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Trial Court No. 12-3-02267-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

AMY E. COLE,

Appellant,

v.

MARK L. COLE,

Respondent.

APPELLANT AMY COLE'S OPENING BRIEF

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I. INTRODUCTION

The trial court disregarded the statutory mandate to impose parenting plan restrictions in this modification case. Respondent Mark Cole has a history of domestic violence against Appellant Amy Cole and their three children. In the original dissolution proceeding, the trial court improperly cut Mr. Cole a "break," declining to make a RCW 26.09.191 finding despite acknowledging the existence of domestic violence. Unfortunately, despite Mr. Cole attending court-ordered domestic violence treatment, the instances of domestic violence against the children continued. Ms. Cole moved to modify the parenting plan to address this and other issues.

Instead of performing a neutral evaluation of the situation in light of the best interests of the children, the appointed guardian ad litem ("GAL") completely ignored the instances of domestic violence, failed to interview numerous of Ms. Cole's suggested contacts, and misrepresented the statements of those she did interview—recommending Mr. Cole have equal residential time and joint decision-making. The GAL then proceeded to perjure herself on the record at trial, passing off the former GAL's report for her own notes.

The trial court disregarded the alarming irregularities in the GAL's report and testimony, failed to consider the newer instances of

domestic violence, and adopted the GAL's recommendation in full. The trial court compounded the original trial judge's error by again declining to make an official finding of domestic violence under RCW 26.09.191 despite acknowledging the history of domestic violence. She ordered joint decision-making and an increase in residential time for Mr. Cole in violation of RCW 26.09.191. When Ms. Cole moved pursuant to CR 60 to vacate the trial court's decision, the motion was denied. The trial court's decision and parenting plan constitute an abuse of discretion and should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Ms. Cole's CR 60 Motion to Vacate.
2. The trial court abused its discretion by fully adopting the recommendation of a guardian ad litem whose report was proven inaccurate and incomplete and who committed perjury on the stand.
3. The trial court erred by orally and in writing noting a history of domestic violence yet not making an official finding of domestic violence or imposing limitations under RCW 26.09.191.
4. The trial court abused its discretion by modifying the parenting plan to provide for joint decision-making and 50/50 residential

time after finding a history of domestic violence and without making a finding under RCW 26.09.191(2)(n).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A judgment should be vacated under CR 60(b)(11) where extraordinary circumstances exist justifying relief from the judgment. Should a judgment be vacated where the trial court fully adopted the recommendation of a guardian ad litem who perjured herself at trial and repeatedly demonstrated that her findings and report were inaccurate and misleading? (assignment of error 1, 2)
2. A trial court must limit a parent's residential time and decision-making authority if the parent has a history of domestic violence. Did the trial court err when it orally and in writing noted that Mr. Cole had a history of domestic violence, but nevertheless failed to enter a written finding of fact to that effect and limit his residential time and decision-making authority? (assignment of error 3)
3. Where a trial court finds a history of domestic violence yet believes circumstances have changed, it must make certain findings under RCW 26.09.191(2)(n) before it can eliminate Section 191 restrictions. Did the trial court err in finding that restrictions were no longer necessary where it made no finding and

substantial evidence does not support that the statutory factors were met? (assignments of error 4)

IV. STATEMENT OF THE CASE

A. In the original dissolution proceeding, the trial court imposed restrictions on Mr. Cole's parenting rights as a result of a history of domestic violence.

Amy and Mark Cole were re-married on July 2, 2005, having been married once before on August 11, 2000. CP 124. They have three children, Magdalyne, Asher, and Maddox. *Id.* The parties separated in August 2012, *Id.*, after a string of domestic violence incidents where Mr. Cole bruised the children, subsequent to many years of spousal abuse. CP 108, 119. A dissolution trial was held before Judge Gonzales in Clark County Superior Court. At the conclusion of trial, Judge Gonzales stated on the record:

> It is the decision of the court; there is no doubt there's been domestic violence in this relationship, it stops today.

