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

Marriage of:
TATYANA MASON,
Appellant,
v.
JOHN MASON,
Respondent.

BRIEF OF RESPONDENT

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

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INTRODUCTION

In the first of its two prior opinions arising out of the trial court's 2013 child-abuse determination against Tatyana Mason (based on the children's allegations and CPS's "founded" determination, and requiring necessary evaluation and treatment that she still refuses) this Court affirmed the trial court's 2013 parenting plan and child support order in 2015. Tatyana thereafter embarked on a course of vexatious litigation rarely seen even in high-conflict divorce cases. She eventually convinced a trial judge to set aside the 2013 child support order and enter CR 11 sanctions against John Mason. But in its second (2018) decision, this Court reinstated the child support order, *vacated* the CR 11 order, and remanded for *either* proper findings *or* a determination that sanctions were unfounded.

In this, the first of Tatyana's two remaining appeals, she claims the trial court should have set aside the 2013 parenting plan under CR 60. That court correctly found no basis to do so. It also found no adequate cause to modify the plan, where Tatyana still refuses necessary evaluation and treatment to lift her RCW 26.09.191 restrictions. Tatyana still has her violent tendencies.

This Court should affirm and dismiss. It should award John fees for having to respond to Tatyana's frivolous appeals.

STATEMENT OF THE CASE

A. This Court's 2015 Opinion provides necessary factual background for this appeal.

Five years ago, this Court stated factual background for this appeal in *Marriage of Mason*, Wash. Ct. of App. No. 45835-7-II, slip op. (July 7, 2015) ("2015 Opinion") (copy attached as Appendix A). It is set forth here verbatim, with headings added to assist the Court.

1. The parties married in 1999, had two children, and John filed for dissolution in 2007.

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

2015 Opinion at 2.

2. Concerning allegations arose in 2011, including Tatyana's abusing the children, who expressed fear of Tatyana.

After the dissolution [in 2008], G.M. and D.M. participated in counseling with social worker Stephen Wilson. During this time, John became concerned about Wilson's treatment of G.M. following an incident in which G.M. hit his younger brother. When the parties could not agree on a new counselor, John filed a motion to the trial court to appoint one. The court appointed Sandra Hurd to assume responsibility for the Mason family's counseling needs. The court also ordered both John and Tatyana to undergo counseling with Hurd, which they each did initially.

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

2015 Opinion at 2.

3. John sought a modification, a GAL found that Tatyana has a “tendency for violence,” and she failed to cooperate with an evaluation of that tendency, which was suspended.

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

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

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

Rather than suspending Tatyana's visitation rights entirely, the trial court ordered that Tatyana's visits be therapeutic in

nature, but Tatyana never arranged or coordinated such visits. Tatyana claimed she could not afford to pay for the therapeutic visits or other supervised visitation time because she had lost her home and she had no income.²

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

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

2015 Opinion at 2-4.

B. This Court's 2015 Opinion also provides necessary procedural background for this appeal, including .191 restrictions against Tatyana.

This Court's 2015 Opinion also sets forth relevant procedure, which is again set forth verbatim, with added headings.

1. The modification trial included a CPS report finding that the children's allegations regarding Tatyana's abuse are "founded."

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

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

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

The trial court heard additional testimony and considered new evidence, including a **CPS report finding that the allegations of abuse by Tatyana were "founded."** The court made an oral ruling during which it noted that there had been a previous finding of domestic violence against John, but concluded that there was no evidence to support an additional finding to that effect and, in the court's view, there were no concerns about future domestic violence from John.

2015 Opinion at 4-5 (emphasis added).

2. The trial court modified the parenting plan, including RCW 26.09.191 restrictions against Tatyana, who appealed.

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

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

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

2015 Opinion at 4-5 (emphases added).

3. But Tatyana did not appeal from the November 2013 Child Support Order to which she agreed.

Concomitant to the proceedings described *supra*, the trial court entered a Child Support Order on November 25, 2013. CP 9-18.¹ Tatyana's income was imputed at \$2,080 per month because she was voluntarily unemployed. CP 10. Her transfer payment was set at \$412.04 per month. CP 12. Tatyana did not request a deviation. *Id.* at ¶ 3.8. Indeed, she agreed to this order. CP 405, 444-45. Thus, she did not appeal from this order (which will be the subject of many motions underlying this appeal).

¹ "CP" refers to the Clerk's Papers in No. 49839-1-II, which this Court ordered transferred into this appeal.

C. The 2015 Opinion affirmed the trial court’s (a) findings based on substantial evidence, (b) order restraining Tatyana, and (c) order denying reconsideration.

1. This Court found substantial evidence of Tatyana abusing the children.

This Court held that “the trial court heard ample testimony, which it found credible, from various professionals who determined that Tatyana abused G.M. and D.M.,” so it affirmed the trial court’s decision modifying the parenting plan. 2015 Opinion at 6-8. This was supported by the “founded” abuse finding from CPS; the therapist’s confirmation regarding G.M.’s disclosure of Tatyana’s abuse, including bruising on G.M.; the GAL’s confirmation that Tatyana “instilled a fear of harm in the children”; and the GAL’s recommendation that the children continue to live with John, having “no concerns about the children living with John.” *Id.* at 8.

