

**FILED**

SEP 17 2013

Clerk  
STATE COURT  
By \_\_\_\_\_

No. 316335

**COURT OF APPEALS, DIVISION III,  
FOR THE STATE OF WASHINGTON**

---

**James MacKenzie, Respondent**

v.

**Rebecca MacKenzie, Appellant**

---

**OPENING BRIEF OF APPELLANT**

---

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Attorney for Appellant  
W. 1707 Broadway  
Spokane, WA 99201  
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ORION

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Rodriguez and the children, after the evidence showed that Mr. MacKenzie had actively subverted that reconciliation.----- Page 5

Assignment of Error #7: It was error of Commissioner Moe, on 4/26/13, to deny the Appellants the use of the evidence of the Carol Thomas report of 2/13/13, previously admitted for the 2/15/13 Petition to Modify (in which rules of evidence apply) as well as for the Motion on DV restraints, in that James MacKenzie had not sought to keep those materials out, and they became part of the admitted court record on 2/15/13. ----- Page 5

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1. Issues Pertaining to Assignment of Error#1: Page 6

*Issue #1:* Did Pro-tem Commissioner Kim err on 12/20/12 to find that the three months that had passed -- since James MacKenzie's domestic violence with a gun on 9/19/12 and the Motion for DV restraints of 12/20/12 -- made the matter not proper for emergency orders, even though the reason for the delay was that Mr. MacKenzie had threatened the children with foster care to get them to hide the fact of his 9/19/12 domestic violence -- i.e., where the delay was induced by the perpetrator of the violence, and by the perpetrator involving the children in his cover-up? (Answer, Yes. Commissioner Kim erred where the delay was induced by the perpetrator of the domestic violence and his involvement of the children; Mr. MacKenzie's misbehavior should not have prejudiced Mr. and Mrs. Rodriguez.)

2. Issues Pertaining to Assignment of Error#2: Page 7

*Issue #2:* Did the trial court err on 12/20/12 when Judge Sypolt denied a request for emergency revision because there was no transcript available for review, since, by definition, a transcript cannot be prepared in time for emergency revision? (Answer, Yes. Spokane County Local Rule LAR 0.7(e) has a provision for emergency revisions, and the rule allows for revision "without the necessity of meeting the requirements set forth in the

above sections of this rule...” which would include the requirement of a transcript, and therefore Judge Sypolt erred.)

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*Issue #3:* Did Commissioner Moe err to rule that the domestic violence with a gun of James MacKenzie in front of the children, and his involvement of the children in covering up the crime, and his subversion of the relationship of the children and Mr. Rodriguez only merited a minor modification of the parenting plan? (Answer, Yes. Commissioner Moe erred not to treat this egregious behavior more seriously, and erred not to adopt the mother’s proposed recommendations for relief.) ----- **Page 7**

*Issue #4:* Was the domestic violence restraining order that Commissioner Moe issued insufficient to the magnitude of the crime and harm of Mr. MacKenzie? (Answer, Yes. The mother’s proposed restraints should have been adopted, and a GAL appointed.) ----- **Page 7**

*Issue #5:* Were the following findings of Commissioner Moe on the transcribed record of 2/15/13 (CP: 332-37) in error? (Answer, Yes. Although Commissioner Moe did find that Mr. MacKenzie committed domestic violence, and that awareness by Commissioner Moe is appreciated; however, the following list of oral findings by the commissioner is disputed.) ----- **Page 8**

**Errors:** (a) Commissioner Moe blamed societal violence on “families like yours.” Only Mr. MacKenzie has been shown to be violent, and the blame is not equal between Appellants and Mr. MacKenzie. (b) Commissioner Moe blamed Rebecca Rodriguez saying to her “you seem to attract people that are violent.” There is no showing that Dave (JD) Rodriguez is violent, and there has never been a showing that Dave has used guns illegally. This “false equivalence” by Commissioner Moe, between the criminal acts of James MacKenzie and the legal behavior of Mr. Rodriguez is profoundly in error. (c) Commissioner Moe failed to appreciate the role of Mr. MacKenzie in creating the problems between Mr. Rodriguez and Jordan, Joseph, and Julie. ----- **Page 8**

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*Issue #6:* Did the trial court, on 3/15/13, through Judge Plese, err to fail to revise Commissioner Moe’s decision of 2/15/13? (Answer, Yes. The law

as presented to Judge Plese commands a more sweeping remedy than that ordered by Commissioner Moe.)

5. Issues Pertaining to Assignment of Error#5:

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*Issue #7:* Did the trial court, through Judge Plese, err on 4/10/13, to deny reconsideration of the denial of revision by stating that the pending hearing, then set for 4/19/13, heard on 4/26/13, addressed the identical issues as the prior hearing, when the subsequent hearing was for contempt and to vacate the orders of 12/13/11? (Answer, Yes. The motion for contempt by Mr. MacKenzie for subverting reconciliation counseling and the motion to vacate the orders of 12/13/11 for fraud were clearly distinct motions, resting on a distinct legal basis, which was noted in oral argument during the revision of 3/15/13 (CP: 545) as a separate motion yet to be brought. Judge Plese should not have conflated the motions of 2/15/13, based upon MacKenzie's domestic violence, and the 4/26/13 motions based upon the 12/13/11 orders for MacKenzie's contempt of the non-disparagement provision and to vacate for fraud, due to MacKenzie's sabotaging of reconciliation counseling.)

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*Issue #8:* Was it error for Commissioner Moe, on 4/26/13, to deny contempt against James MacKenzie, and to fail to vacate the agreed orders of 12/13/11, which had been agreed based upon the reasonable assumption of, and reasonable reliance upon, the good faith efforts of Mr. Mackenzie to facilitate reconciliation between Dave Rodriguez and the children, after the evidence showed that Mr. MacKenzie had actively subverted that reconciliation? (Answer, Yes. The active subversion of the reconciliation counseling by Mr. MacKenzie and his creation of fear of Mr. Rodriguez in the children merited a finding of contempt and basis to vacate the agreed orders of 12/13/11, based upon the Notes of Carol Thomas and the nine elements of fraud specifically pled by the Appellants.)

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*Issue #9:* Was it error of the trial court, on 4/26/13, through Commissioner Moe, to sanction the parties and counsel for bringing the 4/26/13 motion for contempt and to vacate the agreed orders of 12/13/11, and to exclude the forensic notes of counselor Carol Thomas, which were

already part of the record? (Answer, Yes. The motions were distinct and should not have been conflated, and should have been substantively addressed by the court, considering the notes of Carol Thomas, without sanction for bringing the motions, and without a sufficient basis for sanctioning a party or counsel. These motions should have been granted.)

**8. Issues Pertaining to Assignment of Error #8: Page 10**

*Issue #10:* Was it error of Judge Plese to continue to conflate the motion to vacate based upon fraud with the motion for domestic violence restraints in her letter of 5/23/13? CP: 503-04. (Answer, Yes: The requested clarification, CP: 397-402, was based upon a sound distinction between the two motions of 2/15/13, based upon domestic violence, and the two motions of 4/26/13, which were based upon MacKenzie's violation of the orders of 12/13/11.)

