IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Parentage of: J.T.G.-S., A minor child.	No. 39223-2-II UNPUBLISHED OPINION

Van Deren, J. — Lorrie K. sought a modification of the parenting plan for her child, JTG-S. The trial court modified the parenting plan, gave Dane S.,[1] the father, primary residential custody and restricted Lorrie's visitation. Lorrie timely filed an appeal but voluntarily dismissed her appeal and then filed an unsuccessful motion to vacate the trial court's modification decree based on CR 60(b)(1) and CR 60(b)(11) before a different superior court judge.[2] She now appeals the denial of her motion to vacate, arguing that the trial court abused its discretion because the original trial court (1) forced her attorney to withdraw because it would only continue the trial if she agreed to a temporary transfer of residential custody of her child; (2) acted as an expert, in lieu of her excluded expert, when it reviewed a recorded interview of JTG-S by her expert; (3) was actually biased or had impermissible ex parte contacts with the judge's own son,

[1] To preserve the anonymity of JTG-S, we refer to the parties by their first names.

[2]The original trial judge had retired.

an investigator who testified about charges of child molestation by Dane's roommate in an unrelated criminal case; and (4) did not order the guardian ad litem to (a) investigate Dane's roommate or new allegations Lorrie raised during the pendency of the case or (b) remain present during the trial in order to protect JTG-S's interests throughout the modification proceeding. She further argues that these various irregularities combined to work a manifest injustice. Because the bases of her motion to vacate were issues of legal error or abuse of discretion and did not amount to irregularities in the proceeding nor work a manifest injustice, we affirm the trial court's denial of the motion to vacate.

FACTS

During Lorrie's second marriage, she had a relationship with Dane and gave birth to JTG-S in April 2003.[3] Lorrie and Dane arranged Dane's visits with J.T. G.-S. informally until April 2005, when Dane sought a court-ordered parenting plan. After appointing a guardian ad litem, the trial court entered a temporary parenting plan in May 2005 for JTG-S. The plan designated Lorrie as the primary residential parent, split holidays evenly, and afforded Dane increasing amounts of time with JTG-S over two month increments. Dane and Lorrie had joint decision making authority for major decisions, leaving day-to-day decision making to the parent in charge of JTG-S on any given day. In December, the trial court entered a final parenting plan substantially similar to the temporary plan.[4]

In August 2007, Lorrie reported "some sexual allegations" to police and Child Protective

[3] There was some question of JTG-S's paternity, which the parties established in 2003.

[4] JTG-S resided with Lorrie, and Dane cared for the child every other weekend for 49 hours and every other Thursday for 11 hours. But Lorrie exclusively handled education and day care decisions.

Services (CPS) and she also alleged that Dane had "punched [JTG-S] in the head." B Report of Proceedings (RP) at 11, 10. In September, Lorrie petitioned for modification of the parenting plan, and the trial court preliminarily required Dane to have supervised visitation. Dane, in turn, alleged that Lorrie abused JTG-S and requested primary residential custody. CPS determined that Lorrie's allegations were "inconclusive." B RP at 34. The court appointed a new guardian ad litem in December to review these allegations and conduct interviews.

The situation improved, visitation went well, and Lorrie's third husband and his family provided a supportive environment. The guardian ad litem found the situation stable but recommended that Dane receive custody if Lorrie reported additional, unfounded allegations.[5] The guardian ad litem based his conclusion on what he believed to be Lorrie's emotional abuse of JTG-S through false allegations that created conflict with Dane and psychological damage for JTG-S.[6] But in the summer of 2008, Lorrie made more allegations and the trial court reduced Dane's visitation to supervised visits for two hours twice a week.

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[5] The theory behind the guardian ad litem's conclusion is that the only way to stop false allegations and their effects is to cut off the other parent completely, which "punishes the child and punishes the father for not having done anything wrong," or change custody "and hope that alleviates the false allegations and stops all the litigation and CPS work." B RP at 24.