2. This Court affirmed the restraining order.

The trial court found that modification – including restraining Tatyana – was in the children’s best interest, where the existing plan was detrimental to their physical, mental, or emotional health. *Id.* at 7. This too was supported by the substantial evidence discussed above. *Id.* at 7-8. This Court affirmed. *Id.* at 8.

3. This Court also affirmed the trial court's order denying reconsideration.

Tatyana obstructed her own evaluation, and she failed to pay for it until after the trial court had ruled against her. *Id.* at 8-10. Her failure was no-doubt tactical, as the report largely confirmed the conditions in the trial court's modification orders. *Id.* at 10 n.3. This Court affirmed the order denying reconsideration based on allegedly "new evidence." *Id.* at 8. And Tatyana had no argument that the report would have changed the outcome. *Id.* at 10.

D. Following the appeal, the trial court thrice refused to excuse or modify Tatyana's unpaid back child support, or to vacate the 2013 Order of Child Support to which she had agreed in 2013 and never appealed.

On or about September 1, 2015, Tatyana filed a Motion to Dismiss Full Amount of Child Support, requesting vacation of her entire child support obligation since 2013. CP 333-39. September 10, 2015, a Commissioner entered Findings & Conclusions and an Order denying her motion as lacking any legal basis (CP 1594-95, emphasis added):

3. . . . the Motion of Ms. Mason is without merit . . .
4. Ms. Mason's Motion to Dismiss is essentially a request to vacate the Order of Child Support issued November 25, 2013. Ms. Mason does not state a legal basis to set aside an Order that is now almost 22 months old. Her time for appeal of the Order is passed. Her time for reconsideration has passed. She cites no basis under

Civil Rule 59 or 60 for her motion. Additionally, her request would constitute an improper retroactive modification of child support.

5. If Ms. Mason's request is a prospective Motion for Modification of Child Support, she has failed to use the correct mandatory form and she has not supplied the documentation required by the statute in support of such a Motion.

Judge Christine Schaller denied revision of this Order on October 9, 2015. CP 25-26. Tatyana did not appeal. This order is final.

But the same day (October 9), Tatyana filed the same motion again. CP 349-66. On October 13, 2015, the Commissioner modified Tatyana's income to \$0, and imposed the statutory minimum prospective child support of \$50. CP 27-33. The same day (October 13), the Commissioner entered a new Child Support Order reflecting this modification. CP 34-43. For the second time, he denied Tatyana's motion to vacate her back child-support. CP 44, 49. Tatyana did not appeal this order. Again, this order is final.

On October 21, 2015, Tatyana again filed a petition to modify, including another request to vacate her back child-support. CP 986-1001. On November 6, 2015, John provided the Commissioner with a portion of the 2013 trial transcript in which Tatyana – through her trial lawyer – conceded the entry of the 2013 Order of Child Support. CP 1596-1604. On November 10, 2015, the Commissioner awarded

John \$1,987.50 in attorney fees, but refused to bar Tatyana from filing further pleadings, noting that if Tatyana “continues to fail to follow CR 11 the court will reconsider this request.” CP 367-68. He also entered a third order denying Tatyana’s petition to modify parenting plan, motion for temporary orders, and motion to vacate the child-support arrears/2013 Order of Child Support. CP 369-70. On December 15, 2015, he again denied reconsideration. CP 371.

On December 22, 2015, Tatyana sought to revise this third denial of reconsideration. CP 1605-09. John objected that her underlying motion previously had been denied – twice – and that it lacked any legal basis. CP 1610-17. Nonetheless, on January 15, 2016, Judge Schaller granted revision and remanded the motion for reconsideration to the Commissioner because he had refused to reconsider on incorrect timeliness grounds. CP 397-98. The Judge interlineated, however, that “there is no legal basis for the court to do anything with the child support arrears.” CP 398.

On February 1, 2016, the Commissioner again denied reconsideration. CP 1004. Tatyana again sought revision the next day. CP 1005-10. After many more filings and continuances, the trial court again denied revision on March 4, 2016. CP 1013-16.

E. Tatyana sought reconsideration of the order denying revision of the order denying reconsideration of the third order denying vacation of the 2013 Child Support Order entered with her consent and not appealed in 2013.

Yet again Tatyana sought reconsideration, this time of the order denying revision of the order denying reconsideration of the third order denying vacation of the 2013 Child Support Order entered with her consent and not appealed in 2013. CP 1618-19. After many pleadings and continuances (Tatyana often did not appear, see CP 1016) the trial court continued the hearing to April 29, 2016. CP 1011.

During this April 29 hearing, Tatyana argued that John had allegedly signed an immigration document in 1999 (called an I-864, discussed *infra*) which Tatyana had not produced in the 2013 trial, but which “should have been” obtained and offered during that trial. CP 1074. John denied having any recollection of signing this form. CP 1075. The trial court continued the reconsideration hearing to July 8, 2016, allowing Tatyana to produce the actual form, if she could. CP 1012. John subsequently laid out the many legal reasons the trial court could not and should not reconsider its order denying revision of Tatyana’s third motion to vacate the 2013 Child Support Order. CP 1063-73.

F. The trial court denied Tatyana's motion to reconsider the order denying revision of the order denying reconsideration of the third order denying her motion to vacate the 2013 Child Support Order that was entered with her consent and not appealed in 2013, and yet set it for trial as a CR 60(b)(11) motion.