CP 424.

Judge Gonzales entered a final parenting plan on March 27, 2014. CP 001. The Final Parenting Plan did not contain a finding of domestic violence under RCW 26.09.191, but did state "A. Father shall meet with Dr. Landon Poppleton to address all issues of domestic violence. This must be completed prior to commencement of father's summer residential

time. B. Father must have a certified evaluation from a Washington provider regarding domestic violence and follow through with any treatment recommendations." CP 006. Further, with regard to decision-making, the parenting plan explained: "The court is concerned about issues of domestic violence. Until a court hears from a domestic violence counselor/evaluator, mother will have sole decision-making." CP 007.

At the hearing on the finalization of the parenting plan, Ms. Cole's attorney questioned why Judge Gonzales placed restrictions on Mr. Cole's parenting time, but did not label them as Section 191 restrictions. The Judge replied:

> Absolutely, I did give him a break. I did not put 191 restrictions in there, because I wanted father to understand exactly what took place by meeting with Dr. Poppleton, and how it affects the entire family unit. Dr. Poppleton will address those issues. I also would like a[n] evaluation from a Washington Certified Provider on Domestic Violence or anger management, follow through on any recommended treatment.

CP 426.

Mr. Cole did have a Domestic Violence assessment on or about June 2, 2014. CP 102. The result of this assessment was inconclusive; the assessor indicated "It is unclear if client has a significant problem with anger. Client does appear to lack appropriate tools to cope with stressful interpersonal situations. This seems to lead to controlling behaviors and possibly abusive behaviors." *Id.* The assessor recommended a minimum of

26 weekly sessions plus six monthly sessions in a Washington state certified domestic violence program. *Id.*

B. <u>Instances of domestic violence continued.</u>

On August 8, 2014, less than five months after the parenting plan was entered, an interested party made a complaint to CPS regarding significant bruising on Asher Cole's arm. CP 105-107. When asked about it, Asher, age 4, reported "daddy broke my arm a little bit." CP 105. When conducting an investigation, the social worker noted that Magdalyne "worries dad would hit her" or "worries dad might do something to her." Supplemental Clerk's Papers __ ("SCP"), Dkt. 224, Ex. B at 3.[1] CPS recommended that "Mr. Cole has supervised visitation with his children due to the information obtained during this investigation. It is recommended that Mr. Cole participate in parenting classes and anger management classes. Once these services have been completed and it has been determined that Mr. Cole would not cause further harm to his children then unsupervised visits could be continued." CP 036. On October 1, 2014, after the investigation was concluded, CPS issued a report that the abuse was founded. SCP __, Dkt. 224, Ex. B at 3. This occurred while Mr. Cole was supposed to be in or have completed the

[1] A statement of Supplemental Clerk's Paper has been submitted, but the designations have not yet been received from the trial court.

domestic violence treatment program recommended by the assessor and as a part of the parenting plan.

Shortly after, another mandatory reporter reported an instance of Mr. Cole abusing the Cole's oldest daughter. CP 027, 038. As at this time Child Protective Services was transitioning out of making "founded/unfounded" reports, they instead put Mr. Cole in a new program called "Family Assessment Response." *Id.* On November 4, 2014, Dr. Poppleton noted that "I am concerned about the ongoing conflict in this case, the multiple reports to CPS that have been made, and the potential for these impacting the Cole children." CP 121. He recommended a case manager be appointed for the case.