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## **I. INTRODUCTION**

Appellant Rebecca Rodriguez is the ex-wife of James MacKenzie, and they have three children, with whom they had been sharing 50/50 parenting. In early 2011, James MacKenzie brought a motion against *Dave (JD) Rodriguez (Rebecca's husband of many years, by whom she has two young children)*. Eventually, that action in 2011 led to Mr. Rodriguez becoming a party to this case, via agreed orders of 12/13/11, which focused on reconciliation counseling to solve whatever problems had emerged from MacKenzie inciting misunderstanding in the children.

On 9/19/12, James MacKenzie then committed an act of domestic violence with a gun against his domestic partner, Tammy Willard, in front of the three common children of Rebecca and James (Jordan, Joseph, and Julie). After this domestic violence with a gun, Mackenzie persuaded Jordan, Joseph, and Julie to keep it a secret from all counselors, teachers, et al, until Joseph divulged these facts to the counselor for the children, Carol Thomas, in mid-December, 2012, which then precipitated these court actions.

Carol Thomas chose not to report the matter to CPS, but did inform Rebecca Rodriguez, who promptly got the police reports, and then filed a Petition for RCW 26.50 Domestic Violence Restraints and a Petition to Modify the Parenting Plan on 12/20/12.

The decisions on appeal are: (1) The decision of Pro-tem Commissioner Kim to deny emergency relief on 12/20/12, as Pro-tem Commissioner Kim found the three months that had passed deprived Rebecca of her cause of action, rather than finding that the fact that the acts were hidden by MacKenzie suborning and involving the children reinforced Rebecca's cause of action. (2) Judge Sypolt denied an emergency revision on that same day, 12/20/12, and the matter was noted on 1/4/13. (3) After an agreed continuance without prejudice from 1/4/13 to 2/15/13 so that Carol Thomas could complete a forensic investigation, assigned Commissioner Moe found that James MacKenzie had committed domestic violence, but ordered minimal remedies. (4) Judge Annette Plese denied a motion to revise on 3/14/13, and (5) she denied a motion for reconsideration on 4/10/13, stating that the "identical issues" were set to be re-heard (in her view) on 4/19/13 (hearing actually held on 4/29/13). (5) After reviewing the Carol Thomas forensic report of 2/13/13, Dave (JD) and Rebecca Rodriguez brought two motions on 4/26/13: (a) motion to vacate the orders of 12/13/11 for fraud, as they had lost the benefit of the bargain from MacKenzie's aggressive subversion of the reconciliation counseling between JD and the children, as the Appellants specified when they pled the nine elements of fraud, and (b) motion for contempt since Mr. MacKenzie violated the non-disparagement provisions of the orders of

12/13/11. Contrary to the Judge Plese comment, above, that the issues on 4/26/13 were "identical," the motions on 4/26/13 had an entirely distinct basis in evidence and in legal theory. Commissioner Moe denied both motions and collectively sanctioned Mr. and Ms. Rodriguez, and Mr. Mason. (6) On 5/23/13, Judge Plese again asserted the identity of the motions of 2/15/13 and of 4/26/13 in denying a motion for clarification.

Appellants, Dave and Rebecca Rodriguez (and their attorney, Craig Mason, who is a party in regards to the joint sanction), appeal the decision of the Superior Court to treat as relatively insignificant the actions of the Respondent, James MacKenzie, in pulling a gun on his domestic partner, Tammy Willard, doing so in front of Julie, Joseph and Jordan, after which MacKenzie then involved the children in hiding his acts of domestic violence. The trial court erred in not issuing restraints on the terms proposed by the Appellants, Dave and Rebecca Rodriguez.

Dave and Rebecca Rodriguez also believe that the trial court erred to not take more seriously Mr. MacKenzie's deliberate and strategic disruption of reconciliation counseling between Dave Rodriguez and the children of Rebecca and James MacKenzie, and that the trial court erred in (a) failing to vacate prior agreed orders upon learning of this disruption, and that the trial court erred in (b) treating the motion to vacate for fraud as "identical" to the request for domestic violence restraints.

The requested relief is: (a) that the domestic violence restraints and relief proposed by Dave and Rebecca Rodriguez be adopted; (b) that adequate cause be found for a major modification, due to the domestic violence and manipulations of the children by James MacKenzie; (c) that the orders of December 13, 2011 be vacated; and that (d) sanctions against the Appellants (including counsel) be reversed. Further, that (e) the orders of 12/20/12 be reversed.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

Assignment of Error#1: The trial court erred on 12/20/12 when Pro-tem Commissioner Kim denied the Appellant's request for an ex parte restraining order against James MacKenzie, based upon the three month delay during which time James MacKenzie had obscured his crime of domestic violence, and had used the children to do so.

Assignment of Error#2: The trial court erred on 12/20/12 when Judge Sypolt denied a request for emergency revision because there was no transcript available for review, since, by definition, a transcript cannot be prepared in time for emergency revision.

Assignment of Error#3: The trial court, through Commissioner Moe, erred on 2/15/13 in only finding adequate cause for a minor revision, and in issuing an insufficient domestic violence restraining order, in that

supervised visits, a mental health evaluation, and other requested relief should have been ordered.

Assignment of Error#4: The trial court, on 3/15/13, through Judge Plese, erred to fail to revise Commissioner Moe's decision of 2/15/13.

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Assignment of Error #6: It was error of the trial court, on 4/26/13, through Commissioner Moe, to deny contempt against James MacKenzie, and to fail to vacate the agreed orders of 12/13/11, which had been agreed based upon the reasonable assumption of, and reasonable reliance upon, the good faith efforts of Mr. Mackenzie to facilitate reconciliation between Dave Rodriguez and the children, after the evidence showed that Mr. MacKenzie had actively subverted that reconciliation.

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in that James MacKenzie had not sought to keep those materials out, and they became part of the admitted court record on 2/15/13.

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## **B. Issues Pertaining to Assignments of Error**

### 1. Issues Pertaining to Assignment of Error#1:

*Issue #1:* Did Pro-tem Commissioner Kim err on 12/20/12 to find that the three months that had passed -- since James MacKenzie's domestic violence with a gun on 9/19/12 and the Motion for DV restraints of 12/20/12 -- made the matter not proper for emergency orders, even though the reason for the delay was that Mr. MacKenzie had threatened the children with foster care to get them to hide the fact of his 9/19/12 domestic violence -- i.e., where the delay was induced by the perpetrator of the violence, and by the perpetrator involving the children in his cover-up? (Answer, Yes. Commissioner Kim erred where the delay was induced by the perpetrator of the domestic violence and his involvement of the children; Mr. MacKenzie's misbehavior should not have prejudiced Mr. and Mrs. Rodriguez.)

## 2. Issues Pertaining to Assignment of Error#2:

*Issue #2:* Did the trial court err on 12/20/12 when Judge Sypolt denied a request for emergency revision because there was no transcript available for review, since, by definition, a transcript cannot be prepared in time for emergency revision? (Answer, Yes. Spokane County Local Rule LAR 0.7(e) has a provision for emergency revisions, and the rule allows for revision “without the necessity of meeting the requirements set forth in the above sections of this rule...” which would include the requirement of a transcript, and therefore Judge Sypolt erred.)

## 3 Issues Pertaining to Assignment of Error#3:

*Issue #3:* Did Commissioner Moe err to rule that the domestic violence with a gun of James MacKenzie in front of the children, and his involvement of the children in covering up the crime, and his subversion of the relationship of the children and Mr. Rodriguez only merited a minor modification of the parenting plan? (Answer, Yes. Commissioner Moe erred not to treat this egregious behavior more seriously, and erred not to adopt the mother’s proposed recommendations for relief.)