[6] Lorrie made 13 to 20 "allegations of abuse to the police, to CPS," about her second husband and "he now has custody of [their two] children." B RP at 6. The allegations of abuse were "the same types of allegations that are being made against [Dane] . . . with [JTG-S]." B RP at 7. Allegations against her second husband included physical violence, sexual assault, and intentional burns. Another guardian ad litem had concluded that Lorrie used the allegations to control her second husband's contact with their children. The guardian ad litem characterized Lorrie's credibility as "zero." B RP at 29. Given the number of allegations, the guardian ad litem concluded that the earlier allegations against her previous husband and the allegations against Dane were unfounded. At trial, the guardian ad litem opined that Lorrie controlled JTG-S. He further supported his conclusion by noting Lorrie's inconsistent behavior of agreeing to her second husband's custody and encouraging additional visitation with Dane after resolution of the initial allegations.

The trial court set a hearing for trial review for September 15. On August 26, Lorrie's newly hired attorney entered a notice of appearance. At the hearing on September 15, Lorrie's attorney requested a continuance based on his recent entry into the case and due to surgery he had undergone in August.

Dane's attorney objected to a continuance and asked that Dane be designated as the primary residential parent during any continuance the trial court granted. Lorrie's attorney opposed the idea and suggested a 35-45 day continuance without changing the designation of the primary residence. Dane's attorney reinforced his position with a discussion of multiple reports from Lorrie to CPS, police investigation of Dane, and Lorrie's obstruction of Dane's visitation. Dane's attorney argued that Lorrie should have secured an attorney in the preceding year while her petition was pending. Lorrie's attorney countered that no additional allegations occurred after his involvement and he only needed to investigate the case further to narrow the issues for trial. The trial court commented that trial could begin three days later or Lorrie could receive a continuance if Dane received primary residential care with her having residential care Friday through Sunday and midweek on Wednesday. The trial court took a brief recess for Lorrie and her attorney to consult.

After the recess, Lorrie's attorney asked to withdraw, "I believe it's going to be my client's position that I be allowed to withdraw from the matter. She will be proceeding on her own on Thursday. She will be prepared to go to trial." A RP at 11. Dane's attorney asked that the trial court grant the continuance and transfer custody. Lorrie's attorney elaborated, "It's not a question of whether I'm going to stay on the case. I believe there's a communication problem that's developed with my client regarding strategy with this matter and our relationship has

deteriorated so that I would not be able to effectively represent [her]." A RP at 11. Dane's attorney continued to request the continuance and transfer of custody. Lorrie's attorney responded, "A minute ago [Dane's Attorney asked] for the trial to start on Thursday. Your Honor, that's going to happen. It's my motion for the continuance. I'm withdrawing that motion." A RP at 12. Dane's attorney again emphasized that he would like to have the continuance and transfer of custody.

The court clarified, "What I had in mind was doing the transfer, primarily because of the allegations dealing with the obstruction of visitation . . . . That was all. I wasn't making a decision one way or the other on custody." A RP at 12. The trial court allowed Lorrie's attorney to withdraw if that was her wish.

In her subsequent motion to vacate, Lorrie explained her view of what transpired:

> [Dane's attorney] agreed to a continuance but only if [Dane] got immediate temporary custody of [JTG-S]. [My attorney] and I conferred privately. [He] urged me to accept the continuance. I refused because I was afraid for my son. After our private conference, [my attorney] and I went back in front of [the trial court]. It is clear from the record that I had no argument or disagreement with [Dane's attorney] other than giving my son over to [Dane]. [The trial court] then allowed [my attorney] to withdraw if that was my wish. My wish was to protect my son from [Dane], not to be unrepresented. I am not an attorney and have no legal training. The Court, in essence, forced me to choose between giving my son over to [Dane] until the time of trial or represent myself. I did not know that [the trial court] could have compelled [my attorney] to continue representing me. Believing that [Dane] sexually and physically abused [JTG-S], I felt that I had no reasonable choice but to represent myself. I obviously felt the need for an attorney or I would not [have] retained [my attorney]. I had no desire to represent myself.

CP at 18 (citations omitted).