C. Ms. Cole petitioned for modification to address the ongoing issues.

On August 11, 2015, Ms. Cole petitioned for a Modification of the Parenting Plan under RCW 26.09.260(1), (2), based on her belief that the children's environment under the parenting plan was detrimental to their physical, mental, and emotional health. CP 020-121. The reasoning behind Ms. Cole's request for a modification is detailed at length in her Petition for modification, but in general: Ms. Cole, along with several medical professionals, were concerned about the incidents of domestic violence, together with the emotional impact of the frequent back and forth

transfers, the diminished time with their mother and primary caregiver during the school year, and the increased conflict between the two parents. CP 026-029. The Court appointed Josephine Townsend as guardian ad litem on November 4, 2015. CP 250-255. Ms. Townsend issued her report on April 15, 2016. Sealed CP 122. In her report, Ms. Townsend recommended 50/50 custodial split and joint decision-making, among other recommendations. Sealed CP 137-139. In response to the GAL report, Mr. Cole also moved for joint decision-making and a temporary parenting plan in keeping with the GAL recommendation. SCP __, Dkt. 163, 165.

D. The trial court entered a temporary parenting plan removing the prior restrictions placed on Mr. Cole.

On June 24, 2016, the Court held a hearing on Mr. Cole's Motion for a Temporary Parenting Plan, and to adopt the GAL's recommendations. The Court decided to adopt the GAL's recommendations for a temporary parenting plan: "I am going to adopt the GAL's findings in their entirety and adopt the proposed parenting plan." 6/24/16 VRP 25:2-3. At that hearing, Ms. Cole's attorney raised the issue of the subsequent founded findings of physical abuse by Mr. Cole. Neither the trial court, Mr. Cole's attorney Ms. Rusch, nor the GAL had considered or even were aware of the founded report:

> Ms. Rusch: And I haven't seen a—a CPS founded—
> The Court: I was curious about that.
> Ms. Rusch: I know there was a report—
> The Court: Do we have a copy?
> Ms. Rusch: --before the divorce was final. There was a report to CPS in 2014 where they temporarily recommended, I think, just a family plan for his visitation be supervised while they investigated it. But I don't recall seeing a finding of abuse.
> Ms. Townsend: I don't believe-- ...I haven't received a finding of abuse."

6/24/16 VRP 23:17-24:7.

Ms. Cole moved for Reconsideration of the Temporary Parenting Plan on August 19, 2016. SCP __, Dkt. 224. In this Motion, Ms. Cole raised several pieces of newly discovered evidence, including that the GAL, Ms. Townsend, was subject to a disciplinary proceeding before the Washington State Bar Association. SCP __, Dkt 224 at Exh. A. Specifically, the WSBA's Office of Disciplinary Counsel was seeking to impose disciplinary action on Ms. Townsend as a result of her repeated false statements to the court and others. *Id.* Ms. Cole raised concerns that similar circumstances occurred in her case, as Ms. Townsend completely failed to consider the founded report of domestic violence or the other reports of mistreatment, and also grossly mischaracterized in her report her conversations with two relevant professionals. SCP __, Dkt. 224, Exh. C ("I am deeply concerned about the level of misreporting that Ms. Townsend has made in her summary of our telephone discussion on

1/14/16"). Ms. Cole attached the founded report of abuse that the GAL and trial court had been unaware of at the hearing. SCP __, Dkt 224, Exh. B. Ms. Cole's Motion for Reconsideration was denied. SCP __, Dkt. 231.

E. The GAL's testimony at trial demonstrated that her report was incomplete and inaccurate, yet the trial court adopted the recommendation in full, permanently removing restrictions on Mr. Cole.

A trial before Judge Clark began in November 2016, was continued, and was completed in February 2017. *See generally* 11/16/16 and 2/13/17 VRP. At trial, Ms. Townsend stated under oath that she had interviewed a number of people, reading from notes of these conversations. *See generally* 2/13/17 VRP 38:4-49:13 Ms. Cole attempted to call as witnesses three of these individuals, who were prepared to testify that these statements by Ms. Townsend were false—in fact, Ms. Townsend had never interviewed them. 2/13/17 VRP 94:4-101:7. Judge Clark refused to allow Ms. Cole to call these witnesses, instead stating that she would allow the parties to stipulate that Ms. Townsend had never interviewed them. 2/13/17 VRP 102:3-104:9. While Ms. Cole never agreed to such a stipulation, the witnesses were excluded.