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*Issue #5:* Were the following findings of Commissioner Moe on the transcribed record of 2/15/13 (CP: 332-37) in error? (Answer, Yes. Although Commissioner Moe did find that Mr. MacKenzie committed domestic violence, and that awareness by Commissioner Moe is appreciated; however, the following list of oral findings by the commissioner is disputed.)

**Errors:** (a) Commissioner Moe blamed societal violence on “families like yours.” Only Mr. MacKenzie has been shown to be violent, and the blame is not equal between Appellants and Mr. MacKenzie. (b) Commissioner Moe blamed Rebecca Rodriguez saying to her “you seem to attract people that are violent.” There is no showing that Dave (JD) Rodriguez is violent, and there has never been a showing that Dave has used guns illegally. This “false equivalence” by Commissioner Moe, between the criminal acts of James MacKenzie and the legal behavior of Mr. Rodriguez is profoundly in error. (c) Commissioner Moe failed to appreciate the role of Mr. MacKenzie in creating the problems between Mr. Rodriguez and Jordan, Joseph, and Julie.

#### 4. Issues Pertaining to Assignment of Error#4:

*Issue #6:* Did the trial court, on 3/15/13, through Judge Plese, err to fail to revise Commissioner Moe’s decision of 2/15/13? (Answer, Yes. The law as presented to Judge Plese commands a more sweeping remedy than that

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*Issue #7:* Did the trial court, through Judge Plese, err on 4/10/13, to deny reconsideration of the denial of revision by stating that the pending hearing, then set for 4/19/13, heard on 4/26/13, addressed the identical issues as the prior hearing, when the subsequent hearing was for contempt and to vacate the orders of 12/13/11? (Answer, Yes. The motion for contempt by Mr. MacKenzie for subverting reconciliation counseling and the motion to vacate the orders of 12/13/11 for fraud were clearly distinct motions, resting on a distinct legal basis, which was noted in oral argument during the revision of 3/15/13 (CP: 545) as a separate motion yet to be brought. Judge Plese should not have conflated the motions of 2/15/13, based upon MacKenzie's domestic violence, and the 4/26/13 motions based upon the 12/13/11 orders for MacKenzie's contempt of the non-disparagement provision and to vacate for fraud, due to MacKenzie's sabotaging of reconciliation counseling.)

6. Issues Pertaining to Assignment of Error #6:

*Issue #8:* Was it error for Commissioner Moe, on 4/26/13, to deny contempt against James MacKenzie, and to fail to vacate the agreed orders of 12/13/11, which had been agreed based upon the reasonable assumption of, and reasonable reliance upon, the good faith efforts of Mr. Mackenzie

to facilitate reconciliation between Dave Rodriguez and the children, after the evidence showed that Mr. MacKenzie had actively subverted that reconciliation? (Answer, Yes. The active subversion of the reconciliation counseling by Mr. MacKenzie and his creation of fear of Mr. Rodriguez in the children merited a finding of contempt and basis to vacate the agreed orders of 12/13/11, based upon the Notes of Carol Thomas and the nine elements of fraud specifically pled by the Appellants.)

7. Issues Pertaining to Assignment of Error #7:

*Issue #9:* Was it error of the trial court, on 4/26/13, through Commissioner Moe, to sanction the parties and counsel for bringing the 4/26/13 motion for contempt and to vacate the agreed orders of 12/13/11, and to exclude the forensic notes of counselor Carol Thomas, which were already part of the record? (Answer, Yes. The motions were distinct and should not have been conflated, and should have been substantively addressed by the court, considering the notes of Carol Thomas, without sanction for bringing the motions, and without a sufficient basis for sanctioning a party or counsel. These motions should have been granted.)

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*Issue #10:* Was it error of Judge Plese to continue to conflate the motion to vacate based upon fraud with the motion for domestic violence restraints in her letter of 5/23/13? CP: 503-04. (Answer, Yes: The

requested clarification, CP: 397-402, was based upon a sound distinction between the two motions of 2/15/13, based upon domestic violence, and the two motions of 4/26/13, which were based upon MacKenzie's violation of the orders of 12/13/11.)

### **III. STATEMENT OF THE CASE**

James MacKenzie and Rebecca Rodriguez divorced in 2004, and by early 2011 had a 50/50 parenting plan with their children, Julie (now 16), Jordan (now 10), and Joseph (now 11). Rebecca subsequently married Juan David (JD) Rodriguez and has two young daughters with him.

In early 2011, Mr. James MacKenzie filed a request for an ex parte restraining order against JD (Dave) Rodriguez. CP: 49-53. Dave responded that James manipulated the children to aggress against him and Rebecca, and that James would ridicule JD's young children with racial epithets and would claim that those young children were not fathered by Dave. CP: 55-58. The notes of Carol Thomas subsequently confirmed that James would call Dave and Rebecca's kids "little niggers," "spics," and "beaner babies." CP: 220-250, e.g., 228. The notes of Carol Thomas also subsequently confirmed that James MacKenzie would tell the children that Rebecca and Dave's children were fathered by some other man. CP: 220-250, e.g., 230.

Rebecca also responded that James had previously assaulted her and

pointed a gun at Joseph in 2006. CP: 60-81, esp. 60-61. Rebecca also recounted how Mr. MacKenzie had been trying to use their children to aggress against her and disrupt her relationship with their children. CP: 60-81, esp. 61-63.

In the interests of amity, however, an agreed order on family therapy was entered on 4/20/11. CP: 102. And agreed orders with openers to return to court as reconciliation progressed were entered on 12/13/11. CP: 550-62. (These are the orders the Appellants sought to vacate on 4/26/13.)

Unknown to the Appellants until mid-December of 2012, on or about 9/19/12, James MacKenzie pulled a gun on his domestic partner, Tammy Willard, in front of Julie, Joseph and Jordan, and in front of Tammy Willard's 13 year-old child, Aleah. CP: 581-635. The threats during this domestic violence included James saying to Tammy, "You're not leaving and if you do I will pull out my 16 gauge and shoot you going up the stairs." CP: 588. James cocked the rifle menacingly after pulling it on Tammy. CP: 589, and see CP: 605-606. A two-year civil DV protection order was issued against James MacKenzie. CP: 599-604. (Finding of domestic violence was made at CP: 599, Section E.) He was ordered to surrender all firearms. CP: 603-4. The City of Spokane filed a charge of domestic violence, and a gun violation, against Mr. MacKenzie. CP: 618-19. The City dropped the gun violation, based on statutory

exceptions. CP: 634-41.

A permanent (expires 10/31/2099) criminal no-contact order against James MacKenzie also was issued in the criminal case. CP: 631. The City proceeded with the prosecution on domestic violence, relying upon the facts of CP: 621-22. These facts from Tammy Willard included James MacKenzie threatening her with the shotgun, going to get the shotgun, and then "racking" the shotgun and approaching Tammy Willard. CP: 621.

Aleah's facts included going into the home after hearing the gun rack, seeing her mother threatened with the gun, and seeing James MacKenzie shove Tammy toward the back door, and seeing her mother fall. CP: 622.

Officer Wilson then testified that James MacKenzie would not answer the door, despite her use of her police public address system and siren. CP: 622. James MacKenzie had taken the children into the basement. CP: 280 which is Joe's statement to counselor Carol Thomas, "We were all downstairs together on the floor. My mind was going crazy. I was scared."

