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

IN RE MARRIAGE OF:

AMY E. COLE,

Appellant,

and

MARK L. COLE,

Respondent.

RESPONDENT'S BRIEF

Law Office of Charles R. Horner, PLLC
Charles R. Horner
WSBA No. 27504
Attorney for Respondent

1001 Fourth Avenue, Ste. 3200
Seattle, Washington 98154
206-381-8454
crhornerpllc@qwestoffice.net

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I. INTRODUCTION

Appellant Amy Cole contends that the modified Final Parenting Plan entered on June 23, 2017, should have subjected respondent Mark Cole to a limiting factor based on “a history of acts of domestic violence.” She bases that contention on the 2014 dissolution orders that did not find such a factor and her allegation of abuse of the children since then, which the modification court rejected.

Ms. Cole failed to timely appeal the final modification orders following the rejection of her motion for reconsideration, which focused solely on the credibility of the guardian *ad litem*. She timely appealed only a motion to vacate under CR 60(b)(11), filed more than ten days after final judgment and which referred only to a decision in another case that did not alter the law controlling the trial court’s decisions herein.

Ms. Cole attempts to hitch to that motion not only a challenge to the unappealed final orders, but even the 2014 dissolution orders, which she also did not appeal.

Mr. Cole maintains that the modification court did not abuse its broad discretion in declining to grant Ms. Cole’s motion to vacate under the factual and procedural circumstances of this case. He also contends that her attempt to challenge the final orders is untimely and cannot be considered. He believes that, even had Ms. Cole timely appealed, this

Court would have held that there was substantial evidence to support the trial court's findings and the court did not abuse its discretion in adopting the Final Parenting Plan.

Mr. Cole submits that Ms. Cole presents no debatable issue as to the validity of the trial court's orders. He contends that this appeal is frivolous and requests that he be awarded his reasonable attorneys' fees for the cost of defending it.

II. COUNTERSTATEMENT OF ISSUES

1. Was there a change in caselaw that required the trial court to exercise its discretion to vacate its 2017 final parenting plan modification orders?

2. Would the modification court have been required to find a "history of acts of domestic violence" based on events preceding entry of the 2014 Final Parenting Plan?

3. Were the 2014 final orders *res judicata* as to a "history of acts of domestic violence" occurring before their entry?

4. Was there any irregularity in the modification proceeding that required the trial court to exercise its discretion to vacate its final orders?

5. Was the trial court required to undertake an analysis under RCW 26.09.191(2)(n)?

6. Is appellant entitled to complain of errors in the modification court's final orders or its denial of her Motion for Reconsideration when she failed to appeal within 30 days of denial of reconsideration?

7. Even had appellant timely appealed the final modification orders, was there substantial evidence to support the trial court's unappealed finding of an absence of abuse of a child?

8. Could the trial could have been found to have abused its discretion in its disposition of the modification action?

9. Is respondent entitled to an award of his reasonable attorneys' fees because this appeal is frivolous?

III. STATEMENT OF THE CASE

A. Outcome of 2014 Dissolution Proceeding.

The parties herein, appellant Amy Cole (Amy) and respondent Mark Cole (Mark) were divorced in 2014. Following the dissolution trial, the Honorable Gregory Gonzalez declined to find any limiting factors against either party under RCW 26.09.191, including "a history of acts of domestic violence," or to impose any ongoing restrictions on Mark's parental role as to either residential time or decision-making in relation to such factor. CP 2 §§ 2.1-2.2; *see* CP 13. The final Parenting Plan only delayed his exercise of full summer residential time and joint decision-making until he completed a domestic violence evaluation and any

recommended follow-up. CP 2 § 2.1, 3-4 § 3.5, 6 § 3.13, and 7 §4.2. The 2014 final orders made no reference to any form of “abuse of a child.” Amy did not appeal the 2014 orders.