On July 8, 2016, the trial court denied Tatyana's motion to reconsider the order denying revision of the order denying reconsideration of the third order denying her motion to vacate the 2013 Child Support Order entered with her consent and not appealed. CP 1141, 1149.

At the same time, however, the trial court set the same motion it was denying for trial under CR 60(b)(11). *Id.* It entered no order on these decisions. *Id.* On July 26, 2016, Tatyana filed yet another series of pleadings seeking to vacate the 2013 Child Support Order, or to modify the parenting plan. CP 1017-62. Many more motions, responses, continuances, etc. ensued.

On August 10, 2016, the trial court entered a letter ruling reflecting its decision to deny Tatyana's final motion for reconsideration of the trial court's denial of revision of the Commissioner's ruling denying reconsideration of its third order denying her motion to vacate the 2013 Child Support Order. CP 1149. Tatyana again failed to appeal from this final ruling. The same

letter says that the court had, “on its own motion elected to treat [her] motion as a motion to vacate under Civil Rule 60.” *Id.* It also noted that credibility questions required a trial. *Id.*

On August 23, 2016, John sought sanctions for all of Tatyana’s frivolous and harassing filings. CP 1150-87. He also responded to her motions. CP 1188-1235. The trial court denied her motion to modify, finding no adequate cause, and awarded John \$1,500 in sanctions. CP 1237-38.

On September 29, 2016, the trial court entered a Pretrial Order, setting a two-day trial on “child support” (really the back child-support under the 2013 Child Support Order) and noting (*inter alia*) some possible discovery disputes that required a discovery conference. CP 1239-40.

G. This Court’s 2018 decision on John’s appeal reversing Judge Wickham also provides helpful background for this appeal.

In John’s only appeal, this Court (as relevant here) reversed and vacated the trial courts’ CR 11 sanctions against John, and remanded. ***Marriage of Mason***, Wash. Ct. of App. No. 49839-1-II, slip op. (July 31, 2018) (“2018 Opinion”) (attached as Appendix B). This Court correctly held that no specific findings supported CR 11

sanctions against John. 2018 Opinion at 1. This Court *vacated* the trial court's order and remanded (*id.* at 2, emphases added):

we vacate the trial court's order imposing CR 11 sanctions on John and remand either for entry of specific findings supporting the award of CR 11 sanctions that are included or incorporated in the court's CR 11 order or a determination that CR 11 sanctions are not warranted.

As a result, no CR 11 sanctions currently exist against John.

This Court denied Tatyana's motion for reconsideration on September 24, 2018. Tatyana filed a Petition for Review on October 22, 2018. **Mason**, Wash. S. Ct. No. 96438-6.

Tatyana then asked a successor judge (Judge Mary Ann Wilson) to enter CR 11 Findings and Conclusions against John (Judge Wickham had retired). Supp CP² 1-4. But on December 14, 2018, Judge Wilson ruled that it was "premature to rule on [Tatyana's] request because a Supreme Court review is pending and there is no mandate from the Court of Appeals." Supp CP 67-68. Judge Wilson also noted that case law, "especially" **Tacoma Recycling, Inc. v. Capital Material Handling Co.**, 42 Wn. App. 439, 711 P.2d 388 (1985), prohibits a new judge from changing an order entered by a prior judge following a three-day trial. Supp CP 68.

² "Supp CP" refers to the Clerk's Papers Tatyana filed in No. 52959-9-II (Clerk's Papers Index attached as Appendix C).

Judge Wilson also denied the relevant portions of Tatyana's motion for reconsideration on January 8, 2019. CP 85-86.

Tatyana appealed on January 31, 2019. No. 52959-9-II. After several delays and extensions to pay the filing fee, on June 11, 2019, this Court informed the parties that it would treat Tatyana's appeal as discretionary. After briefing, this Court permitted her appeal to proceed on June 27, 2019.

Meanwhile, Tatyana's Petition for Review of this Court's 2018 Opinion was denied on March 6, 2019. **Mason**, Wash. S. Ct. No. 96438-6. This Court issued its Mandate on March 20, 2019. Tatyana also sought a stay of the Mandate from this Court (denied on March 22) and then from our Supreme Court (denied on April 10). The Mandate had already issued.

The same day that John filed his appeal in No. 49839-1, Tatyana filed a CR 60 Motion to Vacate the 2013 and 2008 Parenting Plan. CP 1581-91. The trial court denied her motion on January 25, 2017. CP 1565-66. Tatyana appealed February 13. No. 50009-4-II. That appeal was stayed and delayed for various reasons, including Tatyana's failure to pay the filing fee and John's pending appeal in No. 49839-1.

Tatyana filed her opening brief in No. 52959-9 on December 9, 2019, and in No. 50009-4 on December 12, 2019. On December 15, 2019, she also filed a “Motion to Correct this Court’s Errs” regarding this Court’s 2018 Opinion and its September 2018 denial of reconsideration in No. 52959-9, but not in No. 50009-4. The next day, this Court denied that motion as an untimely motion for reconsideration. On January 31, 2020, this Court denied Tatyana’s Motion to Modify that decision.