Mackenzie told the kids not to talk to anyone about this. CP: 280-281. The only rational inference is that while Officer Wilson was trying to contact MacKenzie, knowing that the police were coming he took the kids downstairs to avoid the police and to ask the kids not to talk to anyone about the domestic violence. MacKenzie then appears to have produced

fear in the children that they would be sent to a foster home. CP: 281.

Then James manipulated the children into agreeing to keep it all a secret.

CP: 281.

James MacKenzie stipulated to the truth of the police reports in his Stipulated Order of Continuance on the Domestic Violence Assault charge. CP: 380.

The 12/21/12 notes of the children's counselor, Carol Thomas, detail the gun incident. CP: 279-81. (Subsequently, the Notes of Carol Thomas, CP: 278-296, were produced by agreed order that Carol Thomas would undertake a forensic role, in addition to her years of counseling the children. CP: 152-54.)

MacKenzie's pressures on the children to hide his secret appeared to succeed, because not until December 5, 2012, did Joseph MacKenzie divulge to Carol Thomas the domestic violence committed by James MacKenzie on 9/19/12. CP: 111-13 (Letter of Carol Thomas of 12/21/12).

The other children then got angry at Joseph for revealing the domestic violence of James MacKenzie. *See* CP: 281, statement of Jordan MacKenzie, "Then Joe told mom and dad and Julie and I got mad at him."

The 12/21/12 letter of (and later the notes of) Carol Thomas also revealed that James MacKenzie was radically subverting the reconciliation therapy between Dave and the kids, as the Carol Thomas letter reads:

“[Joseph] expressed distress regarding his father’s feelings and negative comments about his stepfather. ‘I want to get back to hanging out with both sides of my family without anyone being mad, like dad. He keeps saying J.D. will kill us.’” CP: 112. This topic will be revisited, *infra*.

As soon as practicable after Rebecca learned of the domestic violence of James pulling a gun on Tammy Willard, his domestic partner, and chasing her out of the house, racking the gun, in front of the children, Rebecca brought a Motion for Temporary Orders and D.V. Restraints CP: 107-08 and CP: 651-657. The hearing had to await the procurement of the police reports, and Tammy Willard's statements in her D.V. restraints case. CP: 581-635. The motion was set for 12/20/12. Rebecca's motion was supported by her Declaration of 12/20/12, and which requested supervised visits only by James MacKenzie until a mental health evaluation had been completed, until a Guardian Ad Litem could report, and seeking other relief. CP: 642-50.

Commissioner Kim denied the Ex Party DV Restraining Order due to the time that had passed between the domestic violence of 9/19/13, even though the passage of time was due to MacKenzie suborning the silence of the children, and even though Rebecca had acted as quickly as possible. CP: 658 (order) and CP: 142-150 (transcript).

An emergency revision was denied by Judge Sypolt due to lack of

transcript. CP: 105. A request for emergency reconsideration, CP: 114-27, received no response. Since emergency relief was not granted, the parties entered a continuance, without prejudice to Rebecca and JD, to allow Carol Thomas to produce a forensic report. CP: 152-54. The Carol Thomas Letter of 12/21/12, CP: 112-13, was then supplemented by the notes and report of 2/13/13. CP: 278-96.

The hearing on DV restraints and the Petition to modify was heard on 2/15/13, and one of the orders on appeal was entered on 2/15/13. CP: 307-08. The transcript of 2/15/13 is at CP: 320-338.

At the 2/15/13 hearing, Commissioner Moe admitted that he had not read everything. CP: 321. Rebecca argued that the orders of 12/13/11 that kept her new husband (JD/Dave), with whom she had two young children, away from her three children with James MacKenzie were meant to be very temporary while misunderstandings were worked out in counseling. Instead, the submitted notes of Carol Thomas show that MacKenzie was constantly telling the kids that JD would kill them, and that Rebecca's small children were not fathered by JD, and other extremely destructive acts, all subversive of the reconciliation counseling, and that the agreed orders should not preclude the placement of the children with Rebecca, in response to the discovery of DV with a gun, and in response to the discovery of MacKenzie's deep involvement of the children in hiding his

crime. CP: 322-25.

Rebecca also argued that the domestic violence of James MacKenzie, and his deep involvement of their children in the divorce and in the cover-up of the violence should reduce MacKenzie's visits to supervised visits only, and that a Guardian ad Litem should be appointed. Id.

Mr. MacKenzie sought to make light of the DV with a gun allegations as a minor event. CP: 326. And MacKenzie denied the very police reports (CP: 326) whose truth he was about to stipulate to as part of the 4/16/13 SOC in his criminal trial. CP: 380-84 (titled "Stipulation to Police Reports and Order of Continuance, SOC, for 24 Months").

Commissioner Moe explicitly found that James MacKenzie had committed domestic violence in front of the children. CP: 333.

Commissioner Moe then made a hurtful statement without any evidence to support it, damning Rebecca Rodriguez: "ma'm I don't know how you seem to attract people that are violent and I don't know what your background is, but it takes its toll on kids big time." CP: 333. There is no evidence that JD Rodriguez has ever committed any illegal act with a gun. The Commissioner's comment was gratuitous and prejudicial.

A DV protection order was ordered, but only to the extent that James MacKenzie not commit DV against, or in front of, the children. Id.

No GAL was appointed. Id. And a major modification was not ordered, but a minor modification was. CP: 333-34 (transcript) and CP: 310-12 (order). Other restrictions were ordered placed against James MacKenzie. CP: 335-36 (transcript) and CP: 307-08 (order).

A motion to revise was filed by Rebecca and JD on the following issues:

- 1) DOMESTIC VIOLENCE WITH A GUN: Revision is sought for the failure of the Commissioner to conclude that James MacKenzie's Domestic Violence with a Gun warranted a finding of adequate cause to open discovery and set trial for a major modification, and to appoint a GAL, implement all of Carol Thomas's recommendations (except for #7), and to adopt the mother's proposed parenting plan and to adopt only supervised visits for the father. The commissioner's finding that the use of a gun in front of all three children was domestic violence is not to be revised, but regarding the implications of that finding are revised. This finding was based upon the 2/5/13 Report of Carol Thomas, the Notes of Carol Thomas of 3/3/11 through 1/2/13, the 12/21/20 letter of Carol Thomas, the Criminal File for the DV of 9/19/12 of James MacKenzie against his Domestic Partner, Tammy Willard, the DV Restraint file of Tammy Willard v. James MacKenzie, and the Declaration in Support of Restraints by Rebecca Rodriguez and her Reply.
- 2) SUBVERSION OF RECONCILIATION COUNSELING BY JAMES MACKENZIE: Revision is sought for the failure of the Commissioner to conclude that the all-out subversion of the reconciliation counseling by James MacKenzie should lead to (a) adequate cause and (b) supervised visitation, only, for James MacKenzie. This subversion of Reconciliation Counseling was shown dramatically in the Carol Thomas Notes of 3/3/11 through 1/2/13), and in the Carol Thomas Letter of 12/21/12, and the report of Carol Thomas of 2/5/13, and the Declarations of Rebecca Rodriguez.
- 3) HARM TO THE CHILDREN: Revision is sought for failure of the Commssioner to take seriously the harm to the children of

the DV of James MacKenzie in conjunction with MacKenzie's subversion of the reconciliation process, as MacKenzie often told the children that JD Rodriguez (Rebecca's husband) would kill them. The racism and abuse of the children by James MacKenzie combines with these other harms, listed above, such that a Revision should be made and adequate cause found and a GAL appointed. Rebecca and JD have followed court orders in good faith, and their good behavior, versus the dangerous, damaging, and disruptive behavior of James MacKenzie should lead to a revision, and the granting of the relief sought by Rebecca Rodriguez.

