

**FILED**

DEC 19 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 35090-8-III

COURT OF APPEALS, DIVISION III OF THE STATE OF  
WASHINGTON

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In Re the Marriage of:

LISA MORGAN, Respondent,

and

PAUL HERRMANN, Appellant.

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APPELLANT'S REPLY BRIEF

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**I. RESPONSE TO MS. MORGAN'S RESTATEMENT OF FACTS**

Despite her protestations that Mr. Herrmann is the reason this file constitutes several volumes of documents and that his conduct alone is blameworthy, Ms. Morgan glosses over two key points that suggest otherwise.

First, while she claims that Mr. Herrmann has continuously sought what she characterizes an unfair reduction in support, the file also makes it abundantly clear that Ms. Morgan has taken every action possible to prevent Mr. Herrmann from ever being able to visit with his children, and poisoning them against him to the point that they would not want to see him unless ordered to do so. In fact, the orders at issue in this appeal were initially generated by Ms. Morgan's petition designed to further this goal and remove rights of visitation from Mr. Herrmann. Despite now stating that she did not agree to the child support order (but apparently does agree with the parenting plan entered contemporaneously that gave her the extremely limited visitation she wanted), that she would agree to an order that only allowed Mr. Herrmann one visit per year in exchange for no transfer payment is very consistent with the position she has taken all along in this matter. This factual dispute over the validity of her consent to have her attorney of record sign off on the August 27, 2014 orders was never fully heard by the trial court and, as briefed below, could not be resolved

more than a year after entry of the orders whether under CR 60(b)(1) or CR 60 (b)(11).

Second, this appeal, and the subsequent trial court actions referenced by Ms. Morgan leading to sanctions (which are not in any way relevant to the issues raised in this appeal) are the result of Ms. Herrmann filing a motion to vacate after sleeping on whatever rights or defenses she may have had for more than a year. Ms. Morgan could have filed a motion to increase support. She could have acted sooner if she truly could not abide the effect of these orders. She did neither.

Despite this, she has been rewarded by the trial court's ruling which allows her to obtain the relief she requested of virtually no visitation, the entry of which apparently was not so irregular as to require vacation, but vacate the other order as being void due to irregularities in its entry. If this court is going to affirm the trial court on the basis that the entry of the orders violated a public policy or were done so without consent, it should vacate all of the orders in their entirety and remand for further proceedings. This court should at least recognize and discard the tactic of Ms. Morgan painting Mr. Herrmann as being overly litigious by reference to the size of the file and to subsequent court rulings unrelated to this appeal, when the appeal itself, and what is at issue here is the result of *her* petition and *her* motion to vacate orders

that Mr. Herrmann, and the Court that signed them, believed were stipulated orders.

**CR 60(b)(11) cannot be a valid basis to vacate due to a factual dispute over whether an attorney had authority to act**

Ms. Morgan argues for the first time on appeal, and without support in the record, that the court's use of CR 60 (b)(11) as a basis for vacation was based upon Ms. Morgan's lack of consent to enter the orders and that the orders can be vacated because the relief exceeded what had been sought in the petition. Even if this were the case, the law is clear that CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1). *Friebe v. Supancheck*, 98 Wash. App. 260, 267, 992 P.2d 1014, 1017 (1999), *as amended* (Sept. 27, 1999); *Bergren v. Adams County*, 8 Wash.App. 853, 855, 509 P.2d 661 (1973). Yet that is what Ms. Morgan is advocating in this case. She cites no case that suggests that an order can be vacated under the strict standards of CR 60 (b)(11), either before or after a year has passed, because of a dispute over an attorney's disputed authority to enter the order on behalf of his or her client. In fact, our case law suggests that this type of dispute is not a sufficient basis for vacation under CR 60 (b)(11). *See In re Marriage of Olsen*, 183 Wash. App. 546, 557, 333 P.3d 561, 565 (2014); *review denied*, 182 Wash. 2d 1010, 343 P.3d 759 (2015)(the negligence or procedural defects of an attorney representing the moving party are not sufficient grounds to constitute an irregularity under CR 60 (b)(11)).

