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**Court of Appeals No. 70617-9-1
King County Cause No. 02-3-03386-9 SEA**

**COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

MARK CAVENER,

Appellant
(Respondent Below)

v.

ANDREA JOLLES,

Respondent
(Petitioner Below)

APPEAL BRIEF OF APPELLANT MARK CAVENER

Decisions to be Reviewed:

Orders of King County Superior
Court Judge Deborah Fleck of 06/27/13
Denying Appellant's Motion to Vacate the
Final Orders of 06/14/12

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I. INTRODUCTION

COMES NOW, the Appellant (Respondent Below), MARK CAVENER, by and through his attorney of record, Stuart E. Brown (WSBA #35928), and appeals the final court orders of King County Superior Court Judge Deborah Fleck of 06/25/13 (CP 304), denying the Appellant's Motion to vacate the final orders of 06/14/12, pursuant to CR60(b), including the final parenting plan (PP), and the order of default of that same day (06/14/12) (CP 294). The Appellant (hereafter referred to as 'the father') maintains that the final PP of 06/14/12 was the result of a seriously flawed procedural process, both by the Respondent (on appeal) ANDREA JOLLES (hereafter referred to as 'the mother') and the court (below) pertaining to the mother's petition to modify the existing PP, as was the order of default signed that same day that final orders were signed and entered, with the final PP subjecting the father to supervised visitation only with his only child, requiring unwarranted and unjustified Domestic Violence (DV) treatment before he could have unsupervised visits with his only child, and which dramatically changed the long term existing PP which had provided him with essentially shared custody of the child and unrestricted time with his child. The father maintains that the court below (Judge Fleck), acted in error in denying his motion to vacate the Default

Order signed by Commissioner Les Ponomarchuk on 06/14/12 and the Final PP and Order of Child Support also signed on 06/14/12 by Commissioner Carlos Velategui immediately after the entry of the Motion for Default at the request of the mother, by disregarding clear and egregious violations of procedural and substantive safeguards and requirements under the Statutes and Court Rules, including most significantly, the father's right to a trial on the issues and his right to defend against the claims and allegations of the mother as to her Petition to modify the PP. He further maintains that the final orders of 06/14/12 and the denial of his motion to vacate these final orders, are a denial of his due process and legal rights which eventuated in serious and on-going damage to the relationship with his child at issue in this case.

Finally, the father argues on appeal that Judge Fleck in denying his motion to vacate the order of Default and Final Orders of 06/14/13, seriously misapplied, misunderstood and misinterpreted the analysis of the four factors outlined in *Gutz v. Johnson*, 128 Wn.App. 901 (2005) for determination of vacating (or not) final orders of a court under CR 60(b) and other relevant case law related to these four factors, as well as to Default Orders and Motions to set aside final orders. The father respectfully maintains that Judge Fleck's analysis of the four factors was legally flawed based on the actual facts of this case, mischaracterized

and/or left out critical case law findings which were supportive of his motion to vacate final orders, failed to weigh the factors appropriately, and in short misapplied and/or failed to properly apply both statutory and case law requirements. She thus failed to protect the best interests of the child, failed to protect the legal rights of the father, and failed to assure justice and equity in rejecting the motion to vacate final orders.

This case has a long and tortuous history that will be outlined in detail below and while the father realizes that much of what is detailed in his Statement of the Case was considered irrelevant by Judge Fleck at the hearing of 06/07/13 to vacate the final orders of 06/14/12 (CP 304, CP 301, and see the Verbatim Report of the Hearing proceedings transcript provided to this court), he maintains that much or all of the detail provided, validates that he *certainly did* have a credible defense he could have mounted at trial had he been given the opportunity, a factor that *should have been* considered as a primary (actually *the* primary under case law reviewed below) factor in her review of the four *Gutz* factors to be properly analyzed in reviewing a motion to vacate final orders, and thus were and are highly relevant.

II. ASSIGNMENT OF ERROR

King County Superior Court Judge Deborah Fleck erred

in denying the Appellant's motion to vacate the final orders of 06/14/12 including the final parenting (PP) and the subsequent default orders of 06/14/12 by engaging in a faulty analysis of the four *Gutz* factors provided by our State's highest court to determine whether a motion to vacate final orders should be granted or denied. Her legal analysis misapplied and/or failed to properly apply both statutory and case law requirements. Had the *Gutz* analysis been properly applied and carried out, father's motion to vacate the final orders of 06/14/12 should have been granted.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Did Judge Fleck err in denying the father's motion to vacate the final orders of 06/14/12 including the final PP and the subsequent order of default of that same date (06/14/12), based on her faulty analysis of the four *Gutz* factors required to determine whether a motion to vacate final orders should be granted or denied? Answer: Yes.

IV. STATEMENT OF THE CASE

The parties to the underlying King County case (02-3-03386-9 SEA) are ANDREA JOLLES, the Petitioner below and Respondent on appeal and MARK CAVENER, the Respondent below and Appellant on appeal. The only child at issue in this case is 13 year old Lucy Cavener.

The father filed his motion to vacate the final orders of 06/14/12 (including the final PP and order of default) on 04/29/13 which included his 39 page actual motion and some 258 pages of attached exhibits (CP 294). This case had been marked by a long and tortuous legal and procedural history (CP 294, Exhibit 1: Case docket history). The recent legal and procedural history of the case does without question in the father's view, provide a stark underlying picture of: gross misuse of the legal system by the mother to meet her ends; misguided and errant decision making by the court marked at times by confusion, lack of appropriate checking of the existing court records and failure to establish a factual and/or legal basis to support its decisions and orders; failure to conform to legal criteria in making its decisions as to restricting the father's time with his only child and in findings of DV and issuance of protection orders as to the father; and sadly, a pattern of bias against the father by King County court commissioners. The following represents a brief case history leading to the necessity for and justification of the father's motion of 04/29/13 to vacate the final orders.

The father (44 years) married now 51 year old Andrea Jolles in 2001 when their only child was six months of age. The relationship lasted one year and the parties were separated by May 2002. The divorce was finalized and a final PP entered on 04/11/03 (CP 294 Exhibit 2). The final

PP provided for essentially shared custody and with the parties having joint decision making in all respects. No .191 restrictions of any form were included in the final PP. Of great significance in terms of understanding and appreciating the events which led to the wrongful entry of final orders on 06/14/12: 1) The parties have not co-habited or resided with each since that time, have had no romantic relationship since that time, and have not spent any appreciable time together since that time; and 2) The mother failed to raise any claims as to domestic violence (DV) at the hands of the father or fear of physical harm from the father, at the time of the dissolution and entry of initial final orders and failed to raise *any* such concerns as to the child *to this* day (but as noted at length below did file for a DV protection order (PO) on 08/04/10 as the result of a 07/28/10 bathroom incident where neither she nor the child were present and where her father (Arnold Jolles), attempted to serve the father legal papers in behalf of the mother, literally chased the father and followed him into the men's bathroom in the *King County Courthouse* and where no actual legal claim of any assault was ever made by *anyone*). In short, there appears to have been absolutely no legal basis for a finding of DV or for issuing a PO as to the mother and/or child.