B. Mark Assumes Full Summer Residential Time and Joint Decision-Making by No Later Than August 12, 2016.

At some point after entry of the 2014 orders, Mark transitioned to full summer residential time with the children and joint decision-making, as envisioned by 2014 Final Parenting Plan. That happened by no later than the entry of a Temporary Parenting Plan in this modification proceeding on August 12, 2016, if not earlier.¹ *See* CP 144-155.

The 2016 temporary parenting plan effectively gave Mark equal residential time with Amy and joint decision-making. Those arrangements have remained in place at least from that date through the present, as they are also reflected in the Final Parenting Plan at bar. CP 228-238.

¹ The hearing of the Motion for Temporary Parenting Plan occurred on June 24, 2016, but the written Plan apparently was not entered until August 12. *See* RP of 6/24/16.

C. **No Showing of Domestic Violence Between the Parties After Entry of the 2014 Final Orders Was Made at Trial, Nor Did the Trial Court Find Child Abuse by Mark.**

Although it appears Amy has supplied this Court with a far-from-complete record of the evidence adduced at the modification trial², it does not appear she presented evidence of any domestic violence between her and Mark occurring after entry of the 2014 orders. Throughout her Opening Brief, however, she deploys the term “domestic violence” to refer to alleged abuse of one or more of the children by Mark after that time. *See, inter alia*, Opening Br., at 6-7 and 19-20.

At only limited points in the incomplete trial evidence that Amy has supplied, specifically the testimony of guardian *ad litem* (GAL) Josephine Townsend, was there discussion of alleged child abuse. The GAL’s testimony was that she understood that some founded finding by CPS was being appealed (actually, “reviewed”) but, in any case, such finding would not change her parenting recommendations. *See* RP of 2/13/17, at 56:6-58:16, 59:5-12, and 85:6-86:11; *see also id.*, at 88:2-15.

² Amy refers at many points throughout her Opening Brief to exhibits she attached to her Petition for Modification, CP 20-121, and declarations in support of various motions, rather than to exhibits admitted at trial. Only evidence admitted at trial may be considered on appeal. *Dioxin/ Organochlorine Center v. Department of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992).

The record does not disclose any evidence that CPS, upon review, sustained any finding against Mark.

As for Dr. Poppleton, with whom 2014 Parenting Plan directed Mark to consult, the GAL reported as follows during the modification trial:

He wholeheartedly endorsed the recommendation. My personal view of the report is the balances is achieved by the expectation that the recommendations will be considered seriously and followed in their totality, not by cherrypicking. . . .

I'm hoping that the recommendations can bring resolution and stop the toxic battle that's been a detriment to the family, and start to focus on what we do individually.

RP of 2/13/17, at 18:10-24. The GAL went on to state that Dr. Poppleton's "most important recommendation was about Amy getting into DBT [Dialectical Behavioral Therapy]." *Id.*, at 19:14-16. *See also* CP 136-139 (indicating positive points for Mark, including outcome of his participation in a domestic violence program, in contrast to points of concern about mother suggestive of abusive use of conflict, and recommending a 50-50 residential schedule with joint decision-making); RP of 2/13/17, at 58:19-59:4.

As in this appeal, Amy focused most of her closing argument at trial and, it appears, a substantial amount of trial time to trying to undercut the credibility of the GAL. Much of what she alleges in sections A

through D of her Statement of Facts, however, appears to be based on her own pleadings, not evidence admitted at trial. *See* Opening Br., at 4-10.

The Honorable Suzan L. Clark, who tried the present modification proceeding, did not find any domestic violence after the entry of the 2014 dissolution orders. Nor did she find that there was any “physical, sexual, or a pattern of emotional abuse of a child.” CP 497-498; CP 222, 223. *See* RCW 26.09.191(1), (2).

D. The Trial Court Finds that Mark Complied with the Conditions in the 2014 Final Parenting Plan.

Judge Clark found that Mark had complied with the conditions of exercising of his full parental roles under the 2014 Final Parenting Plan. CP 498:1-4; CP 223:14-16. Amy did not assign error to that finding. *See* Opening Br., at 2-3.