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ARGUMENT

A. Tatyana's frivolous claims regarding supersedeas are improper, untimely, and incorrect.

Tatyana's first three Assignments of Error and first two issue statements concern supersedeas. BA 4-6. That is governed by RAP Title 8. The only method by which to challenge a trial court's supersedeas ruling is "by motion in the appellate court." RAP 8.1(h). Indeed, the trial court repeatedly told Tatyana that. 1/25/17 RP 36; CP 1576. Yet Tatyana never filed such a motion. The time for any such motion passed when the Mandate issued in No. 49839-1.

Instead, Tatyana complains about supersedeas in her opening brief in her subsequent appeal. BA 27-32. That is not permitted: RAP 10.4(d) ("A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits"). Tatyana has not argued that any supersedeas ruling here would preclude hearing the merits of her appeal. It could not. Her untimely "brief motion" is thus frivolous. This Court should disregard it.

And any such *motion* would have been incorrect. Tatyana asked the trial court to "*release*" the supersedeas bond that John filed to stay enforcement of her judgment during the pendency of his successful appeal in No. 49839-1. 1/25/17 RP 10. That is the entire point of supersedeas, to which John had a right. RAP 8.1 ("Any party

to a review proceeding has the right to stay enforcement of a money judgment . . . pending review”). No error occurred.

Tatyana suggests she made an objection to the *amount* of the supersedeas bond (\$15,000). BA 29 (citing CP 785). Rather, Tatyana asked for the \$12,800 to be “released,” and *also* asked for another \$20,000. CP 785. The trial court ruled that *both* questions were for this Court (1/25/17 RP 36), which is correct because they were in the nature of suit money on appeal.³ But since John’s appeal is long over, any issue regarding this correct ruling is moot.

Tatyana nonetheless carries on, asking this Court to increase the moot supersedeas bond to \$40,000 so that she can pay a lawyer (Sharon Blackford) who has never appeared in this or any other of Tatyana’s appeals. BA 29-32. The Mandate issued in John’s appeal (No. 49839-1) long ago. Tatyana’s frivolous claims are moot.

B. The trial court did not abuse its discretion in finding no basis to vacate the Parenting Plan.

The trial court ruled: “There is no basis to vacate the Parenting Plan.” CP 1565. It correctly noted that “a lot of the parenting plan issues that are being addressed [by Tatyana] today were addressed

³ Tatyana did file a motion in this Court seeking fees, dated June 6, 2017. Commissioner Schmidt denied her motion by letter ruling dated June 9, 2017, barring her claims here. Tatyana did not seek to revise that ruling.

by the Court of Appeals some time ago when it affirmed my decision regarding the parenting plan” (in No. 45835-7, on July 7, 2015). 1/25/17 RP 34. It further noted that things “happened during [that earlier] trial before me that were troublesome, and one of the things that was troublesome was the findings by CPS that [Tatyana] physically abused the children and those findings haven’t been changed.” *Id.* “Those findings were one of the reasons the court ordered what it ordered.” *Id.*

Notwithstanding Tatyana’s allegations against John, she was represented by counsel at trial and was given ample opportunities to address any issues she wished. *Id.* at 34-35. The court “tried as best [it] could to give [Tatyana] an opportunity to begin to have contact.” *Id.* at 35. But the court did not “see anything in the motion to vacate that shows there is, frankly, really any basis for the court to make changes or to vacate that earlier order.” *Id.* Specifically, the court found no basis under CR 60(b)(4), a “high bar to prove fraud,” and there was no “showing in front of Judge Wickham that would require or permit me to vacate the parenting plan.” *Id.* at 35-36:

Ms. Mason was represented by counsel throughout the parenting plan trial. The parenting plan issues were very strenuously litigated in my recollection, and, again, I continued the trial several times to allow Ms. Mason to present additional evidence, which she and her counsel never presented me.

1. The trial court did not abuse its discretion in ruling that CR 60(b) provides no basis to set aside the parenting plan, and Tatyana's claims are frivolous.

The trial court's rulings are correct. In the trial court, Tatyana raised only CR 60(b)(1), (3), (4) & (11). CP 1462-65. She cited no caselaw. *Id.* That alone was sufficient to deny her motion.

The trial court's denial of her motion to vacate the parenting plan under CR 60(b) was within that court's discretion. ***Jones v. City of Seattle***, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). This Court reviews that denial solely for an abuse of discretion. ***Tamosaitis v. Bechtel Nat'l, Inc.***, 182 Wn. App. 241, 254, 327 P.3d 1309, *rev. denied*, 340 P.3d 229 (2014). A trial court abuses its discretion only when its decision is based on untenable grounds or reasons. *Id.* Tatyana does not even try to show an abuse of discretion here.

The trial court may vacate a judgment due to “[m]istakes, inadvertence, surprise, excusable neglect or irregularity” in obtaining a judgment or order. CR 60(b)(1). But CR 60(b) authorizes vacation only for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings; errors of law are not correctable through this rule. ***Burlingame v. Consol. Mines & Smelting Co.***, 106 Wn.2d 328, 336, 722 P.2d 67 (1986). And any claim for relief under CR 60(b)(1) must be made within a reasonable

time, but not more than one year after the judgment or order was entered. CR 60(b).

