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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BRYAN MICHAEL ANEWEER, RESPONDENT

v.

AMBER MAE SMITHLIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft

No. 18-3-3129-9

BRIEF OF APPELLANT

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(Assignment of Error 9).

C. STATEMENT OF THE CASE.

1. Procedure

On August 10, 2018, the father filed a Petition to Change a Parenting Plan based on mother's arrest for vehicular homicide. CP 18-27. The parties' five-year-old son, Noah, was in the vehicle at the time of the accident. CP 21. On the same date, the father filed a Motion for an Immediate Restraining Order, and was granted same. CP 8-15, 4-7.

While in the Pierce County Jail, the mother was personally served with the Immediate Restraining Order and Hearing Notice, Summons, Petition to Modify, Motion for Adequate Cause Decision and Proposed Parenting Plan on August 14, 2018. CP 62, 142.

The mother was never served with the Order Setting Case Schedule, as required by PCLR 3(d), the Note for Commissioner's Calendar or Copy of Social Media Reports contained in the court file. CP 62, 142-143.

The father never filed proposed child support worksheets, or a proposed order of child support, or served same on mother, as he indicated would be done in his Petition for Modification. CP 22.

The Order Setting Case Schedule set forth all important and relevant upcoming dates in the litigation, including the Status Conference

date of January 29, 2019, and most importantly, the trial date of February 21, 2019. CP 1.

On September 10, 2018, the father appeared for the return on the ex-parte immediate order and Motion for Adequate Cause. CP 64-65. The mother did not appear because she was being held in the Pierce County Jail. CP 65.

The court found adequate cause and entered a Temporary Family Law Order that gave the mother phone contact one time per week, if it could be arranged by the jail. CP 66-68, 69-74, 75.

The mother was never served with the Temporary Family Law Order, the Order Granting Adequate Cause filled out by the commissioner that contained the trial date, or the LINX generated Order Granting Adequate Cause. CP 142-143.

On October 24, 2018, the trial court mailed a letter regarding the mother's failure to file the Certificate of Parenting Class. CP 76. The letter indicates "copies mailed to" and identifies the mother as a recipient. It does not indicate what category of mail was used, what address it was sent to and is not signed under the penalty of perjury. Id.

On January 29, 2019, the trial court held a status conference and entered an order. CP 77. The order indicates "Trial is scheduled for 2/21/19 at 9:00:00 AM" and… "will take NA days to try. – mother is

incarcerated." Id. The father signed the order. CP 78. No Clerk's Minute Entry was filed on the date of this hearing.

The mother was never served, or provided, a copy of this order.

On February 21, 2019, the trial date set by the Order Setting Case Schedule, the father appeared for trial. CP 80. The trial court continued the case out until after the mother's criminal case was concluded. Id.

The court issued an Order Setting Case Schedule that set the new trial date as May 28, 2019. CP 81-82. The order indicates "copies mailed to" and identifies the mother as having been sent a copy "via mail". It does not indicate what category of mail was used, what address it was sent to and is not signed under the penalty of perjury. Id.

The mother was not served a copy of this order as required by PCLR 3(d). CP 142-143.

On May 28, 2019, the father appeared for trial. CP 83-84. The trial court did not take any evidence, did not go on the record, and signed the father's final pleadings, including a Final Order of Child Support. CP 83-84, 85-98, CP 99-121, 122-129.

The mother never formally appeared in the proceedings. No Motion for Default was filed, and no Order on Default was granted. The case never proceeded to trial.

On October 8, 2019, mother, through counsel filed a Motion to

Vacate the final Orders pursuant to CR 60(b)(1), CR 60(b)(6), CR 60(b)(11), and CR 55(c). CP 141-144.

On November 22, 2019, the trial court denied the motion to vacate. CP 164-165.

On December 9, 2019, the mother filed a timely notice of appeal. CP 168-169.

2. Facts

Prior to the mother's arrest and incarceration for vehicular homicide, she had been Noah's primary parent, as set out in the parties' 2016 Final Parenting Plan. CP 48, 142. The father had every-other weekend, school breaks and vacation by agreement, and alternating holidays. CP 45-47.