Judge Clark issued her ruling on March 21, 2017. SCP __, Dkt. 288. The Court held: "In the past, Mrs. Cole experienced significant domestic violence at the hands of Mr. Cole to the extent that the trial judge

ordered him into treatment. The court does not take the concerns of a domestic violence survivor lightly, however the court is satisfied that Mr. Cole underwent sufficient counseling to address the situation." *Id.* The court then adopted the temporary parenting plan entered August 5, 2016 as the final parenting plan in the matter. "The court adopts the Guardian Ad Litem's recommendations in full." *Id.* The trial court entered Findings of Fact and Conclusions of Law as well as the Final Parenting Plan on June 23, 2017. CP 221, 228. The Court ordered 50/50 residential time and joint decision-making.

F. The trial court disregarded evidence of the GAL's wrongdoing and failed to comply with statutory requirements.

Ms. Cole moved for Reconsideration under CR 59 on June 23, 2017. CP 167-174. In this Motion for Reconsideration, Ms. Cole notified the Court that the GAL, Ms. Townsend, had repeatedly perjured herself at trial by reading from the prior GAL's report as if those findings were her own notes from conversations with relevant individuals. Ms. Cole noted five instances of perjury in her Motion for Reconsideration, with regards to the purported interviews of Margo Priebe, Launda Carroll, Kim Burris, Anne Reed, and Debbie Grove. Ms. Cole also laid out how Ms. Townsend's sworn testimony of her "notes" of her conversations with Margo Priebe, Launda Carrol, Kim Burris, and Anne Reed word for word

matched prior GAL Lisa Yenney's 2013 report, with the exception of Ms. Townsend omitting the year of the interviews from her oral testimony. CP 167, 210-217.

Ms. Townsend submitted a supplemental report (not signed under penalty of perjury) explaining that she had mistakenly read from Ms. Yenney, the prior GAL's notes at trial, believing they were her own. Sealed CP 157-166. She attached the "notes" that she had supposedly read from and received from Ms. Yenney, which were in fact Ms. Yenney's report, with page numbers and other identifying marks removed. *Compare* Sealed CP 159-166 *with* CP 210-217. Yet the evidence presented by Ms. Cole on her motion for reconsideration demonstrated that Ms. Townsend knew exactly what she was doing—her perjury was no mistake. For instance, at trial, when reading from her supposed notes regarding her conversation with Margo Priebe, Ms. Townsend testified: "I spoke with Margo Priebe on May 2,--looks like 2016? 2015? It just says May 2nd." 2/13/17 VRP 39:8-10. In fact, the document Ms. Townsend read from (and attached to her supplemental report) specifically says: "I spoke with Ms. Priebe on 05/02/13 via telephone." Sealed CP 159.

Also contained in Ms. Townsend's supplemental report explaining her perjury was the statement "All of the individuals listed in my reports, were in fact interviewed by me." CP 157. In response, Ms. Cole attached

to her motion declarations from Michael and Becky Davis and Ms. Yenney stating under oath that they had not been interviewed by Ms. Townsend. CP 219-220, 205-206. Ms. Cole also attached statements from interviewees Ruth Cooper and Michael Altig, detailing how what was contained in the GAL's reports regarding their comments was mischaracterized. CP 202-203 ("I am deeply concerned about the level of misreporting that Ms. Townsend has made in her summary of our telephone discussion on 1/14/16"). The trial court disregarded these numerous alarming improprieties and denied Mrs. Cole's Motion for Reconsideration. SCP __, 315.

On July 7, 2017, Ms. Cole filed a CR 60 Motion to Vacate Judge Clark's Order on Modification of Parenting Plan, on the basis that it was improper for the Court to have found a history of domestic violence but impose no restrictions under RCW 26.09.191. CP 410. A hearing on that motion was held September 15, 2017. 9/15/17 VRP. At this hearing, the trial court admitted that she had made a finding of a history of domestic violence:

> "Ms. Cole: But your wording was, There is a history of domestic violence, which is the same as what the Harding case—
> The Court: That had already—that had all been dealt with in front of Judge Gonzalez. And I did not make any new findings, other than that there had been a history." VRP 5:3-9.