The trial proceeded with Lorrie acting pro se. At trial, the guardian ad litem testified based on his report before Lorrie made new allegations in May. He recommended that JTG-S's

primary residence be with his father. Although the guardian ad litem had made his report on February 15, 2008, the trial court had not yet discharged him. The guardian ad litem felt that he had discharged his duty when he issued his report and remained involved only as an unpaid and "reluctant" participant. B RP at 27-28. He did not seriously review the allegations or create another report after Lorrie's new allegations surfaced in May. The trial judge asked the guardian ad litem whether additional investigation would be helpful in formulating his recommendation to the court, and he responded, "It seems those reports are available to the Court, that I wouldn't have to review them for the Court so I'd just . . . leave it up to the Court . . . as to whether or not you think I would be helpful." B RP at 66. The trial court chose to review the documents without additional review by the guardian ad litem.

Lorrie wanted Lawrence Daly[7] to testify as an expert about his forensic interview of JTG-S. Lorrie also sought to introduce a digital video disc (DVD) of the forensic interview and a report about the interview with Daly's evaluation. Dane objected, claiming surprise because he did not receive proper notice of the witness or the related DVD evidence. The trial court explained the problem to Lorrie, "If you have information, you need to pass that information to the other side." C RP at 4. She emphasized the importance of Daly's testimony. The trial court verified that Dane would have an opportunity to review the DVD over the weekend. After reviewing the tape, Dane objected to Daly's testimony because Daly did not produce a written report, but Dane did note that Lorrie could argue for the trial court to view the tape and "draw a

[7] According to Daly, he has "done more than 5000 forensic interviews of children" and he interviewed JTG-S on June 23, 2008. CP at 21. His declaration filed with Lorrie's motion to vacate stated, "Based on my first interview it was my opinion that his statements were reliable and credible and that it is probable that the child had been physically and sexually abused by Dane." CP at 21-22.

conclusion." D RP at 2.

The trial court explained to Lorrie, "Again, normally a professional puts together a report so people can review it, so that people can criticize it one way or another. You just don't come in and say this is his testimony, period. [Dane] has no chance to review that." D RP at 2-3. The trial court watched the DVD. The trial court denied Lorrie's request to have Daly testify.[8]

During the last day of trial, the trial judge queried Dane's living situation and made it clear that his present roommate would have to be removed if Dane were to be the primary residential parent because his roommate was charged with child abuse. Although not discussed at trial,[9] the trial judge's son, in his capacity as an investigator, testified as a witness on behalf of Dane's roommate in his criminal case.

In October, the trial court modified the final parenting plan based on a "pattern of emotional abuse" and "abusive use of conflict by the parent[,] which creates the danger of serious damage to the child's psychological development." CP at 106. The trial court found that "[t]he child's environment under the [existing] schedule is detrimental to the child's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the child." CP at 126. The court identified the substantial change in circumstances, "[Lorrie] has engaged in harmful conduct by making false accusations and

[8] In his ruling, the trial court referred to the video, "And you've got to see that video. When you see that video, that poor little boy, going . . . one more time, that's not enough. CPS, Mary Bridge, Hollencamp, all of those folks, not enough. Okay. One more time right before trial." G RP at 3.

[9] This information only came to light in the motion to vacate. There is nothing in the record indicating that the trial judge knew anything about his son's involvement in Dane's roommate's case.

disrupting the relationship between [Dane] and [JTG-S]." CP at 127.

The modified parenting plan provided that JTG-S would primarily reside with Dane; it also required that Lorrie's contact with JTG-S be supervised and it limited Lorrie's regular contact to three hours each weekend. The plan also conditioned Lorrie's contact on Lorrie attending counseling and demonstrating "an awareness of harm she does to [JTG-S] by comments and actions which attack [JTG-S]'s relationship with [Dane]." CP at 108. The plan continued to authorize the parent in control of the child with day-to-day decisions but gave Dane authority over all major decisions.

Lorrie retained new counsel, appealed the trial court's order amending the parenting plan, and received an extension of time to pay for the verbatim transcript and the clerk's papers, but she later moved to dismiss her appeal.[10] On March 16, 2009, Lorrie unsuccessfully asked the trial court to vacate the order amending the parenting plan. Lorrie's arguments were substantially similar to those she raises in her present appeal.