E. Amy’s Post-Trial Motion Practice and Failure to Timely Appeal the 2017 Final Orders or Denial of Reconsideration.

The trial court entered the Final Order and Parenting Plan on modification on June 23, 2017. CP 221-227; CP 228-238. Amy filed a Motion for Reconsideration that day. CP 167-220. The sole focus of her Motion for Reconsideration was the claimed unreliability of the GAL’s testimony and report based on alleged perjury and plagiarism. Amy did not mention any purported requirement that the Court impose restrictions based the reference to domestic violence in the 2014 Final Parenting Plan.

On July 7, 2017, while her Motion for Reconsideration was pending, Amy filed her Motion to Vacate. CP 409-431. That motion focused solely on whether the Court was, in light of *In re Parenting and Support of L.H.*, 198 Wn.App. 190, 391 P.3d 490 (2016), required to impose restrictions on Mark based on the reference to domestic violence in the 2014 Final Parenting Plan.

The trial court denied the Motion for Reconsideration on September 13, 2016, noting that extensive testimony had been received from witnesses for both parties during four trial sessions and “Petitioner had ample opportunity to present witnesses and evidence, take depositions or otherwise prepare and present her evidence.” CP 499-500.

The trial judge found no merit in Amy’s Motion to Vacate, denying it on September 15, 2017. She awarded Mark attorneys’ fees of \$500. CP 501.

Amy did not file her Notice of Appeal herein until October 10, 2017. CP 435-441. While that came within 30 days of the order denying her Motion to Vacate, it fell 109 and 56 days after entry of the final orders on modification and the Order Denying Reconsideration, respectively. Despite that chronology, Amy designated all of those orders in her Notice of Appeal and seeks to challenge them in her Opening Brief.

III. ARGUMENT

A. **Standard of Review: An Order on a Motion to Vacate May Be Set Aside Only for an Abuse of Discretion.**

A trial court's decision on a motion to vacate a judgment under CR 60(b) is evaluated under the abuse of discretion standard. That means that the appellate court is bound to sustain the trial court's ruling unless it determines that it "is based on untenable grounds or is for untenable reasons." *Union Bank, NA v. Vanderhoek Assocs., LLC*, 191 Wn.App. 836, 842, 365 P.3d 223 (2015). Mark respectfully submits that the trial court cannot be held to have erred under that deferential standard in light of the facts and circumstances of this case.

B. **The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Vacate.**

1. **Only limited bases to vacate under CR 60(b)(11) exist and they do not substitute for a timely appeal.**

Amy founded her Motion to Vacate, the only trial court order from which she timely appealed (*see* Section III.D, below), on CR 60(b)(11), "[a]ny other reason justifying relief from the operation of the judgment." Though broadly worded, the rule "does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings." *State v. Keller*, 32 Wn.App. 135, 140-141, 647 P.2d 35 (1982) (emphasis added); *In re*

Marriage of Thurston, 92 Wn.App. 494, 499, 963 P.2d 947 (1998).³ The rule typically requires a showing of “unusual circumstances that are not within the control of the party.” *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2009).

Irregularities that may be redressed under CR 60(b)(11) must go beyond mere errors of law that can be remedied by an appeal and entail overreaching that is tantamount to fraud or egregious extralegal actions. See *In re Marriage of Hardt*, 39 Wn.App. 493, 693 P.2d 1386 (1985) (party’s overreaching in securing relief beyond the scope of stipulated judgment); *In re Marriage of Furrow*, 115 Wn.App. 661, 63 P.3d 821 (2003) (agreed judgment relinquishing parental rights not in accord with any applicable statute and in disregard of children’s rights).

Crucially, CR 60(b)(11) does not furnish a means for the trial court to correct its own errors of law. *Keller, supra*, 32 Wn.App. at 140. That goal may only be pursued by an appeal. 32 Wn.App. at 140.