Tatyana met none of these factors. In the trial court she argued only that the 2013 trial court incorrectly found her voluntarily unemployed and that the .191 restrictions the 2013 trial court placed against her were unsupported. CP 1464. Here, she seems to allege several more claimed errors by the 2013 trial court, for the first time. BA 44-45. But none of these collateral attacks go to matters extraneous to the actions of the 2013 trial court. Rather, she solely and directly collaterally attacks the 2013 trial court's rulings. Such challenges are not legally cognizable under CR 60(b)(1). And she did not bring these attacks on the 2013 decision until many, many years later. Her challenges fail under the plain terms of CR 60(b)(1).

A trial court may vacate a judgment based on “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b),” but again, only if brought within one year. CR 60(b)(3); see also ***Isla Verde Int’l Holdings, Inc. v. City of Camas***, 99 Wn. App. 127, 142, 990 P.2d 429 (1999), *aff’d on other grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002). Tatyana herself alleges that the I-864 form has been around for a very long time – nothing newly discovered there. And her

challenges based on it have already been rejected by this Court. See 2018 Opinion at 1. Her other frivolous challenges are similarly nothing new.⁴ And this motion was grossly untimely.⁵

A trial court may vacate a judgment for “[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” CR 60(b)(4). But vacating a judgment is an extraordinary remedy. See **Dalton v. State**, 130 Wn. App. 653, 665, 124 P.3d 305 (2005). Clear, cogent, and convincing evidence of fraud, misrepresentation, or misconduct is required to vacate a judgment. *Id.*

For fraud, the trial court must make findings of fact and conclusions of law on each of the nine elements of common-law fraud. **Marriage of Maddix**, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985). No such findings exist here – nor could be made.

For misrepresentation or other misconduct, the moving party might not be required to prove all the elements of fraud. **Mitchell v. Wash. State Inst. of Pub. Policy**, 153 Wn. App. 803, 825, 225 P.3d 280 (2009). But even where, unlike here, a moving party proves a

⁴ Any sort of diligence could have discovered all this decades ago.

⁵ Indeed, the trial court addressed only CR 60(b)(4) & (11) (1/25/17 RP 35-36), no doubt because claims under (b)(1) & (3) are time barred. And even her (b)(4) and (11) claims were not brought within a reasonable time.

misrepresentation, a trial court may not grant relief under CR 60(b)(4) absent clear and convincing evidence of at least two additional elements: first, the moving party must have relied on or been misled by the misrepresentation. See **Dewar v. Smith**, 185 Wn. App. 544, 561-62, 342 P.3d 328 (2015) (reasonable reliance element of misrepresentation). And second, some connection must exist between the misrepresentation and obtaining the judgment; that is, the rule is aimed only at vacating judgments that were unfairly obtained, so the alleged wrongful conduct must have “prevented a full and fair presentation” of the moving party's case. **Dalton**, 130 Wn. App. at 665, 668.

As with fraud, the trial court found no basis to vacate for misrepresentation or misconduct. CP 1576-77. Rather, it repeatedly noted that Tatyana was represented by counsel at trial, had several continuances to allow her to present whatever evidence or argument she wished, and otherwise received a fair trial. 1/25/17 RP 34-36. She hotly contested John's evidence, rather than “relying” on it. *Id.* But the trial court soundly based its parenting plan on, among other things, Tatyana's abuse of her children. *Id.* Even a proven fraud, misrepresentation, or other misconduct would not support a motion to vacate if it was harmless. 4 Karl B. Tegland, WASHINGTON

PRACTICE: *Rules Prac.* § 8, at 613 (6th ed. 2013). Tatyana comes nowhere near meeting any of the applicable legal standards.⁶

The trial court similarly found no basis to vacate the parenting plan under CR 60(b)(11). 1/25/17 RP at 36. As this Court noted in its prior decision (No. 49839-1), a court may grant relief from a final judgment for “[a]ny other reason justifying relief from the operation of the judgment.” CR 60(b)(11). But this provision is “intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies.” ***Shandola v. Henry***, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). It applies solely to “extraordinary circumstances involving irregularities extraneous to the proceeding.” ***Shandola***, 198 Wn. App. at 895.

Simply put, the trial court correctly ruled that Tatyana provided no “extraordinary basis” to set aside the parenting plan. 1/25/17 RP at 36. Indeed, this Court’s 2018 Opinion concluded that Judge Wickham abused his discretion in relying on (b)(11) to vacate the 2013 Child Support Order, where Tatyana’s own trial counsel failed to proffer the I-864 form in the underlying trial. See App. B at 10-13. Yet Tatyana relies on that reversed ruling! BA 46. Moreover, a lack

⁶ Somewhat remarkably, Tatyana alleges malpractice by her own attorney in the 2013 trial. BA 46. At the very least this is not extrinsic to the trial.

of evidence (or her attorney's alleged failures) obviously is not extraneous to the proceedings, so (b)(11) again cannot apply. *Id.* at 14. The trial court simply respected this Court's controlling decision.

But Tatyana does not.⁷ Since the trial court's well-supported CR 60(b) rulings provide adequate and independent grounds to affirm the trial court's rulings, this Court should simply affirm. Tatyana's failure to assign error to the trial court's actual rulings should effectively moot her frivolous appeal. But there was no error.