In addressing Lorrie's motion to vacate, the trial court reasoned that CR 60 is an extraordinary remedy and the issues raised in Lorrie's CR 60 motion were more appropriate for an appeal, a motion for a new trial, or a motion for reconsideration. The trial court also stated that it could not rule that the previous judge abused his discretion when he denied a continuance on the day of trial and when he failed to recuse himself after discovering that the defendant in an

[10] Dane incorrectly claims that the trial court lacked authority to hear a motion to vacate because Lorrie's appeal was on review before us. Our commissioner's December 26, 2008, ruling dismissing the appeal became the final decision terminating review on January 29, 2009, and our mandate issued on January 29, almost two months before Lorrie moved to vacate the trial court's order. Dane's contention lacks support in the record and the trial court had authority, as its decision could not change a decision being reviewed by an appellate court. *See Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986).

unrelated case was Dane's roommate.[11] RP (March 27, 2009) at 18. The trial court also ruled that "whether or not there was adequate cause, whether the [guardian ad litem] did his or her job, whether or not there was error[in] admi[tting]evidence [were] for the Court of Appeals and not for a CR 60 motion." RP (March 27, 2009) at 18. The trial court then discussed possibly awarding Dane attorney fees at a later date.

Lorrie appeals the denial of her motion to vacate.

ANALYSIS

Lorrie, after dismissing her appeal of the trial court's actions, now claims that CR 60(b) should provide her relief and that the trial court subsequently abused its discretion when it failed to vacate the decree modifying the parenting plan. Because Lorrie's CR 60 motion focused on issues relating to the trial court's abuse of discretion or legal rulings—not matters extraneous to the action or procedural irregularities—and we discern no manifest injustice, we disagree.

I. Standard of Review

Under CR 60(b), a trial court "may relieve a party . . . from a final judgment, order, or proceeding." We review a trial court's denial of a motion to vacate for manifest abuse of discretion[12] and do not consider the underlying judgment. *Haley v. Highland*, 142 Wn.2d 135,

[11] The trial court noted that no declaration, affidavits, or court record supported this theory.
[12] Citing *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 877 P.2d 724 (1994) and *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 969 P.2d 1072 (1998), Lorrie argues that the abuse of discretion standard does not apply to questions of law raised in a motion to vacate. Lorrie is correct that an exception of sorts can apply to our usual review under the abuse of discretion standard, but she inaccurately describes its extent: "Exceptions to the abuse of discretion standard are found where the underlying question raised on the motion is one of law. Thus, the standard of review is based on the nature of the underlying questions raised. Constitutional errors receive a de novo standard of review." Br. of Appellant at 16 (citations omitted). In *Khani*, the default judgment was void and vacation mandatory under CR 60(b)(5) because the trial court lacked personal jurisdiction over the defendant, which struck at the trial court's very authority to enter the judgment. 75 Wn. App. at 324-25. Although any judgment may be attacked at any time for lack of subject matter

156, 12 P.3d 119 (2000); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). A trial court abuses its discretion where its decision "is manifestly unreasonable or based upon untenable grounds or [untenable] reasons." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

But a CR 60 motion to vacate is not a substitute for an appeal. Washington courts have defined the limits of authority to vacate under CR 60(b):

> "The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion."

In re Jones' Estate, 116 Wash. 424, 428, 199 P. 734 (1921) (quoting Henry Campbell Black, 1 Law of Judgments § 329, at 506 (2d ed. 1902)); *see Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 758-59, 415 P.2d 501 (1966).

Our Supreme Court has stated, "It has been the uniform ruling of this court that a motion to vacate a judgment does not affect a substantial right, if the errors complained of are errors of law occurring at the trial; that such errors cannot be reviewed in a motion to vacate, and that, therefore, no substantial right could be invaded by a denial of the motion." *Sound Inv. Co. v. Fairhaven Land Co.*, 45 Wash. 262, 263, 88 P. 198 (1907); *see* Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. 505, 510, 514-15 (1960). Without something more, "[e]rrors of law are not correctable through CR 60(b); rather, direct appeal is

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jurisdiction or personal jurisdiction, that exception does not give a trial court the authority to review other questions of law de novo in a motion to vacate under CR 60(b). *See In re Marriage of Mu Chai v. Yi Kong*, 122 Wn. App. 247, 254, 93 P.3d 936 (2004).

the proper means of remedying legal errors." *Burlingame v. Consol. Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986); *see also Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947).