The Court went on to deny Mrs. Cole's CR 60 Motion, explaining: "It's not a limiting factor, though. And it's not something that I felt needed to be addressed in an ongoing fashion, because he completed the treatment that Judge Gonzales required." VRP 6:22-25. Ms. Cole's CR 60 Motion was denied. SCP __, 325. This appeal follows.

V. SUMMARY OF ARGUMENT

The trial court abused its discretion by failing to grant Ms. Cole's CR 60 Motion for Relief from Judgment. Extraordinary circumstances existed that warranted relief from the judgment, including the GAL's repeated improprieties and the court's multiple failures to impose proper restrictions under RCW 26.09.191. The GAL's report was not credible in light of its numerous inaccuracies and her perjury on the stand, and it was error for the trial court to adopt her recommendations in full. The trial court determined that there was a history of domestic violence, yet failed to make an official finding of fact to that effect, or impose the limitations on residential time and decision-making that are mandated by the statute. While the trial court apparently felt Mr. Cole had completed sufficient treatment to alleviate the need for Section 191 restrictions, it failed to make the requisite statutory findings on the issue, and any such findings would not be sufficient to allow joint decision-making under the statute.

This Court should reverse and remand to the trial court for appointment of a new guardian ad litem and a new trial.

VI. ARGUMENTS

A. Standard of Review

Appellate courts review a trial court's ruling on a parenting plan for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997), *superseded on other grounds by statute*, RCW 26.09.405-.560. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). A decision is "manifestly unreasonable" if it is "outside the range of acceptable choices considering the facts and applicable legal standard, it is based on untenable grounds if the factual findings are not supported by the record, and it is based on untenable reasons if it applies an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Parenting & Support of L.H.*, 198 Wn. App. 190, 391 P.3d 490 (2016) (citing *Littlefield*, 133 Wn.2d at 47).

While a trial court has broad discretion to craft a parenting plan, "that discretion must be exercised within the bounds of the applicable statutes." *In re Marriage of Chandola*, 180 Wn.2d 632, 658, 327 P.3d 644 (2014). "The court must base its decision on the correct standard and

correctly apply the standard to facts, which in turn must be supported by the record." *In re Marriage of Pennamen*, 135 Wn. App. 790, 797, 146 P.3d 466 (2006). A trial court's findings will be upheld if they are supported by substantial evidence. *See Chapman v. Perera*, 41 Wn. App. 444, 449, 704 P.2d 1224 (1985). Substantial evidence is "evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." *Chandola*, 180 Wn.2d at 642.

B. <u>The trial court abused its discretion by denying Ms. Cole's CR 60 Motion to Vacate.</u>

CR 60 provides a means by which a court may relieve a party of a final judgment. While finality of judgments is a central value to our legal system, "circumstances can arise where finality must give way to the greater value that justice be done." *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). The decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). The appellate court reviews a trial court's CR 60 decision for an abuse of discretion. *Union Bank, N.A. v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 842, 365 P.3d 223 (2015).

Pursuant to CR 60(b)(11), the court has discretion to vacate a judgment for "any other reason justifying relief from the operation of the judgment." Proceedings to vacate judgments are equitable in character and

the court should exercise its authority liberally to preserve substantial rights and do justice between the parties. *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985).