The father had RCW 29.09.191 factors entered against him due to a history of domestic violence. RP 44, 142. No RCW 26.09.191 factors were entered against the mother. Id. The mother had sole decision making for education and non-emergency health care. CP 50. The parties were not ordered to participate in dispute resolution in the event of a disagreement. CP 51. Both parents were ordered to participate in parenting programs and substance abuse and/or domestic violence assessments or treatment, as recommended. CP 53-54.

On August 6, 2019, the mother was the driver of a vehicle involved

in a horrific car accident. She struck another vehicle, killing three passengers and injuring the parties' 5-year-old son. CP 9.

The father immediately sought to restrict the mother's time with the child, filing a Petition to Modify their 2016 Final Parenting Plan and Proposed Parenting Plan that proposed the mother have no contact with Noah. CP 18-27, 28-41.

Despite the father's request for no contact, the initial temporary order issued by the court allowed phone contact between the mother and Noah. CP 70.

On the trial date, the trial court took no testimony. Nonetheless, it made the following findings:

Petitioner alleges as follows:

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

CP 123.

The evidence before the trial court was what was contained in the court file. Nonetheless, the trial court entered a Final Parenting Plan that

allows for no contact, whatsoever, between Noah and his mother. CP 87, 142. The trial court admitted no evidence, took no testimony, did not weigh the child's best interests and did not consider if the restrictions the father requested were reasonably calculated to protect Noah from harm.

In her criminal case, charges against the mother relating to the injuries to Noah were dropped, and no restraining order limiting contact was entered. CP 143.

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

There is no evidence the trial court reviewed the parties JIS records[1] prior to entry of the May 28, 2020 Final Parenting Plan as required by RCW 26.09.182.

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[1] Appellant attempted to obtain JIS records that *were* reviewed at the time of the temporary order hearing in September 2018, to provide to this Court, but was denied by the trial court. Appellant did not wish to delay her appeal any further, and thus is not appealing the trial court's denial of that request. However, appellant believes the trial court's denial is in error, and that what was before the Court is necessary on appeal and that both parties' criminal history is relevant when making a child custody determination, as demonstrated by the RCW 26.09.182 requirement.

At all times relevant to the underlying proceedings, the mother was incarcerated, and her location was known to both the court and the father. CP 59, 62, 73, 77, 82. 86, 126, 142.

D. ARGUMENT.

1. THERE WERE IRREGULARITIES IN OBTAINING THE FINAL JUDGMENT

Under CR 60(b), a party or his or her legal representative may have a final order vacated for a variety of reasons, including "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order" or for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(1).

Reviewing courts apply an abuse of discretion standard when considering a trial court's ruling on a CR 60(b) motion. State v. Santos, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. In re Marriage of Tang, 57 Wn.App. 648, 653, 789 P.2d 118 (1990). Moreover, a court necessarily abuses its discretion where it bases its ruling "on an erroneous view of the law." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). An appellate court

may more readily find an abuse of discretion when the trial court's determination results in a denial of a trial on the merits. White v. Holm, 73 Wn.2d 348, 351-52, 438 P2d 581 (1968).

Courts of appeal review questions of law de novo. Anthis v. Copland, 173 Wn.2d 752, 755, 270 P.3d 574 (2012). Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally "to preserve substantial rights and do justice between the parties." Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978); accord, Pamelin Indus., Inc. v. Sheen-U.S.A., Inc., 95 Wn.2d 398, 404, 622 P.2d 1270 (1981).

An irregularity for purposes of CR 60(b)(1) has been defined as "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner." Wallis, 89 Wash.2d at 543.

A failure to give notice of proceedings when notice is required is an irregularity under CR 60(b)(1) subject to vacation of orders arising out of the proceedings. Gage v. Boeing Co., 55 Wn.App. 157, 164, 776 P.2d 991 (1989); C.S. Barlow & Sons v. H. & B. Lumber Co., 153 Wn. 565, 280 P. 88 (1929); Kirschner v.

