTIONS

Finally, Smithlin also challenges several of the trial court's findings in its May 28, 2019 orders regarding NA's best interests and the parental conduct restrictions imposed on Smithlin. We assume that Smithlin is asserting that the trial court abused its discretion by failing to consider these arguments when considering Smithlin's CR 60 motion.

Smithlin contends that because the trial court did not consider any "substantive testimony" at the trial, there is no evidence supporting any findings and that the trial court failed to consider the statutory factors required when evaluating a child's best interests. Br. of Appellant at 23. Smithlin further argues that the trial court did not apply the rules of evidence, engage in the proper analysis on the record, or apply the correct standard of proof when it considered the parental

conduct restrictions under RCW 26.09.187(3). There are three significant problems with these arguments.

First, we do not have an adequate record to review what evidence the trial court considered or the analysis it may have engaged in because the May 28, 2019 transcript was not designated as part of the record. As the party seeking review, Smithlin has the burden to perfect the record so we can consider all of the evidence relevant to the issues presented. RAP 9.2(b). "An insufficient appellate record precludes review of the alleged errors." *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012).

Second, Smithlin is arguing that the trial court committed errors of law, which we do not address under CR 60(b).[12] *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986) (CR 60 motions are not a means of correcting errors of law; insufficiency of the evidence is an error of law). And third, we do not consider challenges to the underlying judgment when determining whether the trial court abused its discretion in denying a CR 60 motion. *Gaut*, 111 Wn. App. at 881. Thus, these arguments do not demonstrate that the trial court abused its discretion when it denied the CR 60 motion.

[12] We note that Smithlin argues that the trial court misapplied *Tang* in the order denying the CR 60 motion. But Smithlin does not argue that the specific errors we address in this section are not errors of law.

CONCLUSION

Smithlin does not show that the trial court abused its discretion when it denied her CR 60(b)(1) motion to vacate. Accordingly, we affirm the order denying the motion to vacate.[13]

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.

CRUSER, J.

We concur:

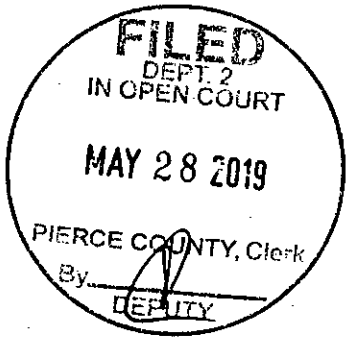
WORSWICK, P.J.

GLASGOW, J.

[13] We note that this decision in no way restrains Smithlin from moving for any appropriate modification to the parenting plan to allow for visitation.

APPENDIX NO. 2

Memorandum of Journal Entry, dated May 28, 2019, previously designated as CP 128-129.



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

BRYAN MICHAEL ANEWEER
Petitioner(s)

vs

AMBER MAE SMITHLIN
Respondent(s)

Cause Number: 18-3-03129-9
Memorandum of Journal Entry

Judge/Commissioner: Timothy L. Ashcraft
Court Reporter: NOT ON RECORD
Judicial Assistant: Sandi Rutten

ANEWEER, BRYAN MICHAEL
SMITHLIN, AMBER MAE
ANEWEER, NOAH MICHAEL

Proceeding Set: Trial

Proceeding Date: May 28, 2019, 11:43 AM

Proceeding Outcome: Uncontested Resolution

Resolution: Uncontested Resolution

Clerk's Code: RESHRG
Proceeding Outcome code: **RESHRG**
Resolution Outcome code:
Amended Resolucton code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

BRYAN MICHAEL ANEWEER
vs
AMBER MAE SMITHLIN

Cause Number: 18-3-03129-9
Memorandum of Journal Entry

Judge/Commissioner: Timothy L. Ashcraft

MINUTES OF PROCEEDING

Start Date/Time: May 28, 2019, 11:43 AM

Judicial Assistant: Sandi Rutten
Court Reporter: NOT ON RECORD

May 28, 2019 11:42 AM - The Court reviews, amends, and signs the final pleadings in this case, which is concluded.