A cursory review of the case docket (CP 294, Exhibit 1) makes it *very clear* from the history and timing of the mother's first DV oriented

allegations on 08/04/10, that there was no basis for a finding of DV or the issuance of a PO as to the mother and/or child. Not only did the mother never raise any DV oriented claims or seek a protection order for herself and/or the child at the time she filed for divorce in 2002, but raised no such concerns or issues as to herself or the child for a full *seven plus years* from the time of final orders in 04/03 until making her bogus DV claim against the father in 08/10 based on an incident which never involved the child. Even when she did make her DV claim and motion for a PO on 08/04/10, she *did not* request that the child be involved in any such PO request as there had *never* been even the slightest evidence that the father had ever abused the child or had ever been a threat to harm the child in any way. This remains true to this very day.

The *only* court action that took place in the seven plus years from 04/03 until 08/10 consisted of a contempt action brought by the mother on 09/05/06 (CP 294, Exhibit 3) which involved a motion by the mother against the father seeking to: 1) compel him to follow the PP as to the child being enrolled in the Seattle School district as opposed to Vashon Island (where the father resided at the time), and 2) seeking court action as to her allegations that the father had failed to pay child support as ordered.

As noted below, this entire case turned on a single incident which occurred in 2010 involving the mother's father attempting to serve Mark

Cavener in the King County bathroom which then became the sole basis for the father being determined by the court that he was a DV perpetrator.

In 2010, as was the case in 2006 as reviewed above, the mother motioned the court to deal with an issue that had absolutely nothing to do with DV or harassment or fear of the father in *any* manner whatsoever. On 06/22/10, the mother motioned the court to allow the child to enter therapy and also requested a clarification of the existing PP (CP Exhibit 6) as to what she claimed were “several unclear areas in the visitation schedule,” despite the PP having been in effect for many years without her having previously raised any such issues. The mother in her supportive declaration did in fact raise the specter of the father being controlling of her and somehow harassing her by for example claiming his harassment had increased over the past year as “he (the father) had begun calling the police because of gray areas in the PP.” Actually, the father’s calls to the police were related to a series of custodial interference concerns the father had regarding the mother’s failure at times to produce the child for the father’s visit times with the child, with the mother referred to the City Prosecutor on at least one occasion for investigation for possible criminal sanctions. In short, no DV or harassment actions were ever brought by the mother as to herself or the child prior to the King County court bathroom incident (see below) in August of 2012. The mother certainly raised no

concern for fear for the child at the hands of the father at *any* time even to this day. The notes for motion docket setting the dual motions of the mother for 08/18/10 are attached under CP 294, Exhibit 6, and clearly indicate no request by the mother to seek an anti-harassment order or a protection order and do not raise any issue of fear of assault from the father as to the mother or the child. That would all change very shortly as the action then morphed into something very different and based on a single event that clearly provided no legal or factual basis for restricting the father's time with the child or for any finding of harassment or DV under the statutes.

On 08/04/10, the mother now filed a Petition for an Order of Protection (CP 294, Exhibit 7) and launched into a literal barrage of past claims as to the father's alleged anger, control and harassment of her and now claimed that she is fearful of him. Again, this was based on the alleged 'King County Court bathroom incident' described below. What is abundantly clear in terms of her now dramatic escalation and change in direction as to her pending motions for child therapy and clarification of the PP scheduled for 08/18/10 (and then continued to 08/30/10), is her use of the incident that occurred in the King County Courthouse bathroom just a week before and involving the father and her own father, Arnold Jolles. This event then dramatically changed the entire landscape of the case and

real and objective factual analyses of the case by the court evaporates. What remains stunning from the father's perspective in evaluating the events from this point onward, is that *to this day* the child (clearly of an age where her input would be highly significant and appropriate in dealing with any claims that the father is a risk to the child and that his time with the child should be reduced to only professionally supervised visits) has *never* been interviewed by any professionals as to her input in what again has been an egregiously flawed process abetted by the court.

The mother's own declaration as part of her request for a PO, includes the following statement: "I am seeking a PO today because *even though my ex-husband has not been physically abusive of me lately* (the father\denies that he has *ever* been physically abusive of her) the level of stress is very high at the present and I *fear* that his escalating anger *makes me at risk for physical violence right now.*" She continues at the end of the first paragraph of her declarative statement, "*I am not attempting to keep him away from our daughter; his violence seems directed at me.*" She then continues with her description of the incident with her father and Mark Cavener at the courthouse, much of which she did not personally observe: "Last week (07/28/10) there was an incident at the courthouse when my dad tried to serve him (the father) papers concerning two motions to clarify our PP. Mark (the father) trapped my 70 year old father

in the men's bathroom grabbing him and pressing him up against the wall, threatening him and yelling at him...." Again, the mother actually *never* saw anything that took place in the bathroom. She then states, "The fact that this incident was in the very public King County courthouse *makes me believe* that *he could* turn violent with me. I have seen this pattern in our marriage and also in 2006 when he was arrested for DV with his ex-fiancée (again now raising every conceivable allegation against the father including the above noted incident with the father's ex-fiancée which did *not* result in any DV or assault conviction of any form as the court record reveals, and where his ex-fiancée wrote a sworn declaration in behalf of the father concerning the mother's false DV allegations).

What is highly significant in terms of the above is that the mother even now, raises absolutely *no concerns* as to harm to the child by the father, includes a narrative as to allegations and claims that do *not* rise to or even approach the statutory requirements for an order of protection or a finding of DV (as the single event she claims took place in the bathroom *did not* involve her nor does she raise any current or even remotely current incidents or events that meet statutory requirements (see below) for such orders to be issued by the court. Review of both the declarations of Andrea Jolles' own mother and father (CP 294, Exhibit 7) make it clear that it *was the father* who was most likely accosted and threatened *and not Arnold*

Jolles. In the declaration of Andrea Jolles' mother (CP 294, Exhibit 7), Carol Jolles, of 07/29/10, she states, "On 07/28/10 around 9:10 am, on the second floor of the King County Court House in Seattle (when the area around family court would be crowded with people and witnesses to any events), I was standing near my husband, Arnold Jolles, when he attempted to serve two motion for docket papers on Mark Cavener. He had agreed to do so at the request of our daughter, Andrea Jolles. Mark turned away from my husband and *began to run down the hall*. My husband *followed him*, trying to reach him to serve the papers. My daughter and I *ran down the hall* behind my husband who was closest to Mark. I believe my daughter called to Mark to stop. Instead, Mark went into the men's bathroom where we saw my husband *follow Mark into the bathroom* with the papers. Almost immediately the door was shut and could not be pushed open from the outside. I could hear Mark's very loud and angry voice. I was afraid for my husband. Mr. Cavener has made threats against me and my husband in the past (the father vehemently denies such claims and no attempt has ever been made by either Arnold or Carol Jolles to request any PO or bring charges against the father). My daughter yelled at Mark not to touch her father and to let him out of the bathroom. The door opened wide enough (conveniently in terms of her allegations) for me to

see that Mark had my husband pushed up against the wall and was blocking the door with his body....”