Worden Orchard Corp., 48 Wn.App. 506, 509, 739 P.2d 119 (1987); cf. Wallis, 89 Wn.2d at 546.

A successful motion to vacate a default judgment requires that the moving party show:

> (1) substantial evidence supports at least a prima facie defense to the claim asserted by the opposing party; (2) the moving party's failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the moving party acted with due diligence after notice of the default judgment; and (4) the opposing party will not suffer substantial hardship if the default judgment is vacated.

Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 308, 122 P.3d 922 (2005). "'These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.'" Hous. Auth. of Grant County v. Newbigging, 105 Wn.App. 178, 186, 19 P.3d 1081 (2001) (quoting Norton v. Brown, 99 Wn.App. 118, 124, 992 P.2d 1019 (1999)).

Here, four irregularities occurred that require this Court vacate the May 28, 2019 orders. The first occurred when the mother was never served with the Order Setting Case Schedule, violating her right to due process, CR 40 and PCLR 3. The second

occurred when the trial court continued the trial date from February 21, 2019 to May 28, 2019, mailed the mother notice of the continuance to an unknown address by unknown means, and the father failed to effectuate service of same as required by PCLR 3. The third occurred on May 28, 2019, when the trial court entered final orders without finding the mother was in default pursuant to CR 55, and without taking any substantive evidence as required by CR 40(a)(5). The fourth occurred when on May 28, 2019, when the trial court entered a Final Order of Child Support in a "default situation" without the mother having ever been served with a Financial Declaration or proposed Child Support Worksheets, exceeding the relief initially plead by the father.

a. The father failed to serve mother with the Order Setting Case Schedule thus creating an irregularity in the proceedings.

CR 5(a) provides:

> Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on

> appeal, and similar paper shall be served upon each of the parties.

Pierce County Local Rule 3(d) provides:

> Certain other types of Family Law Cases such as Nonparental Custody Petitions and Petitions to Modify an Existing Parenting Plan shall be issued an Order Setting Case Schedule at filing pursuant to PCLSPR 94.04(f) and (g) and assigned to a department or to Family Court in accordance with existing court policy and practice.
>
> In every newly initiated family law case or modification proceeding, the petitioner shall serve a copy of the applicable order on the respondent along with the initial pleadings; provided that if the initial pleading is served prior to filing, the petitioner shall within five (5) court days of filing serve the applicable order.

Here, the mother was never served with the case schedule, and did not know a trial would even occur. Based on the pleadings she was served, she knew the father was seeking a temporary order, and adequate cause to change a parenting plan. She did not know a trial date had been scheduled, something the father was required to notify her of pursuant to PCLR 3(d), CR 5(a) CR 40(a)(1).

Because the mother did not know what the initial, or rescheduled trial dates were, it is unknown what steps the mother

may have taken to "appear" at trial. This is not notice that is reasonably calculated to provide the mother with actual notice that trial was going to occur on February 21, 2019 or May 28, 2019.

When such an important matter such as the care, custody and control of a parent's minor child is at issue, it should not be a guessing game to determine whether the parent had notice of the trial date particularly where the other parent is seeking no contact between the child and his primary parent.

The father's failure to serve the mother with the trial date constitutes an irregularity warranting reversal of the trial court's orders.

b. The trial court did not provide mother with proper notice of the new trial date when it mailed her notice of the May 28, 2019 trial date.

Based on the record, the trial court continued the February 21, 2019 trial date until after the mother's criminal case had concluded. CP 82. The trial court continued the trial to May 28, 2019 and issued an Order Setting Case Schedule. CP 79-82. There is no declaration of mailing in the court file, so it is unclear where the February 21, 2019 Order Setting Schedule was mailed, or in what manner it was mailed. Both the trial court and the father failed to provide mother notice of the continued hearing date

constituting an irregularity in the proceedings. This irregularity warrants reversal of the trial court's order.

c. The trial court's May 28, 2019 orders were entered in violation of CR 40 and CR 55.