End Date/Time: May 28, 2019, 11:43 AM

APPENDIX NO. 3

December 17, 2020 email from Judge Ashcraft's court reporter, confirming proceedings in the instant case were not on the record.

Sophia M. Palmer

From: Kellie Smith <kellie.smith@piercecountywa.gov>
Sent: Thursday, December 17, 2020 10:20 AM
To: Sophia M. Palmer
Subject: RE: Aneweer v Smithlin - Pierce County Cause No. 18-3-03129-9

Ms. Palmer,

I looked in my files, and the only thing I have for that entire day is a trial we did with Richard Ricketts and Chris Torrone.

Kellie Smith, **CCR, RPR, CRR | Official Court Reporter to Judge Timothy L. Ashcraft**
Pierce County Superior Court | Dept. #2 | 930 Tacoma Avenue South, Room 334 | Tacoma, WA 98402
Phone: (253) 798-6632 | **Fax:** (253) 798-7214 | **Email**: Kellie.Smith@piercecountywa.gov

---

From: Sophia M. Palmer <Sophia@sophiampalmerlaw.com>
Sent: Thursday, December 17, 2020 10:05 AM
To: Kellie Smith <kellie.smith@piercecountywa.gov>
Subject: Aneweer v Smithlin - Pierce County Cause No. 18-3-03129-9

Ms. Smith,

Can you confirm there are no VRP from the May 28, 2019 hearing in the above entitled case? The Clerks Minutes indicated they were all off the record.

Thanks,

Sophia M. Palmer

SOPHIA M PALMER FAMILY LAW

Sophia M. Palmer | Attorney at Law
PH 253.777.4165 | **FX** 253.777.4168 | sophia@sophiampalmerlaw.com
615 Commerce St. Ste 101 | Tacoma, WA 98402
SOPHIAMPALMERLAW.COM

VIEW MY PROFILE ON Avvo

APPENDIX NO. 4

Washington State Court Form FL ALL FAMILY 161 – Motion for Default.

Superior Court of Washington, County of _____

In re: Petitioner/s *(person/s who started this case)*: _____ And Respondent/s *(other party/parties)*: _____	No. _____ Motion for Default (MTDFL)

Motion for Default

Important! *The person making this motion must ask the court to sign the Order on Motion for Default (FL All Family 162) either at a hearing or at ex parte.*

- *If you must notify the other side about this motion, you may use the Notice of Hearing form (FL All Family 185) unless local rule requires a different form. Contact the court for scheduling information.*
- *If you don't have to notify the other side, you may ask the court to sign the Order "ex parte" (without the other party there). Contact the Superior Court Clerk's office for the procedure in your county.*

1. My name is: _____.

2. Request

I ask the court to find the other party, *(name):* _____, in default, and to approve final orders in this case without the other party's participation because the other party has not filed a *Response.*

3. Notice about the motion *(check one):*

[ ] I must give the other party a copy of this motion and advance notice of the hearing because:

- s/he has filed a *Notice of Appearance* or appeared in this case in some other way,

  OR

- it has been more than one year since s/he was served with the *Summons* and *Petition*.

[ ] I do **not** have to give the other party a copy of this motion and advance notice of the hearing because s/he:

- has **not** filed a *Notice of Appearance,*
- has **not** appeared in this case in any other way, AND
- was served with the *Summons* and *Petition* less than one year ago.

Note: *Even if you do not have to notify the other party, you may choose to do so.*

4. Service of Summons and Petition

The other party was properly served on *(date):* _____ with a *Summons* and *Petition* for this case and any other documents listed in the proof of service filed with the court.

State (or foreign country) where the other party was served: _____

[ ] The other party had to be served outside of Washington State because *(explain):*

_____

_____

5. Timing and type of service

The other party was served with the *Summons* and *Petition* by *(check one):*

[ ] personal service in Washington State, at least 21 days ago.

[ ] personal service outside of Washington State, at least 61 days ago.

[ ] mail, at least 91 days ago.

[ ] publication, at least 61 days ago.