CR 60(b)(11) governs scenarios which are not covered under any other section of the rules, and is to be applied in extraordinary circumstances. *Puget Sound Med. Supply v. Dep't of Soc & Health Servs.*, 156 Wn. App. 364, 374 n.8, 234 P.3d 246 (2010). Furthermore, those circumstances must relate to "irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Cases decided under CR 60(b)(11) show that extraordinary circumstances are "unusual circumstances that are not within the control of the party. For example, extraordinary circumstances were found under the civil rule when a separation agreement that gave a disparate share of property to the former husband in exchange for the wife not being required to pay child support was an unenforceable attempt to avoid child support . . ." *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2009) (citing *In re Marriage of Hammack*, 114 Wn. App. 806, 60 P.3d 663 (2003)). In another case, "the fact that the plaintiff's attorney suffered from severe depression was a sufficient ground under the rule to relieve the plaintiff from an order of

dismissal . . ." *Id.* at 170 (citing *Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003).

In the case of *In re Marriage of Furrow*, the Court of Appeals held that the trial court's "departure from statutory procedures that are designed to serve the best interests of the children" warranted vacation of the judgment under CR 60(b)(11). 115 Wn. App. 661, 664, 63 P.3d 821 (2003). In that case, a mother proposed to voluntarily give up her parental rights, and the court failed to appoint a guardian ad litem to evaluate whether this was in the best interests of the children. *Id.* at 676. The Court of Appeals held that the trial court's failure to appoint a GAL warranted vacation of the judgment under CR 60(b)(11). *Id.* at 677. The court further held that the state's public policy of "placing the welfare of the child above the parents in all proceedings," had been violated, further warranting relief under CR 60. *Id.* at 678.

Relief is similarly warranted here, due to irregularities in the proceedings that arise to the level of extraordinary circumstances.[2] Both trial court judges failed to make required findings of fact, giving Mr. Cole a "break" by failing to find that restrictions were warranted under RCW

[2] Ms. Cole did not argue at length in her CR 60 Motion to Vacate that Ms. Townsend's improper actions warranted relief under CR 60(b)(11). This is because at the time she filed her Motion to Vacate, a lengthy CR 59 Motion for Reconsideration was pending before the court, which covered the issues with Ms. Townsend in detail. Ms. Cole clearly raised the issue regarding Ms. Townsend before the court below.

26.09.191. Then Judge Clark appointed Josephine Townsend as GAL, who proceeded to prepare a "report" that misstated the facts and failed to consider some of the most important issues. The evidence showed that Ms. Townsend failed to interview a number of interested parties and then purposefully lied about it under oath—Judge Clark indicated her willingness to allow the parties to stipulate to testimony on this point. It then came to light that Ms. Townsend had also passed off a prior GAL's report as her own notes—a fact that was also of no concern to the court. Ms. Townsend misrepresented interviews with a number of the parties that she did interview. The GAL was under WSBA investigation due to fraud and misrepresentations in another case at the same time, and investigation that resulted in a finding of Ms. Townsend's negligence by the hearing examiner. 2/13/17 VRP 31:21-33:23. Ms. Townsend failed to consider the instances of domestic violence in her report *or investigate them*, misleading the court regarding the existence of a founded report of domestic violence at the hearing on Ms. Cole's Motion for Reconsideration of the Temporary Parenting Plan. When Ms. Cole brought the founded report to the court's attention in support of her Motion for Reconsideration, the court denied the motion. None of these continued problems with the GAL or her report apparently caused the

court any pause, as the trial court adopted Ms. Townsend's findings in total.

The purpose of the GAL's recommendation and the modification trial was to determine what was in the best interests of the children. The GAL could not make an accurate and fully-informed evaluation where she did not speak with a number of interested parties and did not even consider a founded report of domestic violence that occurred during or after Mr. Cole had underwent his court-ordered domestic violence treatment. Any modification of a parenting plan, "no matter how slight," requires the court to conduct an independent inquiry. *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 640, 976 P.2d 173 (1999). Here, the court failed to independently consider the founded report of domestic violence raised by Ms. Cole, the required CPS FAR program for Mr. Cole to adhere to, and also failed to discount Ms. Townsend's report in any way, even though her work was shown time and time again to be inaccurate and misleading. As a result, there is a significant risk that the trial court's order does not reflect the best interests of the Cole children.