The general rule is that a defendant must file an answer within 20 days after service of the summons and complaint. CR 12(a)(1). Under CR 55(a)(1), a plaintiff can move for default if the defendant fails to answer or otherwise defend within 20 days. Defendants are entitled to notice of the motion only if they have appeared in the action. CR 55(a)(3). *Once a default order has been entered, a plaintiff can obtain a default judgment under certain circumstances*. CR 55(b) (emphasis added). Any party may respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party has previously appeared or not. CR 55(a)(2).

A party has a due process right to "assume that the relief granted on default will not exceed or substantially differ from that described in the complaint and may safely allow a default to be taken in reliance upon this assumption." Columbia Valley Credit Exchange, Inc. v. Lampson, 12 Wn.App. 952, 954, 533 P.2d 152 (1975). A judgment rendered in excess of the relief requested in the complaint without giving the defendant notice and an opportunity to be heard is void to the extent it differs from the

complaint. State ex rel. Adams v. Superior Ct., 36 Wn.2d 868, 872, 220 P.2d 1081 (1950).

CR 40(a)(5) provides:

> Either party, *after the notice of trial*, whether given by himself or the adverse party, may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Here, the trial court had two options: try the case on the merits pursuant to CR 40(a)(5) or entertain a Motion for Default and enter an order confirming same *and then* proceed to a default judgment. It did neither.

There is no dispute the mother failed to appear in the litigation. However, because she never was provided notice of trial, and no order of default was entered, any hearing that proceeded in her absence was contrary to CR 40(a)(5) despite her non-appearance. Further, pursuant to CR 55(a)(2), until a motion for default was filed, she was entitled to appear and defend the action. Thus, had she known about either trial date, she would have been permitted to "appear[2]" and put on testimony.

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[2] Mother understands that given her incarcerated status she likely would not have been permitted to appear in person, but she certainly could have arranged for telephonic appearance, or to have an attorney attend and put on evidence on her behalf.

Because she was never served with notice of the trial date, it is unknown what steps the mother may have taken to appear at trial, and defend against the proposed order that she have no contact with her five-year-old son.

The father never brought a Motion for Default, and the trial court never considered evidence of same. Had the father brought such a motion, the trial court would have had to consider what evidence was offered of the mother's failure to appear and whether it was sufficient to grant an order of default, *before* doing so. Failure to formally appear in the action is not the only factor the court would need to consider in determining whether a default was appropriate or not. The trial court would have needed to know whether the mother had made any informal appearance, such as contacting the father directly regarding the litigation. It is unknown if the mother made any informal appearances because no declaration or evidence of any kind, in support of a default order was submitted by the father or considered by the trial court. Nonetheless, the trial court treated the final orders as if they were entered by default, calling it a "default situation". CP 173.

The trial court neither considered evidence of the mother's lack of appearance nor took *any* substantive testimony. The trial court erred when it assumed a default would have been granted, and that a "default situation" had been created when it did not have sufficient facts to make such a determination. CP 173.

The trial court's assumption a default would have been granted, and simply entering orders proposed by the father is especially dangerous because it ignores its statutory obligation to consider the child's best interests, despite any alleged non-appearance by the mother. The trial court's belief it had the discretion to enter final orders, when no order of default was granted, and the mother did not have notice of the trial date constitutes an erroneous view of the law.

Because no evidence was taken, the trial court did not try the case upon the facts. CR 40 governs the assignment of cases and provides that *after notice of the trial has been given*, either party may "proceed with his case" and receive a judgment despite the absence of the adverse party. CR 40(a)(5).CR 52 then addresses the trial court's entry of judgment and findings and conclusions "[i]n all actions tried upon the facts...." CR 52(a)(1). CR 52(c), in particular, provides that a defeated party who has failed to appear at the hearing or trial need not be given notice prior to the court's entry of findings and conclusions. Here, because the trial court failed to take any substantive testimony, there was never an "action tried upon the facts." Rather, the trial court simply entered final orders without any testimony whatsoever, *and* without a finding the mother was in default but later erroneously indicating it was a "default situation.", in violation of CR 52 (c).

Then, based on a "default situation" the trial court entered a Final Order of Child Support with no evidence the mother had ever been served

with proposed child support worksheets, thus granting relief in excess of the pleadings filed.