[ ] **For a *Petition to Modify Child Support Order* only:**

[ ] by mail in Washington State. Service was effective at least 21 days ago.

[ ] by mail outside of Washington State. Service was effective at least 61 days ago.

6. Correct Court (venue and jurisdiction)

At the time this case was filed:

The Petitioner lived in *(county and state):* _____

The Respondent lived in *(county and state):* _____

The children (if any) lived in *(county and state):* _____

The *Petition* describes how this court has jurisdiction over this case and the parties.

[ ] Other *(specify):* _____

_____

7. Active duty military

*(The **federal** Servicemembers Civil Relief Act covers:*

- *Army, Navy, Air Force, Marine Corps, and Coast Guard members on active duty;*

- *National Guard or Reserve members under a call to active service for more than 30 days in a row; and*
- *commissioned corps of the Public Health Service and NOAA.*

*The **state** Service Members' Civil Relief Act covers those service members listed above who are either stationed in or residents of Washington state, and their dependents, except for the commissioned corps of the Public Health Service and NOAA.)*

[ ] The other party is **not** covered by the state or federal Servicemembers Civil Relief Acts. I know this because *(check all that apply):*

[ ] The attached report from the Defense Manpower Data Center (DMDC) shows his/her status. *(To get the report, visit the Defense Manpower Data Center website. You will need his/her birth date or social security number to search this website.)*

[ ] I sent the other party a *Notice to Military Dependent* (form FL All Family 103) to inform him/her of dependents' rights. The other party did not respond within 20 days claiming to be a protected military dependent. Therefore, the other party should not be considered a protected military dependent.

The *Notice* was *(check one):* [ ] personally served on *(date):* _____

[ ] mailed by first class mail on *(date):* _____

[ ] I have personal knowledge of the other party's military or dependent status *(explain):* _____

_____

[ ] Other *(explain)*: _____

[ ] The other party **is covered** by the state and/or federal Servicemembers Civil Relief Act, but:
- s/he is represented by a lawyer in this case, AND
- s/he has not filed a Response, AND
- the court has not granted a stay (or any stay previously granted has ended).

[ ] I **don't know** whether the other party is covered by the state and/or federal Servicemembers Civil Relief Act. I did the following things to try to find out: _____

_____

8. Other *(specify):* _____

_____

Person making this motion fills out below:

I declare under penalty of perjury under the laws of the state of Washington that the facts I have provided on this form are true.

Signed at *(city and state):* _____ Date: _____

▶ _____ _____

Person making this motion signs here *Print name here*

Lawyer (if any) fills out below

▶ _____ _____ _____

Lawyer signs here *Print name and WSBA No.* *Date*

APPENDIX NO. 5

Washington State Court Form FL ALL FAMILY 162 – Order on Default.

Superior Court of Washington, County of _____

In re: Petitioner/s *(person/s who started this case)*: _____ And Respondent/s *(other party/parties)*: _____	No. _____ Order on Motion for Default [ ] ORDFL (Granted) [ ] ORDYMT (Denied) **Clerk's Action Required: 9**

Order on Motion for Default

1. The court has considered the *Motion for Default* filed by *(name):* _____.

➢ ***The Court Finds****:*

2. Response

The other party, *(name):* _____, *(check one):*

[ ] has **not** filed a *Response* to the *Petition*.

[ ] has filed a *Response* to the *Petition*.

3. Notice about the motion

The other party *(check one):*

[ ] is entitled to notice of the motion because s/he appeared or was served with the *Summons* and *Petition* more than one year ago. *(Check one):*

[ ] Notice was given. The other party was served with the *Motion for Default* and notice of the hearing on *(date):* _____.

[ ] Notice was not given. The *Motion* should be denied.

[ ] is **not** entitled to notice of the *Motion for Default* because s/he has not filed a *Notice of Appearance*, has not appeared in this case in any other way, AND was served with the *Summons* and *Petition* less than one year ago.

[ ] Notice was given even though it was not required. The other party was served with the *Motion for Default and notice of the hearing on (date)*: _____.