As in the *Furrow* case, here there were significant irregularities in the proceedings. In *Furrow*, there was no GAL appointed, in this case, the GAL misrepresented the facts, ignored instances of domestic violence, failed to interview witnesses and lied about it in her report, and then

perjured herself on the stand. In both cases, the trial court did not truly reach the question of what is in the best interests of the children. Vacating the judgment under CR 60(b)(11) was appropriate. The trial court abused her discretion when she failed to grant the motion. This is especially true in light of the irregularities with regard to the court's repeated failure to make appropriate findings under RCW 26.09.191 and impose mandatory restrictions.

C. **The trial court erred in modifying the parenting plan to provide for joint decision-making and equal residential time when she found a history of domestic violence.**

The trial court's failure to grant the CR 60 motion is even more egregious in light of the clear errors that had been committed in the entry of her final order. "Restrictions on a parent's decision-making and residential time are mandatory if the trial court finds that the parent has 'a history of acts of domestic violence as defined in RCW 26.50.010 . . . .'" *In re Parenting & Support of L.H.*, 198 Wn. App. at 194 (citing RCW 26.09.191(1)(c) (reviser's note omitted)); *See In re Marriage of Caven*, 136 Wn.2d 800, 808, 966 P.2d 1247 (1998). The statutory language, "a history of domestic violence," means what it says. *Caven*, 136 Wn.2d at 807-08. "Domestic violence" includes conduct such as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm,

bodily injury, or assault, between family or household members." RCW 26.50.010(3). Thus, a history would mean a pattern of repeated instances.

"The permanent parenting plan shall not require mutual decision-making . . . if it is found that a parent has engaged in any of the following conduct: a history of acts of domestic violence as defined in RCW 26.50.010(3)." RCW 26.09.191(1). Compliance with the criteria of this section is mandatory. *In re Marriage of Underwood*, 181 Wn. App. 608, 611-12, 326 P.3d 793 (2014).

Under CR 52(a)(2)(B), findings of fact and conclusions of law are required in "connection with all final decisions in adoption, custody, and divorce proceedings." *In re Marriage of Stern*, 68 Wn. App. 922, 926, 846 P.2d 1387 (1993). The appellate court's review is limited to determining whether the findings of fact are supported by substantial evidence, and if so, whether the findings in turn support the court's legal conclusions. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

After the original trial, Judge Gonzales gave Mr. Cole a "break" by not entering a finding that RCW 26.09.191 restrictions were necessary.

> Absolutely, I did give him a break. I did not put 191 restrictions in there, because I wanted father to understand exactly what took place by meeting with Dr. Poppleton, and how it affects the entire family unit. Dr. Poppleton will address those issues. I also would like a[n] evaluation from a Washington Certified Provider on Domestic Violence or anger management, follow through on any recommended treatment.

CP 426.

This was improper under this Court's subsequent decision in *In re Parenting & Support of L.H.*, where the court held that it was an abuse of discretion for a trial court to "decline[] to enter a finding that [the father] had a domestic violence history because it wanted to protect him from collateral consequences." *L.H.*, 198 Wn. App. at 195. Ms. Cole focused the majority of her Motion to Vacate on the similarities between the *L.H.* case and this one, of which there are many.

Though the failure to make the Section 191 finding after the initial trial was error (an error which is admittedly not subject to this appeal) the original judge nevertheless restricted Mr. Cole's decision-making and residential time, in keeping with the requirements of RCW 26.09.191. The problem with Judge Gonzalez's failure to enter a RCW 26.09.191 finding was that the error was then compounded by Judge Clark when she ruled on the modification after the second Cole trial. Judge Clark in her written opinion noted: "In the past, Mrs. Cole experienced significant domestic violence at the hands of Mr. Cole to the extent that the trial judge ordered him into treatment," SCP __, Dkt. 288, and on the parenting plan indicated that there wasn't a problem of domestic violence "currently," which implies a problem in the past. But she nevertheless also failed to enter a

finding that restrictions under RCW 26.09.191 were appropriate, and ordered joint decision-making and 50/50 residential time.