Arnold Jolles’ declaration (CP 294, Exhibit 7) states, “On 07/28/10 at approximately 9:10 am, on the second floor of the King County Court House in Seattle, I served two motion for docket papers on Mark Cavener, at the request of my daughter, Andrea Jolles. He would not accept the papers, turned away from me and hurried off down the hall. *I followed* asking him to take the papers. He ducked into the men’s bathroom *where I followed*, still holding the papers. Once in the bathroom *he accepted the papers*, and pushed me away from the door (raising the question even if true, of who was actually blocking the door impeding exit, in contradiction to the above noted claim of Carol and Andrea Jolles). He then blocked the door in a very threatening manner and said *something* angry that *I did not understand*. I tried to leave. He would not let me out. He seemed extremely angry and disturbed....”

While Mr. Jolles seems perplexed or at least wanted the court (below) to accept that he could not understand why Mark Cavener would be annoyed, angry or upset after he had been chased down a crowded court hallway and into a public bathroom where he sought refuge and respite (while being followed by two grown adult women running after him, one of which was a party to the case and should not have been

involved in any manner with personal service of the other party, in what can only be described as a 'Keystone Cops' scenario), any *reasonable* person would certainly understand a person being upset under such conditions and would very likely see Arnold Jolles (and his wife and daughter) as the perpetrators of harassing and even threatening behavior and not Mark Cavener. In addition, the utterly poor judgment of Andrea Jolles to ask her father, who had a documented past acrimonious relationship with Mark Cavener after he (Mr. Cavener) had accused Arnold Jolles in 2006 of sexual molestation of Andrea Jolles as a child, to serve papers in her behalf, cannot be any more clear. It is also of note that Arnold Jolles does not claim that Mark Cavener pushed him against the wall as claimed by Carol Jolles but instead states that his egress was blocked by Mark Cavener even after he (Arnold Jolles) admits that Mark Cavener accepted service. In short, even here the stories of these three highly related individuals with a clear self-serving interest in behalf of the mother herself, do not match. It is also of note that no arrest, detainment or charges of any form were ever lodged or made by Arnold Jolles and that only person claimed to be the 'victim' here was Arnold Jolles and not Andrea Jolles or the child at issue in this case who of course was not present. This contorted incident then becomes the vehicle for everything that follows and literally redirects the case in a direction that never should

have occurred and never was warranted. As a result of the mother's request for a PO based in large part on the falsely depicted above incident, the mother was granted a temporary PO on 08/04/10 (CP 294, Exhibit 8) but even here *only as to herself and not the child*. Seizing on the opportunity to now stop all visits between the father and the child, she then filed a motion for an ex parte restraining order and order to show cause regarding contempt against the father on 08/24/10, which again includes no evidence or claim of abuse by the father against the child or of any fear on the child's part as to the father (CP 294, Exhibit 8). The father refuted the mother's claims in his declaration (CP 294, Exhibit 8). A PO was then issued by the court on 08/30/10 (CP 294, Exhibit 9) *but again did not include the child* and allowed the father's continued PP time with the child, but now ordered a Family Court Services (FCS) evaluation and assessment as to DV concerns or issues related to the father which was then completed by FCS's worker Debra Hunter. The dye was cast and the case spun completely out of control and diverged farther and farther from the facts and appropriate legal analysis and conformity with statute and case law. Even so, the court (Commissioner Jeske) issued its order on Mother's Show Cause regarding Contempt on 09/13/10 (CP 294, Exhibit 10) *not finding the father in contempt* as to the very issues the mother had again used to attempt to stop visits between the father and child in what

should have been clear to any reasonable person and judicial officer, was an on-going and relentless effort by the mother to change the PP to exclude father's court ordered visitation rights in effect since 2003, through any and all means possible. In Debra Hunter, the mother was finally able to get the 'ally' she sought in such efforts. It is of note that even as of 09/27/10, the court in the person of Commissioner Eric Watness, found no basis for the father to be restricted from attending his daughter's school special events, which *was supported even by the mother* (CP 294, Exhibit 10).

Debra Hunter of FCS then issued her report and an addendum shortly before the scheduled hearing of 11/15/10 that had been ordered earlier by Commissioner Jeske to review the FCS evaluation (CP 294, Exhibit 11). Ms. Hunter's recommendations have been also been included under CP 294, Exhibit 11, and it is highly significant to note that it was in fact Debra Hunter who now unilaterally suggests that the child should be included in any protection order (despite this *not* being asked for by the mother and despite the above noted series of court orders by various Commissioners *excluding* the child from any such Protection Orders). She also suggests that the father complete DV perpetrator treatment and DV dad's parenting classes while manufacturing an inaccurate legal definition in her report as to what statutorily meets criteria for a DV finding, and

then couples the father's 'progress' in DV treatment with his receiving time with the child, but states that he should have every weekend with an overnight during the first six months of the child's counseling and the father's proposed DV counseling. Thus, even in the midst of her flawed evaluation, even she sees no basis for the father to not have immediate overnight and unsupervised time with the child. It is also noted in her evaluation that she finds that the mother engaged in poor judgment as to the courthouse service incident with her own father on 07/28/10 and reports other problematic behaviors on the mother's part but finds no issue or requirements as to the mother. She then stunningly states that the father recording the bathroom incident (which was later offered to the court for review in his defense as to his denial of any claims of inappropriate behavior on his part and to refute the false but sworn testimony of the mother and Arnold and Carol Jolles), was somehow 'evidence' of manipulative behavior on the father's part in another misguided and professionally flawed and frankly biased evaluation process by Ms. Hunter. Her addendum report was issued by her to justify the exclusion of a good deal of additional information and declarations offered on his behalf by the father before 11/15/10 and which she herself admits "would have been helpful [in her evaluation]" had they been provided earlier. In fact, any reasonable and responsible court ordered evaluator would have

simply asked the court for a short delay to assure that he or she had reviewed all materials that could have impacted on such a serious decision. She did not.