2. Tatyana has no constitutional right to abuse her children, and her frivolous claims are barred.

Tatyana apparently asserts that she has a constitutional right to continue abusing her children and their father. BA 32-39. Like the frivolous motions she recently filed in this Court attacking its 2015 Opinion, her frivolous claims here are entirely based on alleged problems with the 2013 trial. *Id.* All of them are barred by *res judicata*.

Res judicata bars relitigating actions previously tried.

Marriage of Shortway, 4 Wn. App. 2d 409, 422, 423 P.3d 270

⁷ In the many months intervening since she filed this appeal, Tatyana unsuccessfully sought review of this Court's decision in both the Washington State Supreme Court and in the United States Supreme Court. While she might have had a right to do that, once those futile filings were rejected, she brought repeated motions in this Court attacking that decision, all of which were rejected. Her characterizations this Court's decisions in her pleadings speak for themselves.

(2018) (citing **Richert v. Tacoma Power Util.**, 179 Wn. App. 694, 704, 319 P.3d 882 (2014)). It also precludes litigation by collateral attack. See, e.g., **Shortway**, 4 Wn. App. 2d at 422 (citing **Marriage of Aldrich**, 72 Wn. App. 132, 138, 864 P.2d 388 (1993)). It attaches when the relevant decision (here, the parenting plan) is final. **Aldrich**, 72 Wn. App. at 138. It applies “where a prior final judgment is identical to the challenged action in “(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.”” **Shortway**, 4 Wn. App. 2d at 423 (quoting **Lynn v. Dep’t of Labor & Indus.**, 130 Wn. App. 829, 836, 125 P.3d 202 (2005) (quoting **Loveridge v. Fred Meyer, Inc.**, 125 Wn.2d 759, 763, 887 P.2d 898 (1995))). Whether *res judicata* bars this action is a question of law, reviewed *de novo*. 4 Wn. App. 2d at 423 (citing **Lynn**, 130 Wn. App. at 837).

Here we have identical subject matter (a parenting plan); cause of action (attacking *the entry of* the parenting plan due to the alleged absence of evidence at trial); persons and parties (John and Tatyana); and quality of persons (father and mother). While her claims might at least be *procedurally* colorable if the trial court had

found adequate cause,⁸ “the parenting plan issues that are being addressed today were addressed by the Court of Appeals some time ago when it affirmed [the trial court’s] decision regarding the parenting plan” in 2015. 1/25/17 RP 34. Her claims are barred.

Indeed, Tatyana was long-ago required to pursue a parenting evaluation to address her “tendency for violence.” App. A at 3. She never has.⁹ *Id.* Instead, she undertook to abuse John and his children by other means: vexatious litigation. The course of even *this* litigation (not to mention her *many* other litigations) shows that she has never dealt with her proclivity for abuse. Tatyana appears to be in complete denial, wholly unable to see that by forcing John to expend hundreds-of-thousands of dollars litigating against her, she is continuing to harm the children. Or perhaps she just doesn’t care.

⁸ Judge Wickham had previously denied adequate cause. CP 1236-38. The trial court expressly noted that any modification motion was not procedurally proper. 1/25/17 RP 35 (“the procedural posture . . . I don’t think is accurate. I don’t think it was proper to file that without getting an order signed by the court” finding adequate cause). Tatyana did not claim a substantial change in circumstances, but rather challenged the 2013 trial and 2015 appellate decisions – essentially a collateral attack on those decisions. See, e.g., CP 1030-40. No adequate cause existed.

⁹ This is in sharp contrast to John, whom she falsely accused of abuse, but who “fully submitted” to any required evaluations, convincing the evaluator, the GAL, and the 2013 trial court, that he is no risk to the children. CP 1374.

Either way, she has no constitutional right to abuse them.¹⁰ In light of the trial court's acceptance of the CPS determination that the children's abuse allegations against Tatyana were well founded – findings that Tatyana has *never* challenged – it is not only well within the trial court's discretion, but frankly *mandatory* that she not be permitted to access them unless and until she addresses her obvious abusive tendencies. See, e.g., App. A at 10 n.4 (substantial evidence supports restraining Tatyana from contacting the children). Vexatious litigation is simply abuse by other means.¹¹

And in any event, Tatyana never raised her so-called constitutional right to abuse children in the trial court. See, e.g., 1/25/17 RP 1-40. Notwithstanding her strenuous claims that she “cannot” work because she is an undocumented alien, there is no dispute that *in the relevant timeframe* (2011-2013) *she in fact worked*. CP 1426. Her subsequent employment status is irrelevant.¹²

¹⁰ It almost goes without saying that she cites no precedent recognizing a *proven abusive parent's* constitutional “right” to access her victims.

¹¹ Cf. Clausewitz, ON WAR, Chapter 1, § 24 (Princeton Univ. Press 1976) (war is politics by other means).

¹² Tatyana continues her absurdly false claims that seeing her children would cost “\$144,000 a month” for six months. BA 39. John proffered substantial evidence to the trial court that the entire bill for the evaluation to which she did submit (before she instead chose to abandon her children) was about \$6,000. CP 1375, 1428, 1457-58.