4) FAILURE TO DISTINGUISH LEGAL AND ILLEGAL ACTS: The Commissioner should be revised for finding that the legal carrying of a weapon by JD Rodriguez in 2006 or 2008 was somehow (a) relevant, or (b) equivalent, to James MacKenzie's illegal use of a weapon to frighten and threaten his domestic partner in front of the children. JD carrying a weapon was (a) in the past, and (b) was done within legal and constitutional bounds, while James MacKenzie is facing criminal sanction for his use of the weapon in an assault. The Commissioner's gratuitous insult of Rebecca Rodriguez -- as can be seen in the transcript -- was not well-grounded in fact or law and should be revised. To the extent the Commissioner failed to appreciate the egregious behavior of James MacKenzie and to the extent the Commissioner seemed to treat the behavior of Rebecca Rodriguez as "equivalent" to the behavior of James MacKenzie, revision is sought.

5) Generally, the failure of the Commissioner to take seriously the pattern of egregious behavior shown by James MacKenzie, and the failure to take seriously the short-run and long-run harm that MacKenzie is obviously inflicting upon his children. MacKenzie's sabotage of the children's relationship with JD, as well as his recent abuse and alienating behaviors deserve a greater response from the court. Revision is requested.

6) The Commissioner's finding that Domestic Violence definitely was committed by James MacKenzie because of the use of a gun to commit assault against a domestic partner is specifically not revised, and the finding that a domestic violence order should issue is specifically not revised, but the remedy for that act of domestic violence that was found is revised in request of a stronger response against James MacKenzie and in protection of

the children and of their relationship with Rebecca and JD.

CP: 316-18.

The Rodriguez request for revision was denied on 3/14/13. CP: 347 (order) and CP: 522-49 (transcript). A motion for reconsideration was filed on 3/22/13. CP: 351-54. This was denied on 4/10/13. CP: 379 by letter ruling. The 4/10/13 letter of Judge Plese includes as its basis that "there is a show cause hearing set on April 19, 2013, with almost identical issues being raised that had previously been heard twice by this Court."

However, the matters set for 4/19/13 were entirely distinct issues, based upon the orders of 12/13/11, and were a motion for contempt of non-disparagement, and a motion to vacate for fraud, as Dave and Rebecca had been denied the benefit of their bargain when MacKenzie set out to destroy any chance for reconciliation counseling to succeed. CP: 349-74.

Dave and Rebecca had not learned of Mr. MacKenzie's aggressive subversion of the reconciliation counseling until the Carol Thomas notes were produced. Upon receiving them on 2/13/13, Rebecca and JD moved to hold James MacKenzie in contempt for violating the non-disparagement provisions of those orders, for subverting the reconciliation counseling, and for having not, to that date, signed the DV order that was ordered by Commissioner Moe on 2/15/13 five weeks prior to filing the contempt. CP: 349-50. And MacKenzie only offered his signature just before the

hearing of 4/26/13 (over 9 weeks after Commissioner Moe had ordered it).

Rebecca and JD also moved to vacate the orders of 12/13/11 on the basis of MacKenzie's fraud in subverting the reconciliation counseling. CP: 368-374 (includes declarations of both Appellants in the motion, each specifically pleading the nine elements of fraud). And see CP: 357-59 (Supplemental Declaration of JD on Motion to Vacate) and CP:360-67 (Supplemental Declaration of Rebecca on Motion to Vacate).

The show cause on contempt and hearing on the motion to vacate was set for 4/19/13. CP: 355-56 & 375-76. By agreed order the matter was continued to 4/26/13 to allow Commissioner Moe more time to read the file. CP: 385.

The Notes of Carol Thomas presented great detail of how James MacKenzie would repeatedly tell the children that it was "their funeral" if they reconciled with JD, and that JD would kill them. E.g. CP: 282, and CP: 112 (Letter of Carol Thomas dated 12/21/12). MacKenzie actively questioned the children about therapy. For example, see the Carol Thomas note of 1/20/12 (a month after the agreed orders of 12/13/11 were entered) at CP: 291, which states:

Joe asked for time alone with his mother and the therapist. He expressed his desire to meet with JD in family therapy. He stated he did not want anyone to ask him about the family therapy sessions, including his sisters and his father. "Don't tell Jordan what we talk about. After we're here, dad keeps asking us what

we talked about until Jordan says. Do don't tell Jordan anything cause she always tells dad."

That Carol Thomas note of that same date shows that MacKenzie had been trying to persuade Jordan that her mother was often lying. Id.

On the Carol Thomas note of 2/9/12, at CP: 292, Joe asks to start having overnights with his mother and JD, and Joe reveals that MacKenzie accuses the kids of "throwing him under the bus," and that MacKenzie shows them the therapy bills to make them feel guilty. And again, Joe must ask Carol not to tell Jordan, or MacKenzie will learn of Joe's views. CP: 292, note of 2/9/12.

Given that the original agreed orders were based upon the children misunderstanding comments JD had made about Mr. MacKenzie, and given that the agreed orders of 12/13/11 were to be a bridge to post-reconciliation return to the status quo, Dave and Rebecca believed that they had a strong basis for their contempt motion and for their motion to vacate under CR 60(b)(4). CP: 349-74.

The contempt motion was denied, and the motion to vacate was denied, and the Appellants (including counsel) were collectively sanctioned \$1250.00 for bringing the motion. CP: 489-90 (order) and CP: 506-21 (transcript).

As was noted, above, Judge Plese's 4/10/13 denial of reconsideration

on revision had been based, in part, upon the fact of the pending hearing of 4/19/13 (heard on 4/26/13) being "identical." CP: 405. The Appellants then moved for a clarification of the fact that (1) a motion for contempt and a motion for DV protection, filed subsequent to, and based upon, the Carol Thomas notes of 2/13/13, were motions distinct from (2) the DV protection order and Petition to Modify the Parenting Plan that were filed before the notes of 2/13/13 were available. CP: 397-402. Judge Plese then insisted upon the equivalency of the motions in denying the request to clarify/reconsider. CP: 503-504.

This appeal followed.

#### **IV. SUMMARY OF THE ARGUMENT**

The Appellants argue that the 4/26/13 motions for contempt and the motion to vacate were independent actions, based upon the 12/13/11 orders, and based upon the subversion of reconciliation by MacKenzie and upon the disparagement of JD and Rebecca by MacKenzie, found in the Carol Thomas notes of 2/13/13.

These motions are distinct from 2/15/13 relief sought for the domestic violence committed by James MacKenzie on 9/19/12, to which was related his deep involvement of Julie, Joseph and Jordan in keeping his crime a secret from others, including secret from the children's counselor.

Therefore, the sanctions of the Appellants and counsel are inappropriate, and the motions of the Appellants were justified and merit relief.

The Appellants, Dave and Rebecca Rodriguez, believe that such serious domestic violence in front of the children merit stronger sanctions against MacKenzie in the hearing of 2/15/13, including the ordering of supervised visits, a finding of adequate cause for a major modification, and the appointment of a Guardian ad Litem.