The court then reissued the temporary PO in effect until the new hearing set for 11/29/10, again leaving the father's unsupervised time with the child intact (CP 294, Exhibit 12). The father's prior attorney then filed a legal memorandum denying that there was any basis for the father's time with the child to be restricted and also requested a professionally valid parenting evaluation (PE) by a competent and well trained professional, while including WAC 246-924-445 PE standards and requirements as well as the Association of Family and Affiliated Courts (AFFC) Model Standards for Child Custody Evaluations, which validated that Ms. Hunter had utterly failed to adhere to such standards. It again is noted that at no time did Ms. Hunter or any other mental health professional *ever* evaluate or interview the child as part of this entire court process despite her well-being ostensibly and allegedly being the primary concern in the case. CP 294, Exhibit 14 relates to an evaluation of the father on file with the court and including extensive psychological testing, by Licensed Clinical Psychologist Elizabeth Milo, Ph.D., refuting 'findings' of FCS evaluator Debra Hunter that the father presented with any risk of violence or DV or presented any risk of harm to the child and raising serious concerns as to

the damage that could be inflicted on the child and on the father-daughter relationship should Debra Hunter's recommendations be accepted. CP 294, Exhibit 15, provides the father's response to the evaluation of Debra Hunter and to the mother's false DV and risk claims as to the father.

The court then reissued a temporary PO on 11/29/10 (CP 294, Exhibit 16) granting the father additional time to respond and a hearing was set for 12/20/10, which was then heard by Commissioner Meg Sassaman. Commissioner Sassaman then issued her permanent order of protection (DV related) (CP 294, Exhibit 17) essentially accepting the evaluation report and recommendations of Debra Hunter and disregarding the wealth of evidence and professional reports (of Dr. Milo for example) refuting this flawed evaluation which clearly failed to meet any professional standards as noted above. The entire course of the father's relationship with the child was thus radically altered and severely damaged despite there being no evidence of *any* risk to the child by the father, including during the six months since the mother had started her campaign against the father. In her ruling, the Commissioner referred to 'e-mail shouting' or negative e-mails from the father to the mother; *long past* (while also based on unfounded claims by the mother) alleged events by the mother that she purported were 'DV events;' and the alleged bathroom incident of 07/28/10, as bases for her DV finding. The father

maintained that her ruling did not adhere to statutory standards as to a finding of DV and in essence she simply appeared to decide on a highly subjective basis to find against the father and support the mother's bogus and unsubstantiated claims that she was at physical risk by the father or (an even more extreme false allegation if that is possible) that the child was somehow *ever* at risk of harm from the father.

The father's prior attorney filed a Motion for Revision of Commissioner Sassaman's order of 12/20/10, on 12/29/10 with the matter then heard on 01/28/11 where the motion for revision was denied (CP 294, Exhibit 18). An order allowing unrestricted phone contact between the father and the child was issued by then Commissioner and now Judge Lori Smith (CP 294, Exhibit 19) on 01/31/11, suggesting at least in this judicial officer's view that such *unrestricted contact* between the father and his daughter was not a risk to the child.

The father then completed a DV evaluation with Keith Waterland with a report issued on 04/14/11 and filed with the court on 05/09/11. The mother in support of her later Petition to Modify the PP, stated that the father had been found not amenable to (DV) treatment based on this report. In fact, the summary of said report (CP 294, Exhibit 20) actually notes that he was not 'amenable' to treatment simply because he denied the many false claims as to his risk of violence or harm to mother (or

child) made by the mother in the previous year as noted above, and as he had stated under oath in his many pleadings also offered above for this court's review. The father was thus at an impasse in being required to complete DV treatment in order to have any time with his child and yet was barred from such treatment based on his refusal to lie and agree to the many false allegations that had been made regarding his risk for violence and harm by the mother. He has not seen his child in anything but a supervised capacity for nearly three years. The mother pursued and was granted a year-long renewal of her PO on 11/29/11 (CP 294, Exhibit 21).

Events Relating to Mother's Petition for Modification of PP:

In what may properly be called 'Phase II' of the case that was directly germane to the father's motion to vacate the final PP and orders of 06/14/12, the mother first filed her Petition for Modification of the existing PP on 01/13/12 (CP 294, Exhibit 22). The case schedule issued to the mother noting a trial date of 12/17/12 is also included under CP 294, Exhibit 22. The mother's petition to modify the PP was based on a claim of detriment to the child arising from her claimed DV and risk of harm claims on the part of the father and her claim that he posed a risk to the child based on being an 'untreated DV perpetrator' while now also claiming herself to be a DV victim at the hands of the father. The mother also filed a motion for temporary orders and for a finding of adequate

cause as to her petition to modify the existing PP on 01/13/11 with all issues to be heard on 02/09/12 (CP 294, Exhibit 22).

On 01/17/12, after the mother moved to make the restraining order against the father even more restrictive, her motion was granted by Commissioner Ponomarchuk on 01/17/12. The order notes that the father did attend the hearing and “was present for the argument.” (CP 294, Exhibit 23). On 02/07/12, the mother filed an objection to the father’s response to her petition to modify the PP, for temporary orders, and for a finding of adequate cause (CP 294, Exhibit 24); and objected to any proposed continuance by the father as to her hearing set for 02/09/12 on the above matters. Despite her objection, the father maintained that he had never been served or had received notice of the 02/09/12 hearing, and Commissioner Ponomarchuk issued an order continuing the hearing until 03/14/12 including dates required for submitting pleadings for both parties (CP 294, Exhibit 25). At the hearing before Commissioner Ponomarchuk on 02/09/12, *where the father appeared in person*, the father was asked if he received notice of the hearing and the father denied ever receiving such notice. Despite the clear order of 02/09/12 by Commissioner Ponomarchuk continuing the matter for a full month to 03/14/12 and allowing the father time to provide responsive materials for the 03/14/12 hearing and despite the reality that the father had already *appeared* in the

matter at the hearing of 02/09/12, the mother in continuing her relentless campaign against the father, moved for an order of default against the father (CP 294, Exhibit 26).. As is the case in numerous instances in this bizarre case where events appear to happen with little explanation or logic, Commissioner Velategui then issued an order vacating an order of default against the father which was purportedly entered on 02/15/13 in response to the mother's ex parte motion for default (CP 294, Exhibit 26) which never appears in the case docket schedule (CP 294, Exhibit 1) and was apparently heard on 02/15/12 at ex parte by Pro Tem Commissioner Joan Allison (but was not filed with the court clerk and thus never appeared on the court docket schedule). The order of default issued by Pro Tem Commissioner Allison also is attached under CP 294, Exhibit 26, although the caption notes that that the order is a "Duplicate original as per Judge Sharon Armstrong," and the first time any such order appears in the court file and docket is on 03/26/12 in what appears to be a very irregular process. In addition, the father maintained that he was never given notice of mother's intent to appear at ex parte on 02/15/12 for an order of default, as required under the rules.