³ *In re Marriage of Hardt*, 39 Wn.App. 493, 693 P.2d 1386 (1985), contrary to the implication that Amy seeks to create in her Opening Brief, at 16-17, does not establish an open-ended standard of justice under CR 60(b)(11). It was merely a general guideline for how discretion may be exercised if there is one of a limited number of grounds for vacating under that subparagraph. In that case, the applicable ground was a party’s overreaching by securing relief beyond the scope of stipulated judgment, which did not occur here.

2. *In re L.H.* was not a change of controlling law that might require vacating the 2017 final orders.

Amy's reliance on *In re Parenting and Support of L.H.* as a subsequent decision that required that Judge Clark to exercise her discretion to vacate her own final orders, *see* Opening Brief, at 12, is misplaced. 198 Wn.App. 190, 391 P.3d 490 (2016). *See Shandola v. Henry*, 198 Wn.App. 889, 396 P.3d 395 (2017) (reversal of controlling law on which decision was based may require vacating decision under CR 60(b)(11)).

L.H. was decided upon a timely appeal from a final judgment on an original petition to establish a residential schedule. There was substantial evidence in that case of a "history of acts of domestic violence." This Court held that the history of domestic violence that the trial court had found mandated entry of a limiting factor under the plain language of RCW 26.09.191(1) and (2) and that the trial court had abused its discretion in not doing so. *L.H.* did not overrule any precedential decision in the process.

There is no indication that *L.H.* in any way changed any controlling law on which either Judge Gonzalez or Judge Clark were required to rely, rendering inapplicable the change-of-law basis for vacating a judgement under CR 60(b)(11). It just so happened that the mother in *L.H.* timely

appealed the issue of whether a finding of a history of acts of domestic violence required entry of a limiting factor and parenting restrictions after preserving error in the trial court.

There is no indication that this Court's holding in *L.H.* was inconsistent with what it might have held upon a timely appeal from Judge Gonzalez' 2014 orders, had Amy presented the question by a timely appeal. Her Motion to Vacate is the epitome of an improper attempt to use CR 60(b) in lieu of a timely appeal of legal errors.

3. *L.H.* could not have required vacation of the final modification orders since there has never been a finding herein of a “history of acts of domestic violence.”

A fatal defect in Amy's contentions concerning *L.H.* is the absence of any indication that this Court therein altered any law that would have been controlling upon Judge Gonzalez' 2014 orders. The unappealed 2014 Final Parenting Plan, although it refers to “domestic violence,” is devoid of a finding of a history of multiple acts of such. Nor did the Findings of Fact and Conclusions of Law mention the subject. CP 13-19. The statute uses the words “a history of acts of domestic violence.” RCW 26.09.191(1), (2) (emphasis added). A “history of acts” plainly entails more than one act. *See In re Marriage of C.M.C.*, 87 Wn.App. 84, 88, 940 P.2d 669 (1997). While it is conceivable that a single act of domestic violence (such as a significant act of spousal battery) could

warrant entry of a protective order under Chapter 26.50 RCW, it would not mandate findings and restrictions under RCW 26.09.191(1) and (2). There is no description in the 2014 final orders of any specific instance of domestic violence, let alone a finding of a history of multiple such acts that would have mandated entry of a limiting factor and consequent parenting restriction.

Nor does the record contain a finding, let alone evidence, of any instance of domestic violence by Mark against Amy after entry of the 2014 final orders. *L.H.* is, therefore, inapplicable even at the basic level of its holding, even before considering the procedural distinctions between that case and this one.

4. The 2014 orders were *res judicata* barring the modification judge from finding a limiting factor based on any domestic violence to which they might have referred.

The procedural distinctions between this case and *L.H.* also defeat Amy's contention, regardless of the significance she seeks to ascribe to Judge Gonzalez' reference to domestic violence in 2014. As she tacitly acknowledges in styling his disposition as "an error which is admittedly not subject to this appeal," the 2014 orders preclude her subsequent pursuit of a finding of history of acts of domestic violence that was or

could have been presented to him. *See* Opening Br., at 23 (emphasis added).