## **V. ARGUMENT**

The misbehavior of James MacKenzie is phenomenal. MacKenzie has worked diligently to interrogate the children, and to involve them deeply in defending him and in attacking and alienating Mr. Dave (JD) Rodriguez from the children. Mr. MacKenzie then committed domestic violence with a gun, involved the children in hiding these facts, and he has recruited them into defending him. E.g., CP: 224. He has also abused the children, including while under the influence of alcohol. Id.

### **A. Motion to Vacate for Fraud**

The standard of review is abuse of discretion. A trial court's denial of a motion to vacate is reviewed for an abuse of discretion. *Summers v. Department of Revenue for State of Wash.* (2001) 104 Wash.App. 87, 14 P.3d 902, review denied 144 Wash.2d 1004, 29 P.3d 718. Errors of law

constitute an abuse of discretion. *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 159, 147 P.3d 1305 (2006).

The commissioner made an error of law to exclude the notes of Carol Thomas in the motion to vacate on 4/26/13. CP: 517. All evidentiary objections must be timely and specific. ER 103(1). The Notes of Carol Thomas were admitted on 2/15/13 for both the purposes of the DV restraint hearing (in which ER 1102 suspends the rules of evidence) and for purposes of hearing the Petition to Modify the Parenting Plan (in which the rules of evidence do apply). CP; 320-338. There was no limitation on the admission or use of the Notes of Carol Thomas in the hearing of 2/25/13, and they became part of the court record upon which the Appellants could rely. It was error to retroactively deny the admission of these notes, and then deny the Motion to Vacate and sanction the Appellants based upon this retroactive exclusion of evidence.

The Motion to Vacate for Fraud specifically pled the nine elements of fraud, and the declarations of JD and Rebecca embedded in that motion declared the nine elements of fraud. CP: 368-74. For a listing of the nine elements of fraud, see e.g., *Stiley v. Block*, 130 Wash.2d 486, 505, 925 P.2d 194 (1996). And the Appellants showed their reasonable reliance upon the representations by MacKenzie that he would support (certainly not actively subvert) the reconciliation counseling between JD and the

children. Additionally, the orders of 12/13/11 would be unintelligible without the presumption of good faith.

Remand for re-hearing, or summary reversal, is requested.

**B. Motion for Contempt.**

The exclusion of the notes also then precluded the contempt for Mr. MacKenzie subverting the reconciliation counseling and for disparaging Rebecca and JD to the children. The same argument, above, is submitted in this point. There was no timely objection or limitation of the use of the Notes of Carol Thomas in the hearing of 2/15/13, and so the Notes of Carol Thomas became part of the evidentiary record, without any limitation. In addition to the notes coming into the record without limitation on 2/15/13, they also were stipulated into the record by agreement in the order of 1/4/13. CP:152-53.

Based upon the Notes of Carol Thomas, Mr. James MacKenzie clearly was in contempt of court. See, e.g., *In re Marriage of Farr*, 87 Wn.App. 177, 180-84, 940 P.2d 679 (1997) (father held in contempt for working to "derail" the parenting plan), review denied, *Marriage of Farrq*, 134 Wash.2d 1014, 958 P.2d 316 (1998).

**C. Sanctions: Trial Court Commissioner Abused His Discretion**

An order on sanctions is reviewed for an abuse of discretion. "A trial court abuses its discretion when its decision or order is manifestly

unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Id.*; *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Issues of law are reviewed de novo. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

In reversing CR 11 sanctions as an abuse of discretion, the *Dutch Village* court cited the long-standing principle that CR 11 sanctions should not "chill" representation. *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011), citing *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 208, 211 P.3d 430 (2009).

The most thorough and classic case for exploring sanctions is *Bryant v. Joseph Tree, Inc*, which laid out in detail that a sanction should not issue unless the court makes an explicit finding that the pleading was (a) not well-grounded in fact, and (b) that the attorney failed to conduct a reasonable investigation. See below for details (emphasis added):

The petitioners first argue that the Court of Appeals erred in determining that a complaint may not be the subject of CR 11 sanctions without a finding that the complaint lacked a factual or legal basis. The petitioners maintain that CR 11 sanctions may be imposed against an attorney <sup>[2]</sup> regardless of whether or not the attorney's complaint has a factual and legal basis. The text of CR 11 does not explicitly require a finding that a pleading lack a factual or legal basis Before the court may impose CR 11

sanctions. We must therefore look to the purpose behind CR 11 to determine if such a finding is required.

The present CR 11 was modeled after and is substantially similar to the present Federal Rule of Civil Procedure 11 (Rule 11). See *Miller v. Badgley*, 51 Wash.App. 285, 299, 753 P.2d 530, review denied, 111 Wash.2d 1007 (1988). We may thus look to federal decisions interpreting Rule 11 for [219] guidance in construing CR 11. *In re Lasky*, 54 Wash.App. 841, 851, 776 P.2d 695 (1989); see also *American Discount Corp. v. Saratoga West, Inc.*, 81 Wash.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed.R.Civ.P. 24).

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, --- U.S. ---, ---, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash.Prac., Rules Practice § 5141 (3d ed. Supp.1991). CR 11 requires attorneys to "stop, think and investigate more carefully Before serving and filing papers." See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv.L.Rev. 1013, 1014 (1988).

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

*Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir.1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.

Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the [220] extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to [829 P.2d 1105] deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined that a complaint must lack a factual or legal basis Before it can become the proper subject of CR 11 sanctions.

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. See *Townsend* at 1362 (a filing may be subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry). The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash.App. 106, 111, 780 P.2d 853 (1989).

The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Miller*, 51 Wash.App. at 299-300, 753 P.2d 530. CR 11 imposes a standard of "reasonableness under the circumstances". Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 198; see also *Miller* at 301, 753 P.2d 530. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *Spokane & Inland Empire Blood Bank*, 55 Wash.App. at 111, 780 P.2d 853 (quoting *Cabell v.*

*Petty*, 810 F.2d 463, 466 (4th Cir.1987)). In making this determination, the court may consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether [221] a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

*Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-21, 829 P.2d 1099 (1992).

**Applying *Bryant v. Joseph Tree*:** There is no proper legal or factual basis to sanction Dave and Rebecca, or Mr. Mason. This abuse of discretion should be reversed. *See also, Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) (Trial courts should only impose CR 11 sanctions if an attorney makes a baseless filing and "it is patently clear that [the] claim has absolutely no chance of success"). A retroactive exclusion of previously-admitted evidence (the Notes of Carol Thomas) is itself legal error by the commissioner, and it certainly could not have been anticipated by the Appellants that evidence admitted into the record for the Petition to Modify on 2/15/13, would suddenly be excluded.

As was noted, above, in the 2/15/13 hearing, the commissioner conflated, and treated as equivalent, Dave Rodriguez's legal gun ownership, without any illegal behavior on Dave's part, with James MacKenzie's illegal domestic violence with a gun. CP: 333. It was just

unreasonable for the commissioner to treat the legal, law-abiding, exercise of a constitutional right by J.D., in his ownership of guns, as being somehow equivalent to MacKenzie's illegal, dangerous, and abusive gun-related misbehavior.