A hearing as to whether the father was properly served as to mother's pleadings related to her Petition for Modification of the PP and to her motion for temporary orders and a showing of adequate cause, was

scheduled by the mother on 02/17/12 (the very day her motion for default was rejected as noted above) before Judge Jean Rietschel (obviously by contacting the Judge's clerk to set such a hearing on the Judge's schedule) on 02/28/12, as per the order of Commissioner Ponomarchuk of 02/09/12 (see above) continuing the hearing before Commissioner Ponomarchuk to 03/14/12. In any event, the hearing scheduled before Judge Rietschel set for 02/28/12 never took place although it is unclear as to what transpired in terms of this hearing and the father then *appeared* for the schedule hearing before Commissioner Ponomarchuk set for 03/14/12 and noted that he received an e-mail from Judge Rietschel's stating that the hearing of 03/14/12 had been stricken by the mother in still another irregular process leaving the father in doubt as to what was transpiring in the case. What is unquestionable is that the father did appear for the schedule 03/14/12 hearing which was cancelled without any prior notice to the father.

The mother then filed a Return of Service (without a case number) on 03/26/12 (CP 294, Exhibit 27) as to her alleged service of Summons of her Petition for Modification of the PP, Proposed Final PP and OCS, and proposed order on modification. That document alleged that the service provider had attempted but failed service on the father on 03/15/12, on 03/19/12, and on 03/20/12, but was able to "personally *deliver* at the time and place set forth above (on 03/21/12 at 12:52 pm) the summons, petition

for modification, the case schedule, the proposed final PP and OCS, and the proposed order on modification. Thus, there is no sworn statement that the father was actually personally served. The father claimed he was never personally served and the docket includes no calendar note relating to the claimed service of 03/21/12 and the next entry in the docket of note is a note for motion docket filed by the mother on 05/11/12, almost two full months later and including a *refiled* motion for temporary orders, a *refiled* petition for modification of the existing PP, a *refiled* notice of hearing for adequate cause, a financial declaration and financial documents, a proposed final PP, and another (refiled) motion for default (CP 294, Exhibit 28). No summons was provided and personal service was required under the rules. While the motion for default and supporting declaration by the mother (of 05/11/12) reported and claimed a number of other completed service attempts, the father had denied such service and in any event, the father maintains that the mother's own *re-filing* of her petition for modification of the existing PP and other supportive and attached documents, reflects her understanding and recognition that prior attempts had failed or were not recognized by the court and as such no legally recognized petition for modification existed. Thus, he maintains that a new Petition for Modification clearly was initiated and thus the starting date of any modification action should have been from 05/11/12.

As noted in the court docket schedule (CP 294, Exhibit 1), the father was granted an order to proceed in Forma Pauperis on 05/16/12 and thus again *appeared in the action* even after the new filing of a Petition to modify the PP by the mother. The father then *appeared* at the scheduled hearing before Commissioner Ponomarchuk on 05/31/12 as to mother's petition for modification of the existing PP and her motion for adequate cause and for temporary orders (CP 294, Exhibit 29). The father had filed his special notice of appearance with the court on 05/24/12 in preparation for the hearing of 05/31/12 before Commissioner Ponomarchuk and specifically objected to the motion for adequate cause as well as to personal jurisdiction and venue, and thus unequivocally did *respond* (CP 294, Exhibit 29). The attached clerk's minutes note (CP 294, Exhibit 29) without question note that "respondent *appeared in person, pro se.*" The minutes and/or order of 05/31/12 note that the father objected to jurisdiction and to the hearing itself, and claimed he was not personally served. The court ordered that for good cause found by the court the hearing shall be continued until 06/14/12 to allow the father *time to respond*, noted that the father's responding documents shall be delivered to the mother and/or her attorney by no later than noon on 06/08/12, and decided that "the court finds that service of process is required for original process only [and] therefore service is not a legal issue [and as such] the

Respondent (father) [is deemed] served. Sanctions for this continuance are denied.” No adequate cause was found at this hearing. The father maintains that personal service of a petition for modification of a PP is certainly required under the rules. Again, it is of critical note that the father appeared in person to defend himself in this case making a motion for default legally inappropriate. The father notes that at the hearing before Commissioner Ponomarchuk of 06/14/12 that eventuated in an order of default against him, he handed the Commissioner additional response materials (above and beyond his 05/24/12 filings) but the court refused such materials. It is of note that the father did not have an attorney during most of the above period of time (since the 2010 events) and had no attorney during the final few crucial months of the action as he could not afford one and thus was not 100% certain of the rules. This attorney (Stuart Brown) was approached by the father during this period of time to hopefully represent him, but given the father’s lack of any funding to pay for legal services, could not be helped.

Confusing the issue further, a status hearing was held before now retired Judge James Doerty on 06/01/12, a day after the above noted 05/31/12 hearing before Commissioner Ponomarchuk (CP 294, Exhibit 29). The father did not appear and was not aware of the hearing. That said, the order from Judge Doerty noted that “the case was on track, that the

deadline for a finding of adequate cause was extended to 08/13/12, and noted that the father has not answered or appeared at this hearing.” He had of course *appeared* at the hearing before Commissioner Ponomarchuk the prior day to defend his case. The father then *appeared* at the hearing of 06/14/12 to argue his objection to adequate cause and as to other claims for relief and was simply stunned when Commissioner Ponomarchuk signed the mother’s proposed order of default as opposed to simply ordering temporary orders if he indeed did find adequate cause or rejecting adequate cause as he had requested. The Commissioner noted in his order (CP 294, Exhibit 30) that he based his order of default on the finding that the father had not provided a response (ostensibly meaning as to the Petition for Modification which this court well knows is simply a formality that can be completed at even very late stages of any action as long as the party in question has appeared to defend the action as the father clearly and continuously had done as noted at length above. Commissioner Velategui then signed the final orders as to a final PP (CP 294, Exhibit 30). It is unclear as to whether an order finding adequate cause was ever issued or signed as no such document appears in the court record that this attorney can identify.

Based on all of the above and review of the statutory and court requirements as to a finding of default as detailed below, the father

maintained that the order of default was in clear error, represented bias in favor of the mother on the part of the involved Commissioners, was contrary to justice and fairness, needlessly damaged his relationship with his child and deprived him of legal rights previously ordered in his behalf as to the child, and deprived him of due process, and as such, the orders of default and final PP should be vacated with a new trial set by the court.

