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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 35090-8-III

COURT OF APPEALS, DIVISION III OF THE STATE OF
WASHINGTON

In Re the Marriage of:

LISA MORGAN, Respondent,

and

PAUL HERRMANN, Appellant.

APPELLANT'S BRIEF

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I. Assignment of Error

1. The trial court erred in granting Ms. Morgan's September 18, 2015 motion to vacate portions of the August 27, 2014 stipulated final order of child support and stipulated order regarding modification of custody/parenting plan pursuant to CR 60 (b)(5) and CR 60 (b)(11).

Issues Pertaining to Assignments of Error

1. Is a stipulated order of child support with a zero transfer payment facially void as against public policy where it does not foreclose a party's ability to seek future modification of support? (Assignment of Error 1.)

2. Can stipulated orders be vacated pursuant to CR 60 (b)(11) for procedural irregularities when the motion to vacate is brought more than a year following entry of the stipulated orders? (Assignment of Error 2.)

II. STATEMENT OF THE CASE

This appeal stems from the entry of two stipulated orders on August 27, 2014- an order of child support and an order regarding modification of custody/parenting plan. CP 76-77. On that date, Ms. Morgan was represented by attorney Ann Farnsworth and the undersigned counsel Mr. Geissler represented Mr. Herrmann. The orders were entered on the basis that they represented a settlement in the best interests of the parties and of the children, and were duly signed by Ms. Farnsworth and by Mr. Geissler and entered in open court. CP 117-118. The provision of the orders primarily at issue in this appeal is the provision that Mr. Herrmann would not have a child support transfer payment. Nothing in the orders, however, stated that Ms. Morgan could not seek a future modification of the order of child support or of the parenting plan.

For more than a year, Ms. Morgan lived with and abided by the terms of these orders. She did not object to their entry or their effect, or complain that they were inequitable until she filed a motion on September 18, 2015 seeking to vacate the orders under CR 60 (b)(5) and CR 60 (b)(11). CP 76-77. At the initial hearing on the motion, the trial court found that neither of these bases were adequate to allow for vacation, but that irregularities in the entry of

the orders were sufficient to allow vacation under CR 60 (b)(1). RP 208-213. In order to make this finding, the court *sua sponte* extended the time allowed for Ms. Morgan's motion beyond the year required by CR 60 (b). CP 210-211. Both parties moved to reconsider. CP 247; CP 267. Realizing that it did not have the authority to extend time in this manner, the trial court then reversed itself and found that the orders did, in fact, violate public policy and vacated the orders pursuant to CR 60 (b)(5).CP 271; CP 315-318. Even though the trial court never discussed CR 60 (b)(11) in its letter ruling, CP 271, Ms. Morgan's attorney handwrote that portion of the rule as another basis for the court's ruling in the final order on vacation that was entered on January 24, 2017 without Mr. Herrmann's counsel's signature. CP 313. This appeal followed.

III. ARGUMENT

Standard of Review

Motions for vacation or relief of a judgment under CR 60(b) are within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Morgan v. Burks*, 17 Wash.App. 193, 197, 563 P.2d 1260 (1977). The discretion is abused when based on untenable grounds or reasons. *Davis v. Globe Machine Mfg. Co., Inc.*, 102 Wash.2d 68, 77, 684 P.2d 692 (1984). "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 Wash.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Farmer v. Farmer*, 172 Wash. 2d 616, 625, 259 P.3d 256, 262 (2011). Whether Washington has established a clear mandate of public policy is a question of law subject to de novo review. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wash. 2d 200, 207, 193 P.3d 128, 131 (2008).

The trial court committed an error of law in finding that the August 27, 2014 orders violate public policy solely because they do not provide for a transfer payment

The trial court based its decision to vacate the stipulated August 27, 2014 child support order on the court’s holding in *Hammack v. Hammack*, 114 Wn.App. 805, 808, 60 P.3d 663, 665 (2003) that an agreement to forego payment of child support is void as against public policy. CP 315-316. In *Hammack*, the husband and wife incorporated a separation agreement into the decree of dissolution that provided for a distribution of \$362,000 to the husband and \$15,000 to the wife, which the trial court found to be “based on an oral agreement exempting [the wife] from any future child support obligations.” *Hammack*, 114 Wn.App. at 807, 60 P.3d at 664 (emphasis added). Because of this, the trial court in *Hammack* ordered the wife to begin payment of child support. *Id.* Arguing that the entire agreement was now void, the wife in *Hammack* then successfully moved to vacate the disparate property division, and both parties appealed. *Id.* In upholding the trial court’s finding that the

separation agreement was void, the *Hammack* court cited *In re Marriage of Pippins*, 46 Wash. App. 805, 808, 732 P.2d 1005, 1007 (1987).