The doctrine of *res judicata* plainly applies to this situation. The doctrine “bars the relitigation of claims . . . that were litigated or might have been litigated in an earlier action.” *Pederson v. Potter*, 103 Wn.App. 62, 69, 11 P.3d 833 (2000), *review denied*, 143 Wn.2d 1006 (2001). It requires “identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.” *Pederson*, 103 Wn.App. at 69.

Res judicata is applicable to dissolution proceedings. *In re Marriage of Timmons*, 94 Wn.2d 594, 597, 617 P.2d 1032 (1980).

Judge Gonzalez’ decision not to make a finding under RCW 26.09.191(1)(c) and (2)(a)(iii), as Judge Clark likely appreciated when considering Amy’s Motion to Vacate, was *res judicata* as to the present modification proceeding since no evidence of any subsequent act or acts of domestic violence was presented. *See* RP of 9/15/17, at 5:6-9, 6:15-18 and 22-25. The parties and quality of parties were identical. The subject matter and claim, the contention that domestic violence preceding the parties’ dissolution should be a limiting factor in a parenting plan, were the same. As Amy concedes, the 2014 orders cannot be reviewed in

this appeal and were binding on the modification judge in relation to domestic violence between the parties before their dissolution.

5. There was no indication of irregularity in the modification proceeding that might have required vacating the 2017 final orders.

This is no indication of an irregularity in the proceedings before Judge Clark, such as the overreaching by a party that found disapproval in *Hardt, supra*, 39 Wn.App. 493. Judge Clark simply reached a result with which Amy did not agree and that she belatedly argued was precluded by *L.H.* Instead of timely appealing, Amy permitted the appeal period to lapse after denial of her Motion for Reconsideration. She plainly has no standing to complain of procedural irregularity on the back of her Motion to Vacate, which was filed over ten days after entry of the 2017 final orders. *See* CR 59(b); RAP 5.2(e).

C. Analysis Under RCW 26.09.191(n) Was Not Required.

Amy may not now complain of Judge Clark not explicitly performing an analysis under RCW 26.09.191(2)(n). Any failure to undertake such analysis would have had to been addressed through a timely appeal of the final judgment, not a motion to vacate under CR 60(b) filed more than ten days after its entry.

Even had Amy timely appealed, it cannot be concluded that an analysis under RCW 26.09.191(2)(n) was required in light of the 2014

orders. Judge Gonzalez did not find a history of acts of domestic violence that would render RCW 26.09.191(2)(n) potentially applicable to the present proceeding. Whether or not he might, in some alternate version of history, have himself been required to undertake an analysis under RCW 26.09.191(2)(n), is irrelevant. Judge Gonzales adopted only a condition to Mark's exercise of his full parental role under the 2014 parenting plan. That fulfillment of the condition would not mandate an analysis under the statute or anything akin to a modification analysis under RCW 26.09.260. Mark's assumption of his full parenting role was effectively to be automatic upon his fulfillment of the condition. Such was the 2014 disposition and Amy cannot seek a change in it now.

Amy did not timely challenge Judge Clark's finding that Mark fulfilled the condition in the 2014 Parenting Plan. *See In re Interest of J.F.*, 109 Wn.App. 718, 722, 37 P.3d 1227 (2001) (unchallenged findings are verities on appeal). Her contentions regarding RCW 26.09.191(2)(n) cannot be considered.

D. Amy's Challenges to the Final Orders and Denial of Reconsideration Cannot be Considered Because She Failed to Timely Appeal.

It is an axiom of the judicial policy favoring finality of judgments that a motion to vacate under CR 60(b) neither extends the time for appeal of the underlying judgment nor may serve as a substitute for a timely

appeal. Amy misapplies CR 60(b)(11) in attempting to bootstrap an untimely appeal of the trial court's final orders upon a Motion to Vacate. Her footnote proposing that the subject matter of her previous Motion for Reconsideration, which concerned only the GAL's alleged missteps, was somehow subsumed into her later and wholly distinct Motion to Vacate, which said nothing about that issue, is of no avail. Opening Br., at 18 n.2. Amy is attempting to employ sleight of hand on the slim chance that this Court will not notice her failure to timely appeal.