The father was then unable to secure funds to mount a challenge to the final orders until the spring of 2013 and then retained this attorney (Stuart Brown) to prepare and file a motion to vacate the final orders noted above under CP 294, Exhibit 30. The full motion appears under CP 294, Page 1-39. The Statement of Issues presented in said motion were as follows:

1. Should the court vacate the final Parenting Plan (PP) of 06/14/12 signed and ordered by King County Superior Court Commissioner Velategui and based on the Order of Default erroneously signed by Commissioner Ponomarchuk that same morning (06/14/12), and order a new trial? (Answer: Yes)
2. Should the court, in vacating the final PP signed and ordered by Commissioner Velategui on 06/14/12 and Default Order signed and ordered by Commissioner Ponomarchuk on 06/14/12, consider the events that led up to the signing of these orders to determine if there was even a basis (adequate) cause for mother's petition to modify the then existing PP? (Answer: Yes)

For purposes of judicial economy, we respectfully request that this

Court of appeals read and review the entire Motion to Vacate (CP 294, Pages 1-39) as well as the entire verbatim record of the Hearing Transcript, for the entire legal argument made by the father as to his motion to vacate final orders. However, briefly stated, the father through his attorney argued that CR 60(b) as to Relief from Judgment on Order provided for vacating of a judgment or final orders in cases of (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; or for (11) Any other reason justifying relief from the operation of the judgment. While CR 59 as to New Trial, Reconsideration, and Amendment of Judgments was not specifically implicated in the father's motion to vacate, CR 59(b) does provide specific examples of events which could be implicated in a CR 59 action that very likely could be viewed as meeting criteria for a CR 60(b)(11) motion, such as Irregularities in the proceedings of the court, jury or adverse party; abuse of discretion (by the court); misconduct of the prevailing party; damages so excessive or inadequate as unmistakably to indicate that the verdict (order) must have been the result of passion or prejudice; that there is no evidence or reasonable inference from the evidence to justify the verdict or decision or that it is contrary to the law; and that substantial justice has not been done. The father maintained below that many of these justifications for vacating the orders of default and final orders of 06/14/12

under CR 60(b)(11) and CR 60 were implicated here as detailed at length in above sections. The father further maintained in his motion to vacate as noted at length above, that the court made numerous erroneous and faulty decisions that were not based on law such as those pertaining to a finding of DV and/or issuing of protection orders and that were not in accordance with the law relating to conditions for reducing or eliminating court ordered time between a child and adult in modification procedures; that the opposing party clearly engaged in misconduct in the form of deceiving the court and aggressively using and misusing the court to push her many false claims; that the court abused its discretionary powers; that there were many irregularities in the procedures involving the mother's motion to modify the PP and in prior hearings and actions leading up to the orders of 06/14/12 as noted at length above; and that the orders of 06/14/12

The father noted in his argument before Judge Fleck that CR 55(2), as to Pleading after Default, provides in part that "any party may respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party has previously appeared or not. If the party has appeared before the motion [for default] is filed (as is the case here with the father), he may respond to the pleading or otherwise defend at any time before the hearing on the motion." In this case as noted above, the father appears never to have been given the

opportunity to specifically argue against the motion for default by Commissioner Ponomarchuk who appeared simply to ‘translate’ the lack of the father filing a formal response to the petition for modification of the PP by the mother (which could have been ordered completed by the father at the time of 06/14/12 hearing before Commissioner Ponomarchuk using state pattern forms available at the courthouse) into a basis for a complete and final default on the father’s part. The father thus argued that the order of default was unwarranted, punitive, excessive, and the likely result in part, from bias on the part of the court. Based on all of the above, the father thus argued that CR 55(b)(c)(1), as to Setting Aside Default, allowed for his motion to vacate based on CR 55(b)(c)(1) directive that “for good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment of default has been entered, may likewise set it aside in accordance with rule 60(b).”

The father also noted that under LCR 55(a)(1) as to Default and Judgment, Entry of Default, and Order of Default, “When there has not been an appearance by any non-moving party (not the case here), the moving party shall seek an order of default from the ex parte and probate department through the clerk’s office. *When there has been an appearance* (as is the case here) by any non-moving party, the motion shall be noted without oral argument *before the assigned judge*, or if none, in the

courtroom of the Chief Civil Department for Seattle case assignment area cases and the Chief Judge of the Maleng RJC for Kent case assignment area cases.” The father argued that this procedure *was not* followed by the mother or the court here and no specific argument was made or allowed before the proper judge (or even before Commissioner Ponomarchuk) in what should have been viewed as a serious procedural irregularity which in turn should have led to his being granted his motion to vacate final orders should implicate and justify the father’s motion to vacate the order of default as well as the final orders that were based on the erroneous entry of the motion for default. The father also noted that under LCR 55(b) as to Entry of Default, the rules required that, “Upon entry of an entry of an Order of Default, a party shall move for entry of judgment against the party in default from the Ex Parte and Probate Department through the Clerk’s office. If the court determines that testimony is required, the moving party shall schedule the matter to be heard in person in ex parte and probate Department.” In this case, the father argued that the mother and the court never afforded the father an opportunity to argue the facts and legal basis for denying the motion for default and in any case given the above rule, Commissioner Velategui should never have signed off on final orders relating to the PP following the order of default, without providing the father with an opportunity to argue in person against the

Default orders, especially given this Commissioner's personal knowledge of the case and his having himself vacated a prior order of default in this case and knowing of the many problems and irregularities in the case.

Again, we ask this court of appeals to review the father's entire motion to vacate final orders in terms of specific review of the many arguments he made in his motion to vacate the final orders of 06/14/13.

After hearing argument as to father's motion to vacate final orders, the court denied his motion and issued her order on 06/27/13 (CP 304). In her order Judge Fleck noted that she based her decision on the following: "The Court acknowledges that *Default Judgments are disfavored by the law and that the Law favors determining controversies on their merits.* The Court looks to one of many such cases as to this principle in the case of *Lee v. Western Processing*, 35 Wash.App. 466 (1983). The court is also aware that motions to set aside Default Judgments are proceedings that are *equitable in nature* and that for many decades the law has been that the party seeking to vacate a default judgment as opposed to a default order must demonstrate four factors, two of which are primary and two of which are secondary. *Gutz v. Johnson*, 128 Wash.App. 901 (2005). In making this determination, the court before which such motions are brought, does not make specific factual determinations, but *evaluates whether the moving party has established sufficient evidence of a prima facie defense.*

The party seeking to vacate a default judgment must demonstrate four factors, the first two being considered primary and the next two being considered secondary: 1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; 2) the reason for the party's failure to timely appear, i.e., whether it was the result of mistake, inadvertence, surprise or excusable neglect; 3) the party's diligence in asking for relief following notice of the entry of default; and 4) the effect of vacating the judgment on the opposing party. CR 60.

In the context of CR 55, the significance of a Defendant's appearance is that it precludes the Plaintiff from obtaining a Default Judgment without notice to the Defendant. Here, it was clear that Mr. Cavener had been present and had attempted to file documents, some or all of them late, but nevertheless he had been present and was therefore served with the motion for default. A Defendant or Respondent who has made a timely appearance, but against whom after proper notice of an order of default was entered for his failure or refusal to answer, was not entitled to the five days' notice of time and place of application to the court for the relief demanded in the complaint. The court cites *Pedersen v. Klinkert*, 56 Wash.2d 313 (1960) as to this language. Here, counsel has presented a notebook of materials going back several years and Mr. Brown (attorney for the Respondent) does so because he believes it was error for

King County Superior Court Commissioner Meg Sassaman, to include the parties' child in a Domestic Violence (DV) Protection Order entered in December of 2010. That order was not appealed or changed on appeal (a notice of appeal was filed but not acted on by the Respondent) and was not changed on father's motion for revision. After that the Protection Order was renewed in January of 2012 and the burden on a renewal is to demonstrate by the party who was restrained, why there was not a substantial likelihood of continued behavior warranting a DV Protection Order, and another order was entered. It appears to this court that at this point in time that the law in this case has been established and there are inferences that can be drawn by the statements in the orders and the number of pleadings that have been filed among other things, and so despite argument from father's counsel that there is no basis to include the child, the actual amended PP includes bases to include the child. The court also recognizes that when it comes to both default orders and default judgments as well as CR2As for example, that Judges and Commissioners carry an extra burden beyond for an example a tort case, where these factors might be considered more rigidly even though this (current action) is an equitable proceeding. All that is to say that this court recognizes what is at issue here in terms of contact between a parent and children. In looking at PPs generally, the court notes that of course the courts are

interested in the Best Interests of the Child and which prevails over the rights of the parents, but nevertheless the court recognizes that these parent rights are of a constitutional nature and the court recognizes this as well.