In *Pippins, supra*, the parties stipulated to an agreed order which terminated the father's obligation to pay further child support. *Pippins*, 46 Wash. App. at 806, 732 P.2d at 1006. When the mother moved to modify the order to provide for child support, the husband objected, arguing that the order terminated his parental rights and did not allow for modification. *Id.* The *Pippins* court disagreed and stated the rule that “agreements **which restrict a minor child's right to seek increased support** are invalid as against public policy.” *Pippins*, 110 Wash. 2d at 479, 754 P.2d at 107 (emphasis added). Thus, “while it has long been recognized that parents cannot agree to prospectively terminate either parent's obligation to support their children,” *State ex rel. Lucas v. Superior Court*, 193 Wash. 74, 78, 74 P.2d 888 (1937), there is no absolute prohibition against the parties agreeing upon a child support amount as long as the agreement does not seek to foreclose the right of either party to seek modification or reinstatement of the obligation. *See e.g., Holaday v. Merceri*, 49 Wash. App. 321, 325-26, 742 P.2d 127, 129 (1987)(upholding agreement where mother did not pay support based on a disparate property division given to her where court found that nothing in agreement foreclosed the right to seek further modification.)

In further finding that the property distribution should also be vacated, the *Hammack* court distinguished those cases where a disparate

division of property justified an agreement to forego child support because in those cases there was never an agreement to foreclose a party's right to modify the order and seek child support based on changed circumstances. *Hammack*, 114 Wn.App. at 811, 60 P.3d at 666 (emphasis added) (“Here, there were none of the considerations found in *Holaday*—the calculation of an appropriate child support sum, *the preservation of future support*, or the quantifying of the value of the property that Jeanette relinquished in lieu of paying future child support”). The same distinction should have been made here.

In the present case, there is nothing contained in the August 27th orders which forecloses Ms. Morgan's ability to petition for modification of support upon a showing of changed circumstances. All of the cases cited in *Hammack* make the distinction between unenforceable child support agreements that forego any right to seek future support and those permissible agreements that do allow for future modification of support. Because that is the case, the trial court erred by relying on *Hammack* to find that these orders were facially void as against public policy. This court should review the trial court's determination of public policy *de novo* and find that the orders at issue here were not facially void as against public policy solely because they did not provide for a transfer payment.

Further, these orders were entered by agreement between counsel for both parties, each of whom had authority to bind their clients to such orders. “A written stipulation signed by counsel on both sides of the case

is binding on the parties and the court.” *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wash.App. 707, 715, 525 P.2d 804 (1974) (citing CR 2A; *Cook v. Vennigerholz*, 44 Wash.2d 612, 269 P.2d 824 (1954)). Orders that are entered without client authority, as alleged here, are merely voidable and potentially subject to vacation, but the motion to vacate an order alleged to have been entered without client authority must be brought within 1 year, or there must be proof that said order was procured by fraud, neither of which is the case here. *State ex rel. Turner v. Briggs*, 94 Wash. App. 299, 304, 971 P.2d 581, 583-84 (1999)(upholding trial court’s denial of motion to vacate where father who alleged that attorney did not have authority to stipulate to paternity did not bring motion to vacate within 1 year of entry and did not show that order was entered by fraud)(citing *Haller v. Wallis*, 89 Wash. 2d 539, 545, 573 P.2d 1302, 1305 (1978)(”Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it.”)).

Here, Mr. Herrmann’s counsel and the Court had the right to believe that Ms. Farnsworth had full authority to negotiate and enter orders and agreements on behalf of her client. There is no evidence set forth by Ms. Morgan that her then attorney was not acting in good faith at the time, or that she was committing any fraudulent act by agreeing to these orders. Additionally, and perhaps most importantly, even if there were an issue as to whether Ms. Farnsworth had the authority to enter the orders on behalf of her client, the motion to vacate such orders must be

brought within a year. Here the motion was untimely and, as such, these orders should stand. *See* CR 2A.