The subject matter of the Final Order and Parenting Plan and Amy's Motion for Reconsideration, all dated June 23, 2017, are not properly before this Court on appeal. Rule of Appellate Procedure 5. (a) provides that "a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)." While Amy did timely file a motion for reconsideration, she failed to appeal the final orders or denial of reconsideration within 30 days of the date of entry of the Order Denying Reconsideration, August 15, 2017. RAP 5.2(e). A motion to vacate under CR 60(b), on the other hand, does not toll the appeal period. *See id.*

Rule of Appellate Procedure 18.8(b) prescribes as follows:

The appellate court will only in extraordinary circumstances and to prevent a **gross** miscarriage of justice extend the time within which a party must file a notice of appeal . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice . . . is directed.

(emphasis added). Amy did not submit, let alone prevail upon, a motion to extend the deadline to appeal the final orders or the Order Denying Reconsideration. Even had she done so, she would not have been able to present any “extraordinary circumstances” or grounds on which to find a “gross miscarriage of justice” were the Court not undertake the exceptional step of relaxing the deadline.

Amy’s Assignments of Error and arguments directly challenging the orders that she failed to timely appeal are frivolous and cannot be considered. Those portions of her opening brief include Assignments of Error 2 through 4 (*i.e.*, all but the first Assignment of Error, concerning denial of her Motion to Vacate) and Sections A, C and D of her Arguments, pages 21 to 26 of her brief, and other portions of her brief pursuing such challenges.

E. Even with a Timely Appeal, the Trial Court’s Disposition Was Supported by Substantial Evidence and Could Not Be Deemed an Abuse of Discretion.

1. Amy improperly conflates alleged child abuse, which the trial court has never found, with “a history of acts of domestic violence.”

Careful evaluation of the procedural setting of this appeal invalidates Amy’s attempt to refer to allege abuse of the children after entry of the 2014 orders and to conflate that subject with “a history of acts of domestic violence” that she wrongly insinuates was found in the 2014 dissolution proceeding. There was no finding of “physical, sexual, or a pattern of emotional abuse of a child,” RCW 26.09.191(1)-(2), in the 2014 proceeding, just as there was no finding of a “history of acts of domestic violence.” CP 2.

Amy’s attempt to appeal the final modification orders under the guise of appealing denial of the Motion to Vacate was, of course, untimely. Amy appears to be contriving to divert attention from her failure to timely appeal the final modification orders by conflating allegations of post-dissolution child abuse with her proposition of a pre-dissolution history of acts of domestic violence. Defeating such gambit is that fact that whatever was discussed in the 2014 dissolution, it would have pertained to her and Mark only, not to any allegation of physical abuse of the children.

Second, under the plain language of the pertinent statutes, although physical injury of a child might conceivably be found to fit the definition of “domestic violence” under RCW 26.50.010⁴, a single act of such could not constitute “a history of acts of domestic violence” under RCW 26.09.191. *See supra*, at 11. A single infliction of physical injury to a child, if sufficiently severe, on the other hand, could be “physical . . . abuse of a child.” *See* RCW 26.09.191(1)-(2) (applying “pattern” to emotional abuse, but not physical abuse); *In re Marriage of Goude*, No. 71240-3-I, slip op. at 2 (Wash. Ct. App. Dec. 22, 2014) (nonbinding precedent) (“record does not show that the single incident [pulling child by the hair] rose to the level of ‘physical... abuse of a child.’”).

The foregoing analysis highlights that Amy is conflating alleged domestic violence preceding entry of the 2014 final orders with alleged child abuse after that time in an improper attempt to bootstrap the latter concluded and unappealed allegation onto whatever Judge Gonzales said in reference to domestic violence in 2014, despite his not finding a history of acts of domestic violence.