The trial court *then* made findings that are not contained anywhere in the record. Specifically, it found, "Mother was sentenced to 13 years + 2 months…". CP 123. This evidence is contained nowhere in the record.

It next found the car accident caused, "serious physical injury to child who had surgeries and continues to attend counseling." CP 123. Evidence regarding the child's surgeries and counseling is contained nowhere in the record.

The court next found, "[m]other has a history of substance abuse and alcohol issues which resulted in three other children being removed from her care." This evidence is contained nowhere in the record. CP 123.

The court also found "Petitioner has mental health history which includes hearing voices." CP 123. This evidence is contained nowhere in the record.

Finally, the court found, "[m]other has had no contact since August 6, 2018." CP 123. This evidence is contained nowhere in the record.

It is unclear where the trial court obtained this information.

The trial court's failure to follow *any* prescribed rule and mode of proceeding in this case is blatant, clear, unquestionable and constitutes a gross abuse of discretion and constitutes an erroneous view of the law.

Because the trial court is obligated to consider the best interests of the child, the mother has a prima facie defense to the

father's proposed parenting plan when that plan provides for no contact whatsoever between a five year old child and his primary parent, *especially* when there is no evidence in the record to establish such a restriction is in the child's best interest.

The mother was incarcerated when she was served, was unable to physically appear for court hearings, and did not have the resources to hire counsel to appear on her behalf. As soon as the mother was able to obtain pro bono counsel, she acted to address the May 2019 Final Parenting Plan.

The father will not suffer substantial hardship if the Final Parenting Plan is vacated. The September 2019 temporary order placing Noah with him and providing the mother with weekly phone calls will resurrect if this Court were to reverse the trial court. Further, any Final Parenting Plan on the merits will address what contact the mother can have with the child in light of her incarceration status – it will not remove the child from the father's care given the mother's incarceration.

It is Noah who suffers, and is prejudiced under a court order that prohibits any contact between him and his mother, and primary parent.

At the hearing on the Motion to Vacate, the trial court avers

that the even if it did err, it was an error of law, and that can only be addressed in a direct appeal, and not a CR 60 motion. CP 171. This ruling is particularly disturbing in light of the fact the mother *never had notice of the trial, or the continued trial date*. It is unclear how the mother could have appealed an error of law contained in an order she had no way of knowing was going to be, or was, entered.

In support of its proposition, the trial court cites In re the Marriage of Tang, 57 Wn. App. 648. This reasoning is without merit as the Tang case is distinguishable from the case at bar on several basis.

First, the wife in Tang, did not submit a declaration in support of her CR 60 motion that detailed the irregularities she claimed. Id. at 653. This left the appellate court to reason that because there was no *factual* support for her motion, she was actually arguing errors of law, stating:

> The absence of factual support for Linda Tang's motion sheds light on the basic flaw in the trial court's ruling. Errors of law may not be corrected by a motion pursuant to CR 60(b) but must be raised on appeal. Burlingame v. Consolidated Mines & Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986). Since vacation of the decree was based upon no grounds other than the

> alleged errors of law set forth above, the trial court abused its discretion by granting the motion.

Id. at 653.

Second, the alleged irregularity in Tang centered around whether all property had been disclosed, and whether property was correctly characterized, or not, in a property settlement agreement. Id. at 651. Yet, all property had been previously disclosed in an initial filing *by Ms. Tang*, and both parties had warranted and affirmed all property had been disclosed to the other. Id. at 649, 652. There was no evidence in the record that there was any undisclosed property – and the settlement agreement provided a remedy in that event. Id. at 652.