The error- and abuse-correcting function of appeal is not incorporated into a motion to vacate:

> It may have been, and probably was, improper for the court to have made and entered the judgment upon the pleadings in favor of respondent against these appellants at the time it did. If so, this was an error that could have been corrected upon appeal. Appellants, having taken their appeal, but having neglected to prosecute the same, cannot now be heard to complain of the error.

Ellis v. Moon, 40 Wash. 114, 116, 82 P. 186 (1905) (citation omitted).[13]

B. CR 60(b)(1) and CR 60(b)(11)

Under CR 60(b)(1), a trial court may grant relief for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Irregularities are usually

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[13] One commentator explained the difference between an error of law and an irregularity in the proceedings:

> An error of law is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make. An irregularity has reference to something extraneous to the action of the court or goes to the question of the regularity of the proceedings.
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> The difficulty arises not in determining the difference in definition between the two, but in applying the definitions to diverse factual situations. . . . Viewing the problem more generally it appears that an irregularity is regarded as a more fundamental wrong, a more substantial deviation from procedure than an error of law. An irregularity is deemed to be of such character as to justify the special remedies provided by vacation proceedings, whereas errors of law are deemed to be adequately protected against by the availability of the appellate process. Other than that, the most that can be said is that it must be left for the court in each instance to classify.

Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. at 515 (citations omitted).

procedural mistakes that call into question the validity of the judgment—e.g., insufficient notice, problems with service of process, and facial errors that go to the trial court's power to enter the judgment. *See* Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. at 513-14, 522; *see, e.g.*, *In re Wise's Estate*, 71 Wn.2d 734, 737, 430 P.2d 969 (1967).

In contrast to CR 60(b)(1), a trial court may relieve a party from a final judgment where it finds "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(11). But the use of CR 60(b)(11) "'should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.'" *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) (quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). We will grant relief under CR 60(b)(11) only when these extraordinary situations, extraneous to the trial court's action, result in a manifest injustice. *See In re Marriage of Hammack*, 114 Wn. App. 805, 810, 60 P.3d 663 (2003); *see, e.g.*, *In re Marriage of Burkey*, 36 Wn. App. 487, 490 & n.2, 675 P.2d 619 (1984).

II. CR 60 Claims

Lorrie argues that she was entitled to relief under CR 60(b)(1) and CR 60(b)(11) and that the trial court abused its discretion or committed reversible error when it denied her motion to vacate the order modifying JTG-S's parenting plan. Her reliance on the rule is misplaced. An appeal was the proper forum to address her issues with the original trial court.

A. Withdrawal of Counsel and Denial of a Continuance

Lorrie argues that the earlier trial court conditioned a trial continuance on a temporary change of custody and then accepted her attorney's withdrawal, making the trial court's later denial of her motion to vacate an abuse of discretion.[14] Lorrie fails to point to any authority that

CR 60(b)(1) applies to withdrawal of counsel and the conditioning of a requested continuance in these circumstances. And we decline to elevate one's choice of counsel and disagreement with a condition of a continuance to procedural irregularities that warrant vacation and a new trial. *See In re Marriage of King*, 162 Wn.2d 378, 394-97, 174 P.3d 659 (2007).

