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Trial Court No. 12-3-02267-1

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

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AMY E. COLE,

Appellant,

v.

MARK L. COLE,

Respondent.

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**APPELLANT AMY COLE'S REPLY BRIEF**

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## I. INTRODUCTION

This case presents a series of trial court errors that were compounded over a period of years. Both Judge Gonzalez, presiding over the Cole's 2014 dissolution trial, and Judge Clark, presiding over the 2016 modification trial, failed to impose the limitations on joint decision-making and custody required by the statute where a history of domestic violence has been found. Ms. Cole, a mother of three representing herself *pro se*, has tried every means to correct these errors and ensure the trial court fairly and accurately applied the law to the facts of this case in order to reach a result that reflected the best interest of her children. This appeal represents the last chance for justice to prevail.

While an appeal from the trial court's final judgment certainly would have been the best means to present these errors to the court, Ms. Cole, representing herself during this time, did not fully understand the impact her post-trial Motion for Reconsideration and Motion to Vacate had on the appellate deadlines. It is undisputed that Ms. Cole *did* timely appeal the court's denial of her Motion to Vacate, a motion which can serve as a vehicle to correct irregularities in the proceedings that occurred at the trial court level.

The irregularities were many in this case. The original 2014 trial court failed to make a written finding under RCW 26.09.191 despite

finding a history of domestic violence, a statutory violation which was then compounded at the modification proceeding at issue in this appeal. The guardian ad litem in the 2016 trial utterly failed to perform her duties—not interviewing interested parties, misrepresenting the opinions of others, perjuring herself on the stand, and perhaps most importantly, failing to investigate a CPS founded instance of child abuse. Though also noting the existence of a history of domestic violence which should have also warranted a restriction under RCW 26.09.191, the trial court adopted the GAL’s recommendation of 50/50 custodial split and joint decision-making in full, declining every opportunity to ensure a complete investigation into what was in the best interest of the children. In addition, Ms. Cole was denied the opportunity to present rebuttal witnesses to rebut the guardian ad litem’s fraudulent testimony and work.

The trial court’s denial of Ms. Cole’s Motion to Vacate should be reversed, and the case should be remanded for appointment of a competent and honest guardian ad litem to evaluate whether the modification proposed by Ms. Cole would in fact be in the best interests of the children.

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## II. ARGUMENTS

### A. The trial court abused its discretion in denying Ms. Cole's CR 60 Motion to Vacate.

#### 1. **There was irregularity in the proceeding warranting vacating the decision under CR 60(b)(11)**

CR 60(b)(11) grants the court 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). The parties agree that relief under this statute relates 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). Respondent argues that the circumstance must involve “overreaching that is tantamount to fraud or egregious extralegal action . . .” Respondent's Brief, at 10, but that there was such irregularity here.

The failure of two trial court judges to make required findings of fact and impose statutory requirements, coupled with a guardian ad litem who failed to perform a complete investigation, refused to consider evidence of child abuse, and perjured herself on the stand constitutes extraordinary circumstances. The purpose of a guardian ad litem's recommendation and the modification trial is to determine what is in the best interests of the children. The guardian ad litem could not make an accurate and fully-informed evaluation where she did not speak with a number of interested parties, misrepresented to the court what many parties said, 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. The trial court declined to allow testimony from several rebuttal witnesses who could have provided insight into these deficiencies, and presented their actual impressions regarding what was in the best interest of the Cole children. 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, which was admitted into evidence at trial, and also failed to discount the GAL's

report in any way, even though her work was shown time and time again to be inaccurate and misleading.

**2. The original trial court found a history of domestic violence but did not impose the limiting factors. Judge Clark did the same.**

Respondent contends that the *In re Parenting & Support of L.H.* case does not apply because the 2014 trial court's order contained no explicit finding of a history of multiple acts of domestic violence. Respondent's Brief, at 12 (citing *In re Parenting & Support of L.H.*, 198 Wn. App. 190, 391 P.3d 490 (2016)). That is precisely why *In re Parenting & Support of L.H.* is analogous. Ms. Cole does not dispute that the statutory language "history of domestic violence" requires multiple acts.

Ms. Cole's attorney in this 2014 trial presented multiple instances of domestic violence. In her modification petition, Ms. Cole explained "[t]here were several reports made by mandatory reporters prior to our trial last year before Judge Gonzales for physical abuse towards our three young children by Mr. Cole." CP 26. 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 an official 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. Yet he did not make the required official finding under RCW 26.09.191, just like *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 did not appeal this ruling because the restrictions were in place, though not properly labeled.

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.

At the hearing on Ms. Cole's Motion to Vacate Judge Clark's Order on Modification of Parenting Plan, after the second trial, 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.

It is undisputed that "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); *In re Marriage of Mansour*, 126 Wn. App. 1, 10, 106 P.3d 768 (2004).