4. Service of Summons and Petition

[ ] The other party was properly served on *(date):* _____ with a *Summons* and *Petition* for this case and any other documents listed in the proof of service filed with the court.

[ ] Valid proof of service has **not** been filed.

5. Timing and type of service

[ ] The other party was served with the *Summons* and *Petition* by *(check one):*

[ ] personal service in Washington State, at least 21 days ago.

[ ] personal service outside of Washington State, at least 61 days ago, because service could not be made within Washington State.

[ ] mail, at least 91 days ago.

[ ] publication, at least 61 days ago.

[ ] **For a *Petition to Modify Child Support Order* only:**

[ ] by mail in Washington State. Service was effective at least 21 days ago.

[ ] by mail outside of Washington State. Service was effective at least 61 days ago.

[ ] Does not apply. No valid proof of service was filed.

6. Correct Court (venue and jurisdiction)

[ ] A Washington court can decide this case because it has jurisdiction over the case and the parties. This case should be heard in this county court (venue is proper).

[ ] Other *(specify):* _____

_____

7. Active duty military

*(The **federal** Servicemembers Civil Relief Act covers:*

- *Army, Navy, Air Force, Marine Corps, and Coast Guard members on active duty;*
- *National Guard or Reserve members under a call to active service for more than 30 days in a row; and*
- *commissioned corps of the Public Health Service and NOAA.*

*The **state** Service Members' Civil Relief Act covers those service members listed above who are either stationed in or residents of Washington state, and their dependents, except for the commissioned corps of the Public Health Service and NOAA.)*

[ ] The other party is **not** covered by the state or federal Servicemembers Civil Relief Act.

[ ] The other party **is covered** by the state or federal Servicemembers Civil Relief Act. S/he *(check one):*

[ ] may be defaulted because:

- s/he is represented by a lawyer in this case, AND

- s/he has not filed a Response, AND
- the court has not granted a stay (or any stay previously granted has ended).

[ ] may **not** be defaulted at this time.

[ ] The court signed the *Order re Service Members Civil Relief Act* (form FL All Family 170) filed separately.

[ ] The court does not have enough information to find whether the other party is covered by the state or federal Servicemembers Civil Relief Act.

8. Other findings (if any):

_____

_____

➢ *The Court Orders:*

9. The *Motion for Default* is *(check one):*

[ ] **Granted**. The other party, *(name):* _____, is in default. The court may sign orders and hold hearings in this case without notice to the defaulted party.

[ ] **Denied**. The other party must still be given copies of documents filed and notice of hearings scheduled in this case.

10. Other orders (if any):

_____

_____

Ordered.

_____ ▶ _____

Date *Judge or Commissioner*

Presented by: [ ] Petitioner or his/her lawyer [ ] Respondent or his/her lawyer

▶ _____ _____

Sign here *Print name (and WSBA No., if lawyer)*

Filed
Washington State
Court of Appeals
Division Two

January 29, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

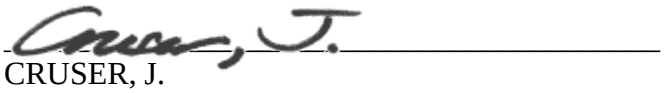
BRYAN MICHAEL ANEWEER, Respondent, v. AMBER MAE SMITHLIN, Appellant.	No. 54287-1-II ORDER CALLING FOR A RESPONSE

Appellant moves for reconsideration in this matter. Because an answer would assist the court in resolving the motion, the court requests that the respondent file an answer to the motion for reconsideration within 10 days of this order. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Glasgow, Cruser

FOR THE COURT:



CRUSER, J.

Filed
Washington State
Court of Appeals
Division Two

March 15, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRYAN MICHAEL ANEWEER, Respondent, v. AMBER MAE SMITHLIN, Appellant.	No. 54287-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's December 15, 2020 unpublished opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Glasgow, Cruser

FOR THE COURT:

CRUSER, J.

LAW OFFICE OF SOPHIA M. PALMER

April 13, 2021 - 1:29 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Bryan Michael Aneweer, Respondent v. Amber Mae Smithlin, Appellant (542871)

The following documents have been uploaded:

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