3. Tatyana’s frivolous claims about the 2013 Child Support Order are also barred.

Tatyana tries to re-raise her failed arguments regarding the 2013 Child Support Order – which she did not even challenge in her 2015 appeal. BA 39-42. Both the 2015 and 2018 appellate decisions of this Court obviously bar further litigation on this. And the 2018 decision, relying (*inter alia*) on this Court’s prior decision in ***Marriage of Khan***, 182 Wn. App. 795, 798-99, 332 P.3d 1016 (2014), already resolved that the I-864 “had no practical effect” because her *imputed* income (which she did not challenge in 2015) was more than 125% of the federal poverty guideline at that time, so John owed her no obligations. App. B at 11. This frivolous claim is barred.

4. Tatyana’s frivolous claims about the “TOTAL FINANCIAL CIRCUMSTANCES [*sic*] OF BOTH PARTIES” are also barred.

Similarly, Tatyana tries to claim that the 2013 trial court failed to consider both parties’ total financial circumstances. BA 43-44. This frivolous claim is plainly barred by *res judicata*.

5. Tatyana’s frivolous claims about Judge Wickham presiding were waived and are incorrect.

Tatyana’s final argument was obviously written by a lawyer – albeit one who would not sign her frivolous brief. BA 47-50. While some of what is said there may be legally true, none of it was raised

in the trial court. CP 1459-79, 1581-91; 1/25/17 RP 1-40. Indeed, there is no evidence in this record that Tatyana asked that retired Judge Wickham be appointed *pro tem.* or otherwise preside, nor that she objected to Judge Hirsch – who presided over the very trial Tatyana was challenging – presiding here. *Id.* The law Tatyana cites is not self-executing. She waived these claims.

Under RAP 2.5, this Court generally will not review issues raised for the first time on appeal unless appellant claims (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. See, e.g., ***Marriage of Sprute***, 186 Wn. App. 342, 358, 344 P.3d 730 (2015). Tatyana neither admits that she failed to raise this in the trial court, nor argues that any exception applies. BA 47-50. She may not do so for the first time in her reply. ***Cowiche Canyon Conserv. v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). This Court should decline to address her tardy unpreserved arguments.

And she is wrong in any event. While Tatyana *could have* asked for Judge Wickham to preside, John would have affidavitted him, moved for his recusal, or both. Judges should recuse themselves where, as here, their “impartiality might reasonably be questioned.” CJC 3(D)(1). This includes when “the judge has a

personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” CJC 3(D)(1)(a). Whether impartiality “might reasonably be questioned” concerns whether a reasonable person with knowledge of the relevant facts would conclude that all parties obtained a fair, impartial, and neutral hearing. **Sherman v. State**, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

But here, Judge Wickham had previously made credibility determinations, imposed CR 11 sanctions, and entered legally incorrect rulings in Tatyana’s favor after a trial, which this Court has since reversed. The appearance of fairness thus would require Judge Wickham’s recusal.

Finally on this point, Tatyana relies on the inapposite decision in **Zachman v. Whirlpool Fin. Corp.**, 123 Wn.2d 667, 869 P.2d 1078 (1994). BA 47-48. There, a trial judge rendered summary judgment and was “retired” (*i.e.*, lost his election); his summary judgment ruling was reversed on appeal and remanded for trial; and **the superior court – “on its own motion” – appointed the retired judge to hear the case pro tem.** because it would “be a great expense and disservice to the cause of justice and to the parties for a new judge to start over from the beginning.” 123 Wn.2d at 669.

No such order was entered here. Again, the law Tatyana relies on is not self-executing. Since Judge Wickham was retired, he could not just show up on remand. He had to be appointed *pro tem*. He was not. And by contrast, it would have been “a great expense and disservice to the cause of justice and to the parties” to have anyone but Judge Hirsch – who presided over the 2013 trial – preside here. Tatyana’s claims are frivolous.

C. This Court should award John attorney fees on appeal due to Tatyana’s many frivolous and vexatious filings, including her appellate briefing.

This Court should award John appellate attorney fees for having to respond to Tatyana’s frivolous appeal(s). RAP 18.9(a). An appeal is frivolous when it presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. ***Stiles v. Kearney***, 168 Wn. App. 250, 267, 277 P.3d 9 (2012) (citing ***Mahoney v. Shinpoch***, 107 Wn.2d 679, 691, 732 P.2d 510 (1987)). Doubts are resolved in favor of the appellant. ***Public Emps. Mut. Ins. Co. v. Rash***, 48 Wn. App. 701, 706, 740 P.2d 370 (1987).

There is no doubt here: Tatyana’s appeal is frivolous. As explained above, her attacks on both the 2013 trial court decision and this Court’s 2015 Opinion affirming that decision are plainly

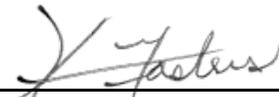
barred and are otherwise filed without a reasonable basis in fact or law. There was never any ground for her appeal that was properly preserved in the trial court. No reasonable chance of reversal exists.

CONCLUSION

This Court should affirm and award John fees and costs on appeal.

RESPECTFULLY SUBMITTED this 1st day of April 2020.

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



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

APPENDIX

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APPENDIX A

FILED
COURT OF APPEALS
DIVISION II

2015 JUL -7 AM 8:45

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re the Matter of the Marriage of	
JOHN ARTHUR MASON,	
	Respondent,
and	
TATYANA IVANOVNA MASON,	
	Appellant.