Respondent attempts to differentiate between “domestic violence,” which 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 member,” RCW 26.50.010(3), and child abuse, saying they are not related. Though they are separate statutory factors, Respondents admits that an instance of child abuse could fall within the definition of domestic violence. Respondent’s Brief, at 20.

The evidence before the court demonstrated that there is a history of domestic violence, which required mandatory limitations that were not properly imposed by the prior court, and then an additional finding of an instance of child abuse (which qualifies as domestic violence) after the Respondent had undergone his treatment. Ms. Cole introduced at trial a founded CPS report of abuse against Asher. Supplemental Designation of Clerk’s Papers, at \_\_ (Trial Exhibit 44, Dkt. 175). There was no evidence before the court at trial that Mr. Cole appealed that finding or that it was overturned. Thus, the evidence before the court demonstrated that not only was there a history, but an ongoing issue with domestic violence against the children that mandated the statutory restrictions on joint decision-making and residential time. Judge Clark erred by not imposing them.

**3. Res judicata did not prevent Judge Clark from correcting the prior error when new evidence had been presented.**

Respondent argues that the trial court’s 2014 decision was res judicata, thus Judge Clark could make no different ruling because “no

evidence of any subsequent act or acts of domestic violence was presented.” Respondent’s Brief, at 14. As discussed above, evidence of a subsequent act was presented. And further, while res judicata principles do apply in a child custody modification proceeding, the actual standard that is applied is the statutory standard set forth at RCW 26.09.260. The Washington State Supreme Court noted that the legislature intended in this context “to moderate the harshness of res judicata . . . due to the public interest in the welfare of children,” for instance in the allowance of consideration of previously undisclosed facts. *In re Marriage of Timmons*, 94 Wn.2d 594, 600, 617 P.2d 1032 (1980).

In a modification proceeding, the trial court shall modify a prior custody decree “upon the basis of facts that have arisen since the prior decree or plan that were unknown to the court at the time of the prior decree or plan” or where “a substantial change has occurred in the circumstance of the child or the nonmoving party” and “the modification is in the best interest of the child”. RCW 26.09.260(1).

Judge Clark had the power and authority under RCW 26.09.260, taken together with the supplemental facts presented by Ms. Cole of additional abuse post-trial and Mr. Cole’s domestic violence treatment, to remedy Judge Gonzalez’s failure to comply with the statutory mandate. The trial court’s failure to do so was in error.

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**B. Mr. Cole is not entitled to his attorneys' fees on appeal because this appeal is not frivolous.**

In determining whether an appeal is frivolous, the court is guided by the following considerations: “(1) a civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

When these considerations are applied to this case, it is evident that Ms. Cole’s appeal was not frivolous. Ms. Cole is entitled to a right to appeal, and all doubts as to the frivolity of the appeal should be resolved in her favor. Looking at the record as a whole demonstrates significant irregularities during the modification trial that were ignored by the trial court judge. Ms. Cole, despite proceeding *pro se*, made every effort to raise these irregularities with the trial court judge—at trial, in a motion for reconsideration, and in a motion to vacate. But it appeared that the trial court was more concerned with concluding the trial and moving on than reaching a result that was truly in the best interests of the Cole children.

Before the trial court and this court she has demonstrated several cases that present extremely analogous facts—in *In re Parenting & Support of L.H.*, the Court of Appeals reversed trial court decisions where the court failed to properly imposes restrictions under RCW 26.09.191. The only difference between those cases and this is the fact that unfortunately, due to her misunderstanding of the impact of her motion for reconsideration and motion to vacate upon the appellate deadlines, Ms. Cole did not appeal the final order or the motion for reconsideration. Her appeal is not frivolous due to this fact. Ms. Cole *did* timely appeal the Motion to Vacate under CR 60, and CR 60 is a vehicle that provides both the trial court and the appellate court broad latitude to vacate a judgment in order to correct errors in a proceeding. This case present meritorious arguments and debatable issues upon which reasonable minds might differ. Respondent’s request for an award of attorney’s fees pursuant to RAP 18.9 should be denied.

### III. 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 failing to take into account the father’s complete history of domestic violence. The trial court, despite full knowledge of these deficiencies and both a history of

domestic violence and undisputed evidence that the issue was ongoing, 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 29th day of October, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.



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**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 29th day of October, 2018, a copy of the foregoing **APPELLANT AMY COLE'S REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

Charles R. Horner  
Law Office OF Charles R. Horner, PLLC  
1001 Fourth Avenue, Suite 3200  
Seattle, WA 98154

Of Attorneys for Respondent

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

DATED: October 29, 2018

At: Vancouver, Washington

  
HEATHER A. DUMONT

**LANDERHOLM, P.S.**

**October 29, 2018 - 10:07 AM**

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