In terms of the reason for Mr. Cavener's failure to timely appear (factor 2), that is, what he has presented to show that it was a result of mistake, inadvertence, surprise or excusable neglect, the court does not think that he has been able to show any of these given the number of continuances he was granted and his familiarity with the court system based on this court looking at the number of entries in this case which in looking at the entries and sub-entries is close to 300 such entries.

Looking at a secondary factor, the party's diligence in asking for relief following notice of the entry of the default, citing other cases, "a party must use due diligence in asking for relief following notice of the entry of the default." (*Calhoun v. Merritt*, 46 Wash.App. 616, 619 (1986)). A party that receives notice of a Default Judgment and does nothing for three months, has failed to demonstrate due diligence. Conversely a party that moves to vacate a Default Judgment within one month of notice satisfies 60(b)'s diligence prong. (Citing *In re Estate of Stevens*, 94 Wash. App 20, 35 (1999)).

The fourth factor, is one that is usually difficult if not impossible for the opposing side to meet. That is, the effect of vacating the judgment on the opposing party. The fact that they may have to go to trial for example, is not a sufficient reason, so that factor is one this court does not weigh.

Understanding that default judgments are disfavored this court is going to deny the motion under CR 60(b).”

ARGUMENT

In providing its basis for its decision to reject father’s motion to vacate final orders, Judge Fleck correctly and significantly states that “*Default Judgments are disfavored by the law and that the Law favors determining controversies on their merits,*” and further noted that “the court looks one of many such cases as this principle in the case to *Lee v. Western Processing*.” Judge Fleck then also noted that “the court is aware that motions to set aside Default Judgments are proceedings that are equitable in nature...” In fact, in *Lee v. Western Processing*, the court specifically stated that not only are “proceedings to vacate a default judgment equitable in nature,” but significantly stated that “relief is to be afforded in accordance with equitable principles. The court *should* exercise its authority to that end that substantial rights *be preserved* and justice done between the parties.” Citing *White v. Holm*, 73 Wash.2d 348,

438 P.2d 581 (1968). The *Lee* court further stated, “CR 60(b)(1) allows the court to relieve a party from a final judgment for mistakes, inadvertence, surprise, excusable neglect or *irregularity in obtaining a judgment or order.*” *Lee* at 468. In fact, the very case (and related cases) Judge Fleck relied on clearly emphasizes the basic principle that a court ruling on whether or not to vacate a final order, *should* err in the direction of vacating final orders to *assure* equitable principles and justice and make every possible assurance that controversies are determined *on their merits* and not be decided on procedural factors and/or errors as occurred in our case. In addition, we believe that based on the extensive case history provided above, there simply is no question that under CR 60(b)(1), there most certainly was evidence of “irregularities in obtaining a judgment or order” in our case. In short, Judge Fleck simply was in clear error in not following what could be maintained as *the* basic tenant in terms of deciding whether to vacate final orders or not.

Judge Fleck in her order then points appropriately and correctly to *Gutz v. Johnson*, 128 Wash.App. 901 (2005) in terms of analyzing the four factors our case law requires in order to determine (two primary and two secondary) whether or not to grant a motion to vacate a final order of the court and starts her analysis of whether the father met these criteria for his motion to vacate. In what can only be respectfully noted to be a glaring

oversight on the court's part, Judge Fleck utterly fails to analyze at any significant level if at all, the primary and critical first factor as to "the existence of substantial evidence to support, *at least prima facie* (a relatively low bar in realty) a defense to the claim asserted." While commenting at some length as to whether a finding of DV was contested and whether the child should or should not have been included legally in the protection order leading to the petitions for modification of the PP, etc., she fails to analyze and apparently recognize that what is at issue here is whether the father could have presented a prima facie case against a modification at trial which was scheduled for 12/13 (or least in terms of the first of what the father maintains were two separate filings for a petition to modify parental rights). Based on review of the extensive case background materials presented above to this court of appeals, there can be *no* question that the father could have mounted a spirited and credible defense against such a modification. Whether or not a legal finding of DV and a protection order took place as here, the father could have certainly counted on a trial court's discretionary powers to determine that the evidence *did not* warrant his being deprived of immediate unsupervised contact and extensive time with his child even if .191 factors were present. Judge Fleck simply took away such a trial and right to defend his constitutional parenting rights, based no less on procedural grounds, and at

the same time completely avoided what may be termed the ‘prime directive’ as to the four factor *Gutz* analysis. The *Gutz* court at 916 (and 398) restated that “Default judgments are generally disfavored in Washington based on the *overriding* policy which prefers that parties resolve disputes on the merits. Citing *Showalter v Wild Oats*, 124 Wash.App. 506, 101 P.3d 867 (2004). The *Gutz* court continued, “We review a trial court’s ruling under CR 60 (b) for an abuse of discretion. Citing *Wild Oats* at 510. Of great significance in terms of our case, the *Gutz* Court then stated, “Our *primary concern* is that the default judgment is just and equitable; thus, we evaluate the trial court’s (or in this case, the court making a ruling as to vacating a default order and judgment) decision by considering the unique circumstances of the case before us (Citing *Wild Oats* at 511). Of even greater significance in terms of our case if possible, the *Gutz* Court then stated, “Further, we are more likely to reverse a trial court decision refusing to set aside a default judgment.” Citing *Wild Oats* at 511. This dual emphasis could not be any more clear and directive to a trial court to allow a case to be heard on its merits if there is *any* question as to whether a party seeking to vacate a final order could present even a minimal *prima facie* case at trial. Judge Fleck simply overlooked these directives as well as any real analysis as to whether the father could present a *prima facie* case at trial (which he plainly could