There appeared to be prejudice against Mrs. Rodriguez when Commissioner Moe said in the 4/26/13 hearing (emphasis added), "I think it's pretty clear dad had the children most of 2011, maybe all of 2011, because mom's boyfriend frightened them, scared them. And that was the issue and it – to me it looked like mom chose the boyfriend over the boy or the kids." CP: 518. Once again, Rebecca had to suffer a denigrating criticism that was contradicted by the record.

In the transcript of the 2/15/13 hearing, Commissioner Moe had acknowledged that Rebecca and Dave were married and had two small children. Now, on 4/26/13, the commissioner was denigrating Rebecca as choosing a "boyfriend" over her children, as if the two small children she and Dave have had did not exist and as if JD was not her husband.

Mr. Mason reminded the commissioner, "That's the husband." CP: 518 (emphasis added).

The commissioner immediately proceeded, very hurtfully: "Okay. Whatever it was, they entered a plan that was basically the status quo and had been for a number of months and now she's unhappy with it.

She can't have her boyfriend and her kids too. That's the bottom line."

CP: 518 (emphasis added). The commissioner continued to call JD Rebecca's "boyfriend" as if the facts of eight years of marriage and two small children did not exist. CP: 519.

Mr. Mason was not allowed to discuss Mr. MacKenzie's violation of his criminal restraints. CP: 516. And see CP: 447-49. And other than Mr. Mason interjecting "That's the husband," he was allowed no opportunity to make any additional comment. CP: 517-20.

This hearing of 4/26/13 was one in which the commissioner made errors of law, and abused his discretion. Reversal and remand, or summary determination, is requested on the motion to vacate and on the motion on contempt. Reversal of the sanction is requested.

**D. The Motions of 2/15/13 and of 4/26/13 Were Distinct**

The trial court (both commissioner and judge) committed a clear legal error to fail to distinguish (1) the motions of 2/15/13, based upon MacKenzie's domestic violence with a gun, for DV restraints [granted] and for a Petition to Modify the Parenting Plan [granted in part] with (2) the 4/26/13 Motion on Contempt and Motion to Vacate, based upon the orders of 12/13/11 [both denied and sanctioned after retroactive exclusion of previously admitted evidence].

The Motion on Contempt was based upon the non-disparagement provisions of the orders of 12/13/11. CP: 556. The Parenting Plan, to which JD was made a party, had non-disparagement provisions at CP: 556.

The Notes of Carol Thomas document egregious disparagement by MacKenzie, and it is contemptuous under the law. See, e.g., *In re Marriage of Farr*, 87 Wn.App. 177, 180-84, 940 P.2d 679 (1997) (father held in contempt for working to "derail" the parenting plan), review denied, *Marriage of Farrq*, 134 Wash.2d 1014, 958 P.2d 316 (1998).

This 4/26/13 Motion for Contempt, based upon the 12/13/11 order, is clearly distinct from the 2/15/13 DV Protection Order Motion and from the Petition to Modify of 2/15/13. Denial of the contempt, and a sanction for bringing the contempt motion was legal error, and it was legal error for Judge Plese to treat the motions as "identical."

Further, the commissioner's construction of the facts was unreasonable, and it was prejudicial to the Appellants. *In re Marriage of Davisson*, 131 Wn.App. 220, 224, 126 P.3d 76 (2006). The trial court abuses its discretion if its decision was based on untenable grounds or untenable reasons. *Id.*

#### **E. Domestic Violence Remedies of 2/15/13**

On 2/15/13, the commissioner found that James MacKenzie had committed domestic violence on 9/19/13 under RCW 26.50. That finding

is not under appeal. The problem for the appeal is the weakness of the remedy.

In the *Stewart* case, the children witnessed the assault, and that was deemed a sufficient basis for no-contact between the father [Wilson], and his children:

There is no allegation that Wilson assaulted his children. But the children witnessed Wilson's assaults on Nichole, and were afraid for her. For example, R.S. attempted to call 911 during one assault, and when Wilson invaded Nichole's house "both children were terrified, begging [Wilson] to stop and just leave."<sup>FN11</sup> In short, there was ample evidence that Wilson caused his children to fear he would assault Nichole. Such fear is indeed psychological harm, as the trial \*\*29 court termed it. It is also domestic violence, and is a statutory basis for an order of protection.

*In re Marriage of Stewart*, 133 Wash.App. 545, 551, 137 P.3d 25 (2006).

In addition to the gun violence of James MacKenzie, the Notes of Carol Thomas, admitted without limitation on 2/15/13, showed (a) that Mr. MacKenzie continued to get drunk and behave abusively toward the children, especially Joseph, as part of a long-running pattern of alcohol problems, and (b) that the Mr. MacKenzie continued to abusively create conflict between the children and the Appellants. See, RCW 26.09.191, which includes the following:

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in

any of the following conduct... (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) ...

(2)(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 26.50.010(1)

(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:

(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;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

.... (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

Based upon the foregoing, the response of the court on 2/15/13 should have been much stronger, with an immediate suspension of any unsupervised visits, and then with strong restrictions to prevent the abuse, the violence, and the abusive use of conflict that Mr. MacKenzie has been thoroughly documented as engaging in.

Stronger short-run remedies should have been ordered by the court, and a major modification should have been ordered under RCW 26.09.260(2) which includes the following:

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

Of all the forms of domestic violence, wielding a shotgun, and racking it threateningly, to chase and then to push someone out of the home, in front of the children, must be the most egregious violence kids can suffer, short of MacKenzie actually firing the gun. The court's remedies of 2/15/13 are insufficient to the harms Mr. MacKenzie committed against the children. The trial court abused its discretion in taking gun violence so lightly. As was recently declared in *State v.*

*Williams*:

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971); *see State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (“A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices.” (citations omitted) (internal quotation marks omitted)). We interpret a statute de novo. *State v. Bright*, 129 Wash.2d 257, 265, 916 P.2d 922 (1996). In doing so, we “ascertain and carry out” our

legislature's intent. *State v. Neher*, 112 Wash.2d 347, 350, 771 P.2d 330 (1989).

*State v. Williams*, --- P.3d ----, 2013 WL 4176076, Wash.App. Div. 3, (August 15, 2013).

The trial court's laxity about domestic violence with a gun, especially in the context of the abusive use of conflict by MacKenzie, is "manifestly unreasonable," and it is a decision "no reasonable person would take," and the decision is unclear on its legal standard, leading to a result "outside the range of acceptable choices."

The Appellants ask this court to either impose more suitable remedies, or to remand with instructions. Greater restrictions should be imposed on Mr. MacKenzie, and a major modification should be granted to fully explore the parenting plan at trial, and a GAL should be ordered.

#### **F. Decisions of 12/20/12**

##### **1. Should MacKenzie Benefit from Using the Children to Hide His Crime, or Does the "Discovery Rule" Apply?**

On 12/20/12, Pro-tem Commissioner Kim denied Rebecca Rodriguez's request for emergency DV restraints, even though she had promptly filed her motion after discovering the relevant facts because of the three months that had passed between MacKenzie's domestic violence with a gun on 9/19/12 and the hearing. CP: 142-51.