⁴ *See* RCW 26.50.010(6) (“Family or household members’ means . . . persons who have a biological or legal parent-child relationship”)

2. Amy failed to assign error to the trial court's finding of a lack of basis to enter a limiting factor based on child abuse.

To the extent Amy raised an allegation of child abuse occurring since the 2014 dissolution, the trial court did not find that such had occurred. CP 221, CP 497. The Court found no basis for a limiting factor, which would include child abuse, and otherwise found that Mark was “strong, nurturing, and loving” and “the children appear to be thriving under the current residential schedule.” CP 222, 223; CP 497-498.

Whether there was or was not substantial evidence to support the trial court's finding of a lack of a basis for limiting factors in the final modification orders, Amy did not appeal. Even were one to indulge her mistaken belief that those orders may be reviewed in this appeal, she did not assign error to the lack of a finding of domestic violence or of child abuse based on any event after the 2014 dissolution. Amy's only assignments of error respecting Judge Clark's findings pertained to her not finding a limiting domestic violence factor based on the outcome of the 2014 proceeding and not making a findings under RCW 26.09.191(2)(n) in relation to that issue. Opening Br., at 2-3, Assigns. of Error 3 and 4.

Having failed to assign error as to any lack of finding of child abuse after the 2014 final orders, Amy's references to such alleged abuse could not be considered even had she timely appealed. *See* RAP 10.3(g)⁵.

3. Amy fails to show a lack of substantial evidence to support the modification court's findings.

This Court is required to view "the evidence and all reasonable inferences in the light most favorable to" Mark and does not reweigh conflicting evidence and substitute its own judgment where there is substantial evidence to support a finding. *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006); *Brown v. Superior Underwriters*, 30 Wn.App. 303, 305-06, 632 P.2d 887 (1980). *See Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).

To the extent Amy raised an allegation of child abuse occurring since the 2014 dissolution, the record supplied on appeal does not disclose evidence of a degree that would make a finding of child abuse the only permissible outcome. The GAL mentioned in her testimony only a report of a "thumbprint that was found on Asher" after he had apparently not

⁵ "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."

been with Mark for several days and stated there was some reason to believe Amy had coached him to say that Mark had caused it. RP of 2/13/17, at 56:9-11 and 88:2-7. The trial testimony also indicates that Mark had asked CPS to review its founded finding and there is nothing in the record to indicate that CPS sustained it. *Id.*, at 86:1-11. There was substantial evidence to support the trial court in not finding abuse of a child as a limiting factor.

4. The modification court properly exercised its discretion by not imposing restrictions on Mark.

Paramount to the determination of a parenting plan, either initially or upon a petition for modification, is the best interests of the children. RCW 26.09.002. The statutes respecting establishment and modification of plans expressly incorporate that objective and seek its achievement through the legal mechanisms they prescribe. *See* RCW 26.09.184, RCW 26.09.187, RCW 26.09.260(1), (4), and (10).

Amy sought a modification under RCW 26.09.260(1)-(2) only. CP 24-26. That statute protects a child's best interest in stability and continuity by prescribing that a significant modification in residential time, as requested in this case, shall not occur unless the trial court finds:

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.

(emphasis added). The statute goes onto to limit major alterations of the residential schedule to circumstances where:

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.

RCW 26.09.260(1)(c).

Parenting plan determinations are subject to an abuse of discretion standard, as noted in Amy's Opening Brief, at 15-16. Amy has apparently supplied this Court with but a fraction of the evidentiary record at trial, both as to testimony and exhibits. She has failed to establish that the entirety of the evidence before the Judge Clark was not substantial evidence supporting the judge's conclusion that her desired outcome would not be in the children's best interests.

Based on the partial record presented on appeal, it appears that a major focus of Amy below and in this Court is the GAL's credibility. Judge Clark elected to accept the GAL's overall conclusions and to adopt her recommendations into the Final Parenting Plan after being repeatedly informed of Amy's credibility concerns and after receiving all the other evidence and testimony at trial.