In reversing the trial court's order vacating the Decree of Dissolution, the Tang court describes what type of irregularities would fall under a CR 60(b)(1) motion, virtually describing the facts currently now before the Court, and contained in the mother's declaration that were before the trial court:

> Linda Tang argues, however, that a trial court must have before it a list identifying and stating the value of the relevant properties in order to determine whether a separation contract was "unfair at the time of its execution" under RCW 26.09.070(3). Since the court that ordered the dissolution

> did not have such a list before it, she asserts that an "irregularity" under CR 60(b)(1) occurred.
>
> Irregularities which can be considered under CR 60(b)(1), however, are those relating to want of adherence to some prescribed rule or mode of proceeding. Adamec, 100 Wash.2d at 174, 667 P.2d 1085. *Cases relying on this ground typically involve procedural defects unrelated to the merits*. See 4 L. Orland, Wash.Prac., Rules Practice § 5713, at 543 (3d ed. 1983). The errors alleged here do not fall into this category.

Id. at 653 (emphasis added).

The irregularities identified by the Tang court are *precisely* the type of irregularities that occurred in this case. Accordingly, this Court should reverse the trial court, vacate the May 28, 2019 final orders, and remand for a trial on the merits.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FOLLOW STATUTORY REQUIREMENTS WHEN IT ENTERED THE FINAL PARENTING PLAN.

Decisions regarding residential placement must be made in the best interests of the children after considering the factors set forth in RCW 26.09.187 (3). In re Parentage of J.H., 112 Wn.App. 486, 492–93, 49 P.3d 154 (2002). Courts of appeal review a trial court's decision regarding the residential placement of children for an abuse of discretion. J.H., 112

Wn.App. at 492. "A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Parentage of Schroeder, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001). *Failure to consider the required factors under RCW 26.09.187 (3)(a) is an abuse of discretion*. In re Marriage of Murray, 28 Wn.App. 187, 189, 622 P.2d 1288 (1981) (emphasis added).

RCW 26.09.002 provides, in part:

> In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. *Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.*

Emphasis added.

RCW 26.09.184(1) identifies the seven objectives of a parenting plan as:

> (a) Provide for the child's physical care;
>
> (b) Maintain the child's emotional stability;
>
> (c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
>
> (d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;
>
> (e) Minimize the child's exposure to harmful parental conflict;
>
> (f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
>
> (g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

The relevant portion of RCW 26.09.191[3] provides:

> (2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct:
>
> (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;

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[3] Version in effect July 23, 2017 to July 27, 2019.

(ii) physical, sexual, or a pattern of emotional abuse of a child;

(iii) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iv) the parent has been convicted as an adult of a sex offense under…

…

(m)(i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

…

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

> (a) A parent's neglect or substantial nonperformance of parenting functions;
>
> (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
>
> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
>
> (d) The absence or substantial impairment of emotional ties between the parent and the child;
>
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
>
> (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

…

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

RCW 26.09.187(3) states:

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant

activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule;

(vii) Each parent's employment schedule and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

Here, the trial court heard no evidence that would allow it to fulfill the RCW 26.09.002 mandate that the best interests of the child *shall* be the standard by which the trial court allocates the parties' parental responsibilities, or that would allow it to analyze the factors set forth in RCW 26.09.187, or RCW 26.09.191. Therefore, it did not, and could not, have considered any of the factors contained therein, in violation of RCW 26.09.002. Pursuant to this Court's ruling in Murray, 28 Wn.App. at 189, this is an abuse of discretion that requires this Court to vacate the May 28, 2019 final orders.

Because of the above statutory mandate, and policy considerations associated therewith, cases where parenting plans are involved require the trial court to ensure the Final Parenting Plan is in fact, in the child's best interests notwithstanding the non-appearance or default of a non-moving parent. The non-appearance of a parent does not abrogate the trial court's

responsibilities under RCW 26.09.002, RCW 26.09.187 or RCW 29.09.191.

Similarly, RCW 26.09.191(m)(i) required the trial court to impose only those restrictions on the mother's parenting time that were reasonably calculated to "protect the child from physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time." Because the trial court did not take any evidence, it is unclear how it could have engaged in such analysis. It is clear from the record the trial court never considered whether the restrictions imposed were in Noah's best interests. Based on the facts that *were* before the trial court, no contact between Noah and his primary parent is *de facto* not in Noah's best interests.