RCW 26.09.191 is clear that the restrictions are mandatory when there is a history of domestic violence. Judge Clark's final order was an abuse of discretion because it was based on untenable reasons. Taken together with the other procedural irregularities, this repeated failure to impose the proper statutory limitations warrants relief.

D. In the alternative, the trial court erred in eliminating RCW 26.09.191 restrictions as a result of her finding that they were no longer necessary.

Judge Clark indicated in her ruling that while significant domestic violence had previously been an issue, this had been resolved, eliminating the need for any restrictions on Mr. Cole's residential time or decision-making. SCP __, Dkt. 288. RCW 26.09.191 provides a means by which a parent who has a history of domestic violence may overcome some of the statutory limitations. RCW 26.09.191(2)(n) states:

> If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and m(i) and (iv) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iv) of this subsection.

Therefore, Judge Clark could have found that the chance of harm was so remote that restrictions on residential time (contained in (a), (b),

and (m)) were no longer warranted. But Judge Clark entered no such finding. She indicated that "[t]he court does not take the concerns of a domestic violence survivor lightly, however the court is satisfied that Mr. Cole underwent sufficient counseling to address the situation." SCP __, 288. This is not the statutory finding required under RCW 26.09.191(n). It was error not to make an explicit finding. *See In re Marriage of Kinnan*, 131 Wn. App. 738, 752, 129 P.3d 807 (2006) (though the dissolution court did not specifically reference RCW 26.09.191, it was error for the trial court to remove restrictions without making explicit required findings under RCW 26.09.191).

Additionally, the restriction on joint decision-making is contained in RCW 26.09.191(1), which is not referenced in subsection n. Under the canon of construction of *expression unius est exclusion alterius*, *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2002), the import of the legislature's purposeful exclusion from subsection (n) from any reference to section 1 or joint decision-making indicates that once there is a finding of a history of domestic violence, the restriction on joint decision-making required by RCW 26.09.191 is permanent. *See In re Parentage of B.C.P.*, 2015 Wash. App. LEXIS 1383, at *19 (Unpub'd. June 30, 2015) ("Unlike the restrictions on mutual decision making, the trial court has discretion not to apply the limiting factor found in RCW 26.09.191(2)(a)"). Even if

Judge Clark had made the proper findings under subsection (n), the limitation on joint decision-making should have remained.

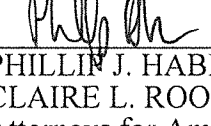
VII. CONCLUSION

The trial court abused its discretion when it denied Ms. Cole's CR 60 Motion to Vacate. Extraordinary circumstances existed warranting vacating the trial court's modified parenting plan. The guardian ad litem failed to prepare an accurate and unbiased report demonstrating what would actually be in the best interests of the children, taking into account the father's complete history of domestic violence. The trial court, despite full knowledge of these deficiencies, adopted the GAL recommendation in full and granted joint decision-making authority and 50/50 residential time to Mr. Cole, in violation of the statute. Relief under CR 60(b)(11) was warranted, and it was an abuse of discretion not to grant Ms. Cole's Motion. The court's final parenting plan and order should be reversed.

DATED this 15th day of June, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.



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Attorneys for Amy Cole, Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 15th day of June, 2018, a copy of the foregoing **APPELLANT AMY COLE'S OPENING BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

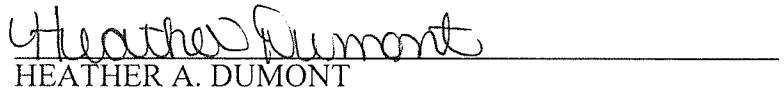
Mark L. Cole
20414 N.E. 229th St
Battle Ground, WA 98604

Pro Se Respondent

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 15, 2018

At: Vancouver, Washington



HEATHER A. DUMONT

LANDERHOLM, P.S.

June 15, 2018 - 11:13 AM

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