No. 45835-7-II

UNPUBLISHED OPINION

JOHANSON, C.J. — Tatyana Mason appeals from a trial court order modifying a parenting plan in which the trial court ordered that John Mason assume responsibility as the primary parent of the parties' children. Tatyana¹ argues that (1) the trial court's ruling was not based on substantial evidence, (2) the trial court erred by denying her motion for reconsideration based on the existence of new evidence, (3) this court should reverse the trial court's entry of the restraining order, and (4) this court should award her attorney fees. We hold that substantial evidence supports the trial court's ruling, the trial court did not err by denying Tatyana's motion for reconsideration nor by entering the restraining order, and neither party is awarded attorney fees. We affirm.

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

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FACTS

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

II. PROCEDURE

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

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

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

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

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

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

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

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

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ANALYSIS

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

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

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

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

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

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

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

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. . . .

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

....
 (c) The child’s present environment is detrimental to the child’s physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

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

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

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

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

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

II. RECONSIDERATION

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

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

(a) **Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

.....
 (4) Newly discovered evidence, material for the party making the application, *which the party could not with reasonable diligence have discovered and produced at the trial.*

(Emphasis added.)

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

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

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

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

III. ATTORNEY FEES

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

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

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

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Affirmed.

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

Johanson, C.J.

JOHANSON, C.J.

We concur:

Bjorge, J.

BJORGE, J.

Maxa, J.

MAXA, J.

APPENDIX B

July 31, 2018

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

In the Matter of the Marriage of

JOHN ARTHUR MASON,

Appellant,

and

TATYANA IVANOVNA MASON,

Respondent.

No. 49839-1-II

UNPUBLISHED OPINION

MAXA, C.J. – John Mason appeals the trial court’s order vacating a 2013 order requiring his former wife Tatyana Mason to pay him child support. The trial court vacated the child support order under CR 60(b)(11) because in the 2013 proceeding the court had not been informed that John¹ had an obligation to support Tatyana based on an I-864 affidavit of support relating to Tatyana’s immigration to the United States.

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

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

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

FACTS

Marriage and Dissolution

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

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

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

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

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

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

Motions to Dismiss Child Support

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

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

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

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

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

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

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

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

Trial and Ruling

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

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

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

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

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

Expert Witness Fees

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

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

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

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

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

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

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

ANALYSIS

A. FORM I-864 AFFIDAVIT OF SUPPORT

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

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

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

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

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

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

1. Legal Principles

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

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

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

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

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

2. Extraordinary Circumstances

a. Legal Background

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

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

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

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

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

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

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

b. Extraordinary Circumstances Analysis

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

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

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

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

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

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

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

Second, the fact that John's I-864 obligation might be relevant as an offset for Tatyana's child support obligation⁶ does not constitute an extraordinary circumstance. Even if John owed money to Tatyana, that amount would not affect the amount of Tatyana's child support obligation. The trial court's calculation under RCW 26.19.065 and .071 determines the amount of child support based on actual or imputed income. And Washington dissolution law and a spouse's I-864 obligations are independent of each other. *Khan*, 182 Wn. App. at 801. "Nothing in the federal statutes or regulations provides that an I-864 obligation must . . . be enforced in a dissolution action." *Id.*⁷

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

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

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

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

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

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

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

3. Extraneous to the Proceedings

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

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

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

4. Summary

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

C. AWARD OF EXPERT WITNESS FEE

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

1. Award of Costs

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

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

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

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

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

D. AWARD OF CR 11 SANCTIONS

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

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

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

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

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

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

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

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

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

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

E. ATTORNEY FEES ON APPEAL

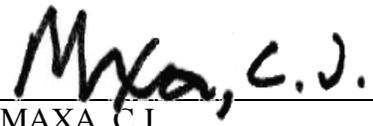
Both parties request attorney fees on appeal. John requests fees based on Tatyana's alleged intransigence. Tatyana requests attorney fees and costs under RCW 26.09.140 based on

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

CONCLUSION

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

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

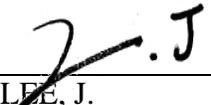


MAXA, C.J.

We concur:



WORSWICK, J.



LEE, J.

APPENDIX C

JOHN MASON AND TATYANA MASON

COURT OF APPEALS NO. 52959-9-II

SUPERIOR COURT NO. 07-3-00848-0

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CERTIFICATE OF SERVICE

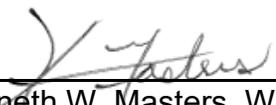
I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF RESPONDENT** on the 1st day of April 2020 as follows:

Co-counsel for Respondent

Washington Family Law Group, PLLC	<input type="checkbox"/>	U.S. Mail
Laurie G. Robertson	<input checked="" type="checkbox"/>	E-Service
1070 Meridian Avenue North, Suite 107	<input type="checkbox"/>	Facsimile
Seattle, WA98133		
laurier@washingtonattorneys.com		

Appellant, Pro Se

Tatyana Mason	<input type="checkbox"/>	U.S. Mail
PO Box 641	<input checked="" type="checkbox"/>	E-Service
Olympia, WA 98507	<input type="checkbox"/>	Facsimile
tatyan377@gmail.com		



Kenneth W. Masters, WSBA 22278
Attorney for Respondent

MASTERS LAW GROUP PLLC

April 01, 2020 - 4:37 PM

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Superior Court Case Number: 07-3-00848-0

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