Ms. Morgan's citation to *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386, 1388 (1985) is also misplaced. In that case, the court vacated a decree because the wife had misrepresented to the court that the parties had stipulated to an amount of child support by filling in a blank on the final order when the husband had understood from the petition that child support was never at issue. *Hardt*, 39 Wn. App. at 495, 693 P.2d at 1387. In affirming vacation of the order, the court stated:

The next consideration, then, is whether this dissolution decree was void because it provided greater relief than the petition request. In *Haller*, the court held a judgment by consent may not be set aside if it conforms to the stipulation unless obtained by fraud or mutual mistake. *Haller*, 89 Wash.2d at 544, 573 P.2d 1302 (quoting 3 E. Tuttle, *A Treatise of the Law of Judgments* § 1352, at 2776–77 (5th ed. rev. 1925)). Here, the court found the judgment did not conform to the parties' stipulation. Hence, it correctly vacated the judgment.

*Hardt*, 39 Wn. App. at 496, 693 P.2d at 1388.

In the present case, there is no stipulation to compare to the order that was entered. The order itself is the stipulation. As such, *Hardt* is inapplicable and does not provide a basis to grant the extraordinary relief contemplated by CR 60 (b)(11).

**Hammack is distinguishable**

Ms. Morgan argues that this case should be controlled by the court's finding of a void order in *Hammack v. Hammack*, 114 Wn.App. 805, 808, 60 P.3d 663, 665 (2003), rather than the order that was upheld in *Holaday v. Merceri*, 49 Wash. App. 321, 325-26, 742 P.2d 127, 129

(1987) because there is no evidence that Ms. Morgan received adequate consideration for the agreement or that the children would be adequately supported. These cases do not make these distinctions and the decision to find the respective orders in these cases either void or enforceable does not rest on these considerations. The rule providing the foundation for enforceability in these cases is whether or not the order seeks to foreclose any future right to modify child support, in which case it would be void, or whether it preserves the right to seek modification of support, in which case it will be upheld. The trial court below made its ruling on a bright line rule that does not exist, i.e., that any agreed order that waives support is void. This is not the law, and this is why the court abused its discretion.

#### **Attorney's Fees**

The basis for attorney's fees most applicable to this case is found at CR 60 (b). That rule provides that an order can be vacated "upon such terms as are just." These orders were in place for over a year. It is not Mr. Herrmann's fault that the court below erred in vacating under CR 60(b)(1) and then reversed itself causing more time and effort to be put into these proceedings. If this court is going to affirm vacation of the orders, it should also recognize that it was not Mr. Herrmann's conduct, but rather a disagreement or lack of communication between Ms. Morgan and her then attorney, that led to entry of these orders. As a result, it would only be just to either order Ms. Morgan to pay Mr. Herrmann's fees spent defending

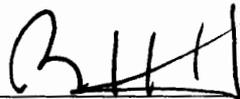
the validity of these agreed upon orders, or, at the very least, leave the parties to pay their own fees.

#### IV. CONCLUSION

More than a year passed before Ms. Morgan decided she should seek relief from these orders. Respectfully, the trial court fashioned Ms. Morgan relief based on a misapplied rule of law to fit this case into one of the bases for vacation that does not have a time limit. This court should therefore reverse the trial court and remand for further proceedings. Alternatively, this court should vacate the entirety of the August 27, 2014 orders (child support and parenting) and remand, if it is going to uphold the trial court.

Dated: December 19, 2017.

Respectfully Submitted,



R. Bryan Geissler, WSBA #12027  
Attorney for Appellant

**FILED**

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By \_\_\_\_\_

**COURT OF APPEALS  
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**In re:**

**Lisa Morgan**

**and**

**Paul Herrmann**

**Respondent,**

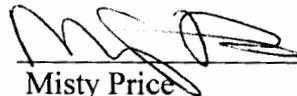
**Appellant.**

**Div. III No. 35090-8-III**

**Declaration of  
Mailing  
(DCLR)**

I, Misty Price, under penalty of perjury under the laws of the State of Washington, declare that on the 19<sup>th</sup> day of December, 2017, I deposited in the United States postbox (with first class postage affixed) a copy of the following document(s): Appellant's Reply Brief which was mailed to the attention of: Smith Goodfriend, PS, Attn: Valerie Villacin and Victoria Ainsworth, 1619 8<sup>th</sup> Avenue North, Seattle, WA 98109-3007.

Signed at Spokane, WA on December 19, 2017.



Misty Price

*Declaration of Mailing (DCLR)  
WPF DRPSCU 01.0100 (6/2006)*

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