In State v. DeLeon, 11 Wn.App.2d 837, 456 P.3d 405 (2020), this Court examined an analogous situation, albeit in the context of a criminal case. There, the father had pleaded guilty to three felony sex offenses. Id. at 839. At sentencing, the State asked that the father have no contact with all minors, including his biological children who were not the victims of the crime to which he pleaded guilty. Id.

The trial court granted the State's request and indicated the basis for the restriction was because of, 'the danger…to society.' Id. No further analysis was done by the trial court on the record.

The legal principal at issue in DeLeon, is analogous to the issue currently before the Court. In reaching its conclusion, the appellate court set out the applicable law:

> Trial courts may impose "crime-related prohibitions" as a condition of a sentence. RCW 9.94A.505(9). A "crime-related prohibition" prohibits "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).
>
> We review the imposition of crime-related prohibitions under the abuse of discretion standard. In re Pers. Restraint of Rainey, 168 Wash.2d 367, 374-75, 229 P.3d 686 (2010). However, "[m]ore careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).
>
> If a condition interferes with a fundamental right, it "must be reasonably necessary to accomplish the essential needs of the State and public order." Warren, 165 Wash.2d at 32, 195 P.3d 940. Such conditions "must be narrowly drawn" and "[t]here must be no reasonable alternative way to achieve the State's interest." Warren, 165 Wn.2d at 34-35, 195 P.3d 940. Trial courts must conduct this inquiry on the record. See Rainey, 168 Wash.2d at 382, 229 P.3d 686; State v. Torres, 198 Wn. App. 685, 689-91, 393 P.3d 894 (2017).
>
> A parent has a fundamental constitutional right to the care, custody, and

> companionship of their children. Warren, 165 Wash.2d at 34, 195 P.3d 940. However, a court may impose a condition affecting a fundamental right to parent if it is reasonably necessary to prevent harm to a child. State v. Howard, 182 Wn. App. 91, 101, 328 P.3d 969 (2014). " 'Prevention of harm to children is a compelling state interest, and the State does have an obligation to intervene and protect a child when a parent's actions or decisions seriously conflict with the physical or mental health of the child.' " Howard, 182 Wash. App. at 101, 328 P.3d 969 (internal quotation marks omitted) (quoting State v. Ancira, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001)).

Based on the applicable law, this Court held that when a parent's constitutional right to parent is affected by a "crime-related" prohibition, the trial court is required to consider the issue on the record, and must include an explanation as to whether the no-contact provision was reasonably necessary to achieve the compelling state interest in protecting the child from harm. Id. at 841.

Recognizing "fundamental constitutional rights are not implicated in a dissolution proceeding" and that "no case has applied a strict scrutiny standard when weighing the interests of two parents" Momb v. Ragone, 132 Wn.App. 70, 77, 130 P.3d 406 (2006), the legal framework in DeLeon, is nonetheless, similar to the analysis the trial court was required to engage in under RCW 26.09.002 and RCW 26.09.191(m)(i), whether

the mother's constitutional rights are implicated or not.

Thus, here, the trial court was required, on-the-record, to analyze the restrictions requested by the father, and whether they were reasonably calculated to protect Noah from physical, sexual or emotional abuse or harm if he had contact with the mother. In engaging in this analysis, the trial court was mandated to, "apply the civil rules of evidence, proof and procedure." RCW 26.09.191(6). This failure by the trial court to adhere to any of the applicable statutes, is an abuse of discretion that requires this Court to vacate the May 28, 2019 Final Orders.

E. CONCLUSION.

For the foregoing reasons, the mother respectfully requests this Court reverse Judge Ashcraft's denial of the mother's Motion to Vacate, and remand for a trial on the merits.

DATED: July 16, 2020

LAW OFFICE OF SOPHIA M. PALMER, PLLC

SOPHIA M. PALMER, WSBA No. 37799

CERTIFICATE OF SERVICE

I certify that I caused to be transmitted via U.S. Mail, postage prepaid, transmitted via the Appellate Court on-line portal, and/or emailed as designated below, a copy of the foregoing BRIEF OF APPELLANT on the 16th day of July, to the following parties or counsel of record at the following address:

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