CR 60 (b)(11) cannot be utilized to circumvent the one year time limits of CR 60 (b)(1)

The court also based its order on CR 60(b)(11). This rule provides that:

(b) 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:

(11) Any other reason justifying relief from the operation of the judgment.

CR 60(b)(11) “is limited to situations involving ‘extraordinary’ circumstances.” *Jennings v. Jennings*, 91 Wn.App. 543, 546, 958 P.2d 358 (1998), *rev'd on other grounds*, 138 Wn.2d 612, 980 P.2d 1248 (1999). Whether a circumstance is “extraordinary,” justifying relief under CR 60(b)(11), has been narrowly construed. *Jennings*, 91 Wn.App. at 547–48. The operation of CR 60(b)(11) is only used in situations involving extraordinary circumstances not covered under any other section of the rule. *In re Marriage of Tang*, 57 Wn.App. 648, 655 (1990). 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). *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).

Furthermore, 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). In *Bergren*, for example, the appellate court found that the trial court correctly refused to vacate the judgment under CR 60(b)(11) because the basis for vacation was that the County argued that its attorney and auditor simply failed to protect its interests. The *Bergren* court explained:

Defendant seeks to argue a question of fact that comes too late. Its tardiness is explained only by the argument of excusable neglect or mistake by its auditor and attorney. This does not constitute an 'other reason' within CR 60(b)(11); rather, it falls within CR 60(b)(1) and cannot be asserted after 1 year from the date of judgment. 4 Orland, Wash.Prac. 423 (2d ed. 1968); 7 J. Moore's Federal Practice, 60.27 at 352 (2d ed. 1972).

Bergren v. Adams Cnty., 8 Wash. App. 853, 857, 509 P.2d 661, 664 (1973).

Here, just as in *Bergren*, the true basis by which Ms. Morgan sought to have these orders vacated was that her attorney did not adequately represent her interests and that the resulting agreements were unfair. These arguments, initially accepted by the trial court below, were appropriate to make under CR 60 (b)(1), but, as the trial court eventually realized on reconsideration, Ms. Morgan did not timely file her motion. Despite this, the trial court has allowed Ms. Morgan to "get around" the timeliness requirement of CR 60 (b)(1), not by extending time as the trial court initially did, but by now relying on CR 60 (b)(11) as a basis for

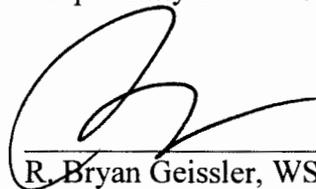
vacation. However, this too was error. *Friebe, supra*, 98 Wash. App. at 267, 992 P.2d at 1017.

IV. CONCLUSION

Appellant respectfully requests that this Court find that the trial court abused its discretion in vacating the stipulated orders after more than a year had passed. The orders do not violate public policy because they do not seek to foreclose the right to child support. Further, the irregularities in the entry of these orders, if any, whether based on lack of authority or upon procedural defects, are deficiencies that should have been the subject of a motion under CR 60 (b)(1) within a year of entry of the orders. The failure to do so by timely filing for relief, in and of itself, cannot be an “extraordinary circumstance” justifying the relief given to Ms. Morgan by the trial court. Based on these abuses of discretion, the orders below should be reversed and this case remanded for further proceedings.

Dated: June 9, 2017.

Respectfully Submitted,



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Attorney for Appellant

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III**

In re:

Lisa Morgan

Petitioner(s),

and

Paul Herrmann

Appellant.

No. 04-3-02456-9

Div. III No. 350908

**Declaration of
Mailing
(DCLR)**

I, Misty Price, under penalty of perjury under the laws of the State of Washington, declare that on the 9th day of June, 2017, I deposited in the United States postbox (with first class postage affixed) a copy of the following document(s): Appellant's Brief which was mailed to the attention of: Lisa Morgan, 202 N Shamrock Street, Spokane Valley, WA 99037

Signed at Spokane, WA on June 9, 2017.



Misty Price

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

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