Lorrie had no United States Constitution Fifth Amendment or Sixth Amendment right to counsel in this case because she did not face criminal prosecution or any other infringement of a fundamental liberty interest, such as termination of parental rights. *Compare In re Det. of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999) *with In re Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983). Thus, resolution of these issues related to withdrawal, continuances, conditions on continuances, and Lorrie continuing pro se were within the trial court's discretion and were better resolved in the appeal that she voluntarily dismissed. *See, e.g.*, *Trummel v. Mitchell*, 156 Wn.2d 653, 670-71, 131 P.3d 305 (2006); *Balandzich v. Demeroto*, 10 Wn. App. 718, 720-21, 519 P.2d 994 (1974); *Wagner v. McDonald*, 10 Wn. App. 213, 217-19, 516 P.2d 1051 (1973); *Jankelson v. Cisel*, 3 Wn. App. 139, 141-42, 473 P.2d 202 (1970). The trial court's indication that the trial could commence in three days or that it could grant a longer continuance, conditioned on a temporary residential placement with Dane, was not an irregularity in obtaining the modification decree. And Lorrie's attorney's withdrawal was by agreement, not necessitated by the trial court. Thus we hold that Lorrie is not entitled to relief from judgment under CR 60(b)(1) based on the trial court's decision to not hold a CR 71 withdrawal hearing or address CR

[14] As amicus curiae, Northwest Justice Project argues the substantive merits for concluding that the trial court erred and abused its discretion during the parenting plan modification proceedings. But these highly persuasive arguments were more appropriate in the voluntarily dismissed appeal than in this appeal and amicus does not supply arguments sufficient to support relief under CR 60(b)(1) or CR 60(b)(11).

40.

Lorrie similarly errs in relying on CR 60(b)(11). She posits no facts to support her allegation that the denial of her motion to vacate was based on sufficient irregularity in the underlying trial to merit the extraordinary relief requested under CR 60(b)(11). After reviewing the record, we cannot say that the trial court abused its discretion when it denied her motion to vacate and ruled that CR 60(b) did not apply in these circumstances.

B. Expert Testimony

Lorrie also argues that the trial court abused its discretion when it refused to vacate the modification decree because the original trial court did not allow her proposed expert to testify but did allow admission of the expert's DVD. On appeal, we would have reviewed the trial court's interpretation of the rules of evidence de novo and that court's application of properly interpreted rules to the particular facts of the case for abuse of discretion. *Hensrude v. Slos*s, 150 Wn. App. 853, 860, 209 P.3d 543 (2009). But our review of a decision under CR 60 does not provide the same means for us or the trial court to review the trial court's original rulings on the admission of evidence.[15] *See, e.g.*, *Bjurstrom*, 27 Wn. App. at 450-54. Thus, the trial court did not abuse its discretion when it denied Lorrie's motion to vacate on the ground that the trial court viewed the DVD without also hearing Lorrie's expert testify.

[15] We note that the Pierce County Local Rules required disclosure of witnesses, including experts and their summary reports, and disclosure of exhibits to be used at trial. PCLR 3(b)(2); PCLR 5(d). Absent disclosure, the witness may not testify and the party may not introduce the exhibit "unless the court orders otherwise for good cause and subject to such conditions as justice requires." PCLR 3(b)(2); PCLR 5(e). The trial court's decisions barring Daly's testimony and admitting the DVD fell within its broad discretion. *See In re Estate of Palmer*, 145 Wn. App. 249, 259-60, 187 P.3d 758 (2008); *Hendrickson v. King County*, 101 Wn. App. 258, 265-66, 2 P.3d 1006 (2000); *see, e.g.*, *State v. Swan*, 114 Wn.2d 613, 634-37, 790 P.2d 610 (1990).

C. Dane's Roommate

Lorrie argues that the trial judge was actually biased or had ex parte contacts that call into question the fairness of the proceedings, and, under the Canons of Judicial Conduct and procedural due process, the trial court should have vacated the order modifying the parenting plan.[16] Again, we disagree.

In arguing this issue, Lorrie again asked the subsequent trial court and asks us to examine the underlying judgment. She raises issues about the trial judge and his son's investigation of Dane's roommate, but she points to no facts in the record and merely speculates that the trial judge was aware of his son's investigation and that it caused bias. Br. of Appellant at 39. The trial judge's discussion on the record with Dane, that he must remove his roommate if he took custody of JTG-S, addressed any future concerns. And Lorrie does not allege that Dane's roommate abused JTG-S. Again, without more, these arguments were reviewable on appeal but they do not constitute such irregularity—even with the additional evidence she submitted in the motion—that CR 60 is an appropriate avenue of relief. The trial court did not abuse its discretion when it denied her motion to vacate on these grounds.