Usually, the law does not allow a perpetrator of a wrong to benefit from the delays that result from his trickery or treachery. The "discovery rule" has many applications in the law. See, e.g., *Crisman v. Crisman*, 85 Wash.App. 15, 931 P.2d 163 (1997). As the *Crisman* court summarizes the discovery rule:

In some instances, however, there is a delay between the injury and the plaintiff's discovery of it. *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992). If \*\*166 the delay was not caused by the plaintiff sleeping on his rights, the court may apply the discovery rule. The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. *Allen*, 118 Wash.2d at 758, 826 P.2d 200. This rule is a court doctrine designed to balance the policies underlying statutes of limitations against the unfairness of cutting off a valid claim where the plaintiff, due to no fault of her own, could not reasonably have discovered the claim's factual elements until some time after the date of the injury. *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 220-21, 543 P.2d 338 (1975); *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wash.App. 194, 215-16, 859 P.2d 619 (1993).

*Crisman*, 85 Wash.App. at 20.

The involvement of the children in hiding the facts of his domestic violence provide the culpability such that Rebecca's prompt motion for DV restraints should have been given the same legal respect as if she filed it on 9/20/13. Additionally, as MacKenzie was continuing to harm the children and to disparage JD and Rebecca, there was all the more

reason to find the DV motion of 12/20/12 "legally fresh," and to grant the relief.

It should also be noted that even though Ms. Rodriguez brought the "ex parte" motion for DV restraints, she in fact provided sufficient notice that Mr. MacKenzie's counsel could be present. CP: 142-51. There was no attempt to end-run such due process as could be provided.

## **2. Denial of Emergency Revision Violated LAR 0.7**

Judge Sypolt denied an emergency revision on 12/20/12 because "No record. Transcription of hearing is required."

Spokane County Local Rule, LAR 0.7 does, indeed, normally require a transcript before a revision can be heard. LAR 0.7(b).

However, the section that deals with emergency revisions reads (emphasis added):

(e) Emergency Motions. If a party can demonstrate exigent circumstances, an emergency motion may be presented to the Presiding Judge, upon reasonable notice to the opposing party, without the necessity of meeting the requirements set forth in the above sections of this rule. The Presiding Judge may determine that exigent circumstances do not justify an emergency hearing. In that event, the moving party shall follow the procedures set forth above.

Had the judge ruled that "exigent circumstances do not justify an emergency hearing," then while the Appellants would have disagreed with the judge, the order would have comported with the local rule.

In response to both of the decisions of 12/20/13, Ms. Rodriguez would ask this court to clarify that Mr. MacKenzie should not have been able to benefit from using the children to hide the facts of his DV with a gun, and that the local rule should have been followed, and grant summary relief to Ms. Rodriguez until the decisions of 2/15/13 and of 4/26/13 can be re-heard on remand with instructions from this court, unless additional summary relief is granted.

#### **VI. RELIEF REQUESTED**

Appellants, Mr. and Mrs. Rodriguez, and counsel, Craig Mason, ask the court to reverse the sanction of \$1250 regarding the hearing of 4/26/13.

Dave and Rebecca Rodriguez ask the court to: (1) grant immediate temporary restraints requiring that Mr. MacKenzie's visits with the children be supervised at his expense, and placing the children in the care of Rebecca Rodriguez, with a hearing set to determine how to handle their proximity to JD, given that nearly another year of reconciliation counseling has passed; (2) remand with instructions to order a major modification, appoint a GAL, and to order a mental health evaluation for Mr. MacKenzie, and to otherwise maintain the restraints on Mr. MacKenzie ordered on 2/15/13; (3) remand with instructions for the hearings of 4/26/13 to be held on a proper basis (the orders of 12/13/11), with the Notes of Carol Thomas deemed as previously admitted evidence.

Respectfully submitted,

9/17/13

A handwritten signature in black ink, appearing to read 'C.A. Mason', with a long horizontal flourish extending to the right.

Craig A. Mason, WSBA#32962  
Attorney for Appellants

## VII. Appendix

### Spokane County LAR 0.7

#### *LAR 0.7: REVISION OF COURT COMMISSIONER'S ORDER OR JUDGMENT*

(a) Revision by Motion and Notice. Revision shall be initiated by filing a motion on a form approved by the Court, with the Clerk of the Court within 10 days after entry of the order or judgment as provided in RCW 2.24.050. The motion must specify each portion of the Order for which revision is sought. The revision form shall designate a hearing date no later than 30 days after the filing of the motion. The Motion for Revision shall also be noted in accordance with Civil Rules 6 and 7. A copy of the motion for revision shall be served upon the other party, or their counsel, if represented, within 10 days after the entry of the order or judgment and at least five court days before the hearing date. An additional three days notice shall be required if service is by mail.

Amended effective 3/1/06

(b) Transcript Required. At least two days prior to the hearing on the motion, the moving party shall file a transcript of the oral ruling of the Commissioner. The moving party shall obtain the transcript at their expense. A copy of the transcript shall, at least two days before the hearing, also be served upon the other party and furnished to the Judge who will hear the motion. A transcript will not be required if the matter was decided by letter decision, or if no oral decision was rendered. The transcript shall be double spaced in at least eleven point type. The person preparing the transcript shall certify, under penalty of perjury, that it is an accurate transcription of the record. Failure to comply with these requirements may result in denial of the motion.

Amended effective 3/1/06

(c) Assignment and Procedure. Revision motions in cases that have been assigned, will be heard by the assigned judge. Family Law revision hearings involving non-assigned cases will be heard by the Chief Family Law Judge. Non-Family law revision hearings will be heard by the Presiding Judge. The Juvenile Judge will hear all Juvenile Court revision hearings. A Judge required by this rule to conduct the revision hearing, may, in the efficient administration of justice, assign the matter to another Judge.

Amended effective 9/1/12

(d) Hearing Procedure. Hearings before the Family Law Judges shall be scheduled at 1:30 p.m. on Thursdays. Hearings before other judges shall be set pursuant to motion procedures for each department. The hearing will be on the factual record made before the Commissioner. Argument will be up to 10 minutes per side. The moving party shall confirm with the other party whether they are ready for hearing, or whether a continuance may be requested. The moving party shall notify the Judicial Assistant to the Presiding Family Law Judge by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule will result in the motion being stricken. The non-moving party may be granted sanctions if they appear at the time set for hearing and the matter is stricken due to non-compliance with the rule by the moving party. The Judge scheduled to conduct the hearing shall approve any order of continuance. If the moving party fails to appear at the time set for hearing, the Court may enter an order denying the motion. The Juvenile Judge shall determine the setting of motions in that Court. Absent good cause, a party seeking revision shall be deemed to have abandoned the motion if they fail to calendar the case and obtain a hearing within 60 days of the filing of the motion. Multiple orders of continuance shall not be freely granted. The agreement of the parties, standing alone, may not be deemed sufficient basis for a continuance.

Amended effective 3/1/06

(e) Emergency Motions. If a party can demonstrate exigent circumstances, an emergency motion may be presented to the Presiding Judge, upon reasonable notice to the opposing party, without the necessity of meeting the requirements set forth in the above sections of this rule. The Presiding Judge may determine that exigent circumstances do not justify an emergency hearing. In that event, the moving party shall follow the procedures set forth above.

Amended effective 3/1/06

(f) Stay. The filing of a Motion for Revision does not stay the Commissioner's order. The moving party may seek a stay of the order from the Judge expected to conduct the revision hearing as set forth in this rule. A request for stay may also be addressed to the Commissioner who issued the judgment or order.

**CR 60(b)(4)**

*RULE 60: RELIEF FROM JUDGMENT OR ORDER*

... (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

...(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

**CR 11**

*RULE CR 11: SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS*

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed

in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the *extension, modification, or reversal of existing law or the establishment of new law*, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.