have done given the facts of our case) and based on this factor alone, could have and should have granted the motion to vacate to the father (especially in light of all of the procedural and other irregularities in our case). We believe with all due respect to this Court as well as to Judge Fleck, the analysis should end there as to reversing Judge Fleck and ordering a trial. In fact, in *Wild Oats*, the court noted at 510 in its specific analysis as to whether or not to vacate a default judgment, “A trial court abuses its discretion by issuing a manifestly unreasonable or untenable decision.” The court stated further at 510 that “The trial court must balance the requirement that each party follow procedural rules with a party’s interest in a trial on its merits.” We maintain that Judge Fleck failed to follow this important dictate and in fact essentially got lost on minutia and missed the ‘big picture’ analysis by choosing procedural analysis over the importance of assuring a party does not lose its significant legal rights including as to a trial on the merits relating to theoretically the most important relationship one can have in life: with his or her children. That right is so important, it is protected by both our State and Federal Constitutions. The *Wild Oats* Court at 512, stated unequivocally, “It is *well settled* that if a strong or virtually conclusive defense is demonstrated (at the hearing for a motion to vacate orders), the court will spend *little time* inquiring into the failure to appear and answer,

provided the moving party timely moved to vacate and the failure to appear was not willful.” The father did timely file his motion to vacate and certainly did appear again and again in this case as carefully detailed above. Again, based on these directives alone as to factor one (being able to mount a prima facie case at trial), we believe the Court of Appeals should reverse Judge Fleck and order a new trial on its merits. The court reiterated this critical issue disregarded by Judge Fleck, in *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wash.App. 829, 834, 14 P.3d 837, when it stated, “In determining a motion to vacate, the trial court does not make factual determinations; rather, the court evaluates whether the movant, under CR 60(b), has established substantial evidence of a prima facie case. Significantly, the court *must review the evidence in the light most favorable to the moving party.*” Judge Fleck utterly failed to do so or even apparently recognize this critical perspective in denying the father’s motion to vacate. In *Norton v. Brown*, 99 Wash.App. 118, 123, 992 P.2d 1019 (2000), the court stated unwaveringly, “The *overriding* reason (as to granting or rejecting a motion to vacate) should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed....” The court further stated, “What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.” Justice was not done in our case by

Judge Fleck. In *Calhoun v. Merritt*, 46 Wash.App. 616, 619, 731 P.2d 1094 (1987), the Court noted. “We will not overturn the Superior Court’s decision (as to its ruling on a motion to vacate orders) unless an abuse of discretion is found. Such an abuse is less likely to be found if the Superior Court *sets aside the default judgment* than where it refuses to do so (as in our case).” In summary then, again and again our highest courts have in varying but consistent ways, noted its strong preference against default judgments and its insistence or assuring that the real and actual substantive rights of the parties are protected through a trial on its merits where all, facts and evidence can be presented to assure justice and equity. This simply was ignored or misunderstood by Judge Fleck whom this attorney respects greatly. The Judge simply erred in this case and certainly did not weigh the evidence in the light most favorable to the movant, the father, and ignored the reality that the father easily could have presented a credible case in his defense at a trial which Judge Fleck effectively made impossible.

In then addressing factor two, reasons for failure to timely appear, Judge Fleck noted in her final order, “that is, what he (the father) has presented to show that his failure to appear was a result of mistake, inadvertence, surprise or excusable neglect, the court does not think he has been able to show any of these given the number of continuance he was

granted and the familiarity with the court system based on this court looking at the number of entries in this case which in looking at the entries and sub-entries is close to 300 such entries.” As noted above, this factor in fact does not likely have to even be reached based on the above analysis as to the first factor of the father being able to present a credible defense in his behalf at trial. That said, the detailed information presented at length in above sections attests to the reality that the father did in fact appear at many hearings in the petitions to modify the PP filed or claimed to be filed appropriately by the mother. As to appearing at the actual motion for default, we have made it 100% clear that the father *did appear* and handed the court documents at that time. However, whether the court was willing to accept those filings or not, what is also clear is that Judge Doerty had extended the date for final review of adequate cause to well beyond the date of 06/14/13 when the order of default and final PP and other final orders were signed. The sad reality is that rather than allowing the father to file a basic response to mother’s first or second petition to modify the existing PP, or simply go on the record at the hearing of 06/14/13 and state his response, or simply order temporary orders as requested by the mother and continue with the case schedule, etc., both Commissioner Ponomarchuk and Valetgui choose to dismiss the father’s critical personal rights at every level and took the path of unwarranted and

unsupportable 'expediency' and denied the father a trial on its merits which frankly appears to have been at least in part due to distaste or even dislike of the father which simply is unconscionable.

Judge Fleck then reviewed the secondary factors finding that factor four was "one not weighed by the court," and in terms of factor three as to a party's diligence in asking for relief, simply presented two relevant cases without any actual ruling as to the father's case (although by innuendo it appears that the Judge was indirectly stating that the father did not diligently seek relief following the notice of entry of relief. Again, she actually made no ruling here and the father has presented his credible reasons (primarily financial) for not asking for relief following notice of the entry of default. In short, while the secondary factors are just that, secondary, the court below appears not to have addressed these factors in any meaningful way and we again state our belief that the analysis at this secondary level is unnecessary as the father has proven that he could mount a credible case at trial and the analysis based on above case law should end there.

CONCLUSION

Based on all of the above, we respectfully request that the Court of Appeals find that Judge Fleck abused her discretion and misapplied and misunderstood the four factor *Gutz* analysis and came to an incorrect and

legally indefensible ruling (based on case law) in denying the father's motion to vacate the final orders of 06/14/13. Based on the above, we ask that this court reverse Judge Fleck's decision and order a new trial on mother's motion to modify the PP.

Respectfully submitted this 3rd day of December, 2013 by:



Stuart E. Brown, WSBA #35928
Attorney for Appellant Mark
Cavener

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**The Court of Appeals of the State of Washington
Division I**

MARK CAVENER,

Appellant (Respondent Below),

v.

ANDREA JOLLES,

Respondent/Appellee (Petitioner Below).

Case No. King County Superior
Court Case No. 02-3-03386-9 SEA

**Return of Service/Declaration of
Service as to Karma Zaike,
Attorney for Andrea Jollies**

I Declare:

- 1. I am over the age of 18 years, and I am not a party to this action.
- 2. I served the following documents to:

KARMA ZAIKE, Attorney for ANDREA JOLLE, WSBA #31037

[X] APPEAL BRIEF OF APPELLANT MARK CAVERNER

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date:	December 5, 2013 Time: Approximate Time: 4:00 pm.
Address:	Karma Zaike, Attorney at Law c/o Michael Bugni & Associates, PLLC 11300 Roosevelt Way NE, Suite 300 Seattle, WA 98125 206-385-5500; 206-363-8067 (Fax)

4. Service was made:

By delivery to the person named in paragraph 2 above (to the front desk of the law firm of the person noted in paragraph 2 above, and by E-mail

5. Service of Notice on Dependent of a Person in Military Service: **NA**

The Notice to Dependent of Person in Military Service was served on mailed by first class mail on (date) _____.

Other:

6. Other: **NA**

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, WA on 12/05/13 by:

WSBA #35928



Signature/Bar Number

Stuart E. Brown

Printed Name