D. Guardian ad Litem

Lorrie further argues that the original trial court should have ordered the guardian ad litem to investigate her additional allegations and investigate Dane's roommate; she contends that the trial court's failure to do so is sufficiently irregular or manifestly unjust to require vacation under CR 60(b). She also claims that RCW 26.26.555 mandated appointment of a guardian ad litem to

[16] We do not pass judgment on judicial conduct under the Canons of Judicial Conduct. This function is specifically reserved to the Supreme Court. *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 181, 955 P.2d 369 (1998).

represent JTG-S's interests.[17] Again, her arguments are not well taken under CR 60 but are, rather, issues that could have been raised in an appeal regarding legal error or abuse of discretion. Her contentions require an examination of the underlying action and judgment, not the subsequent trial court's order denying her vacation motion. The trial court did not abuse its discretion when it denied Lorrie's motion to vacate on these grounds under CR 60.

E. Multiple Procedural Irregularities

Finally, Lorrie argues that the various issues she raises about the modification proceeding combine to warrant relief under CR 60(b)(11). But no issue Lorrie raises merits vacation under CR 60. And we decline to hold that, when combined, these issues raise concerns of manifest injustice sufficient to warrant vacation and a new trial such that the trial court abused its discretion in ruling otherwise. If there is a substantial change in circumstances, Lorrie may file a new petition to modify the parenting plan in JTG-S's best interests. *See* RCW 26.09.260;[18] *King*, 162 Wn.2d at 385-86.

III. Attorney Fees

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[17] RCW 26.26.555 applies to proceedings to determine parentage and did not apply to this modification proceeding. Instead, in a parenting plan modification proceeding, a guardian ad litem is appointed to investigate or serve as a special advocate under RCW 26.12.175 (last revised July 26, 2009 (Laws of 2009, ch. 480, § 3)). The trial court exercised its discretion when it decided whether to order the guardian ad litem to investigate further or to serve as J. T. G.-S.'s advocate—due process concerns are not automatically implicated in these circumstances. *In re the Parenting and Support of S.M.L.*, 142 Wn. App. 110, 118-21, 173 P.3d 967 (2007). Here, the trial court conducted the ultimate fact finding proceeding, which included Lorrie's new allegations. And nothing in the record shows that JTG-S's interests required further independent representation in the proceedings.

[18] RCW 26.09.260 has been updated since this appeal was filed. None of the changes are pertinent to Lorrie's right to file a new petition to modify the parenting plan. *See* laws of 2009, ch. 502, § 3.

Lorrie requests that we vacate the trial court's award of attorney fees to Dane based on her motion to vacate and that we award her attorney fees and costs on appeal.[19] The record on appeal does not disclose that the trial court formally awarded fees to Dane. The trial court stated:

> I believe counsel's entitled to attorney[] fees. However, . . . I will not give attorney[] fees unless it's supported by an affidavit and breakdown as to what time you spent preparing to contest this motion and, therefore, will consider it at a later date when I have adequate documentation as to the amount of time you spent on this and counsel has an opportunity to respond if she so desires.
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> . . . . I would ask the moving party to prepare an order today denying the motion and granting of attorney[] fees before they leave the courtroom.

RP (March 27, 2009) at 18-19. The order, with a handwritten attorney fees award, states, "Further Atty fees are awarded to counsel for respondent Dane S[.], in an amount to later be established" and in another hand "only as regards the motion to vacate." CP at 77. The record includes no additional proceedings or documentation related to attorney fees, thus we do not review the trial court's award, if any. As Lorrie does not prevail in this appeal, we decline to award costs and attorney fees. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992).

We affirm the trial court's denial of Lorrie's motion to vacate.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

[19] Dane seems to have contemplated a request for attorney fees on appeal, referring to such a section in his table of contents, but did not include that section in his body of his brief. As Dane declined to brief this issue, we do not address it. *See* RAP 18.1(a)-(b).

Bridgewater, J.

Hunt, J.