Even had Amy timely appealed the final medication orders, she could not prevail simply by challenging the GAL's credibility. Credibility

determinations are within the exclusive province of the trial court. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Judge Clark's credibility determination cannot be made the basis of complaint of abuse of discretion.

Amy would, instead, be required to show that all the evidence before the Court did not constitute substantial evidence that the best interests of the children would not be met by restricting Mark's parenting role. She does not even attempt that task. Simply attempting to pick-off the credibility of a witness, even one as key as the GAL, is not sufficient to show a lack of substantial evidence.

Even were the Court to conclude that Judge Clark abused her ample discretion in declining to vacate the final orders, Amy fails to show that granting the Motion to Vacate would have resulted in any practical differences to the Final Parenting Plan. The trial court could reasonably have concluded from the evidence presented that, regardless of the reference to domestic violence in the 2014 Final Parenting Plan, that it was in the children's best interests not to find a limiting factor and to restrict Mark's parenting role.

F. The Court Should Award Mark His Reasonable Attorneys' Fees on Appeal Because this Appeal is Frivolous.

Mark respectfully requests that this Court award him reasonable attorneys' fees for the expense of responding to this appeal because it is frivolous. RAP 18.9(a). "An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Chapman v. Perera*, 41 Wn.App. 444, 455-456, 704 P.2d 1224 (1985). That is an exacting standard but Mark respectfully submits it has been met in this appeal.

There is no reasonable prospect of a reversal of the trial court's rulings in this case. Amy failed to timely appeal the modification court's Final Order, Final Parenting Plan, and Order Denying Reconsideration, barring her from complaining of any error in them that should have been addressed on appeal. That notably includes, but is not limited to, the trial court's declining to find a limiting factor based on anything alleged to have occurred since the 2014 dissolution.

Amy has frivolously sought an untimely appeal of the 2017 final orders by improperly conflating the wholly distinct subjects of her two post-trial motions, of which only one was decided within 30 days before she filed her Notice of Appeal. *See* Opening Br., at 18 n.2.

Amy has even sought to go beyond the 2017 orders to challenge the 2014 dissolution orders, which did not find a history of acts of domestic violence and which she also did not appeal. *See* Opening Br., at 18 and n. 2 (“Both trial court judges failed to make required findings of fact . . .”), 23 (Judge Gonzalez’ disposition was improper under *L.H.* and Judge Clark “compounded” his “error”). Such a cynical assault upon the principle of finality of judgments and orderly judicial procedure exposes the frivolity of this appeal.

It is just as clear that Judge Clark cannot be found to have abused her broad judicial discretion by declining to vacate her final orders under CR 60(b)(11) in light of *In re Parenting and Support of L.H.* That decision entailed no change of controlling law applicable to the facts and procedural circumstances of this case, which featured a prior order that did not find a limiting factor and no finding of a basis for a limiting factor since that order’s entry.

Amy’s method below and, now, before this Court has been and continues to be to repeatedly pursue untimely bites at the apple with no debatable prospect for a change in the outcome. This behavior, which was also remarked in the trial court,⁶ have served only to pointlessly consume

⁶ CP 106 (Amy “is obsessed with presenting information that will reflect

Mark's financial resources. Mark should be awarded his reasonable attorneys' fees for having to defend this frivolous appeal in an amount to be determined upon presentation of a fee affidavit.

IV. CONCLUSION

Appellant Mark Cole respectfully requests that the Court grant him the following relief:

- (1) Affirmance of all of the trial court's orders;
- (2) An award of his reasonable attorneys' fees on appeal; and
- (3) An award of his costs of appeal.

RESPECTFULLY SUBMITTED this 28th day of September 2018.



Charles R. Horner, WSBA No. 27504
Attorney for Respondent

badly on Mark"); CP 499-500; CP 501 (awarding attorneys' fees); RP of 9/15/17.

LAW OFFICES OF CHARLES R HORNER PLLC

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