IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Custody of M.W.F., Minor Child. JUDY CAIN, Respondent, and BARBARA ST. LOUIS, Appellant.	No. 42107-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Barbara St. Louis appeals the trial court's denial of her request to vacate a permanent third party custody decree placing M.W.F., her grandchild, with a nonrelative, Judy Cain. St. Louis argues that the trial court's factual findings are not supported by substantial evidence and that it abused its discretion in rejecting the guardian ad litem's (GAL) recommendation that M.W.F. be placed with St. Louis. St. Louis also contends that the trial court abused its discretion in denying her CR 60 motion to vacate the permanent third party decree granting custody to Cain and that the custody decree is void for jurisdictional defects.

The record supports the trial court's findings of fact and reflects that the trial court

carefully weighed the best interests of M.W.F. in rejecting the GAL's recommendation and in denying St. Louis's request that it vacate the custody decree. We affirm the trial court's decision. However, it appears from the record presented for our review that the parties failed to amend the trial court's findings and conclusions and final residential parenting plan to correctly reflect a number of the trial court's decisions as it directed them to do. Accordingly, we remand for correction of these drafting errors.

FACTS

Background

Jodie Fate gave birth to M.W.F. on May 28, 2008. During the pregnancy, Fate's mother, St. Louis, provided maternity clothes, food, bus money, and attended doctor appointments. St. Louis attended M.W.F.'s birth and continued to help with related expenses. And when a car accident hospitalized Joshua Francis, M.W.F.'s presumed father, M.W.F. stayed with St. Louis and her two sons (M.W.F.'s uncles) for a week.

Following Francis's release from the hospital, M.W.F. lived with Fate and Francis in Hoquiam, blocks away from Francis's aunt (through marriage), Cain. Cain lived with Dawna Shapansky (her daughter) and Shapansky's two daughters.[1] The Cain household frequently cared for M.W.F. during this time. Although they were supporting Fate, Francis, and M.W.F., the Cains did not know Fate's family well. In February of 2009, Fate and Francis were reported to Child Protective Services (CPS) for illegal drug use and maintaining unsanitary living conditions. CPS threatened a dependency action to take M.W.F. into state custody unless Fate and Francis

[1] Dawna Shapanksy's estranged husband, Jeremy Shapansky, later reconciled with Dawna Shapansky and moved into the Cain household after Cain received custody of M.W.F.

agreed to place M.W.F. with someone else. Fate agreed that M.W.F. could live with St. Louis until March 2, 2009, the date of a "Family Team Decision Meeting" with CPS and the interested parties, although St. Louis arranged for M.W.F. to stay with the Cains most of that week because she was working.

At the March 2 meeting, all parties, including St. Louis, agreed that M.W.F. would reside with Cain during the week and with St. Louis during the weekend. CPS's notes of the meeting state the arrangement was temporary. Ex. 1 ("[M.W.F.] has been residing with [St. Louis] MGM [maternal grandmother] on a safety plan. . . . Parents have discussed having Dawna [Shapansky] and [Cain] get temp[orary] third party custody.").

After this Family Team Decision Meeting, Cain filed a "Nonparental Custody Petition" on April 15, 2009. She used the required form under RCW 26.10.030 to petition for permanent custody rather than temporary custody.[2] Both Fate and Francis joined this petition and waived notice of entry of the custody decree. In asking for permanent custody, Cain identified herself as M.W.F.'s sole custodian and made no provision for M.W.F.'s time with St. Louis. The proposed residential schedule provided supervised visitation for Fate and Francis with Cain's prior approval.

At a May 4 custody hearing, the trial court[3] found that it was in M.W.F.'s best interests to reside with Cain and granted her permanent third party custody. Despite the order, by amicable

[2] RCW 26.10.110 controls proceedings for temporary custody and provides, "A party to a custody proceeding may move for a temporary custody order. The motion must be supported by an affidavit. . . . The court may award temporary custody after a hearing, or, if there is no objection, solely on the basis of the affidavits."

[3] Judge Godfrey made the initial custody determination. Judge Edwards presided over the show cause hearing on St. Louis's third party custody decree. Judge McCauley presided over the later bench trial.

agreement of the interested parties, M.W.F. continued to stay with St. Louis for two or three days a week after Cain received custody.

On May 31, 2009, Fate was booked into Grays Harbor jail for felony eluding.[4] St. Louis took M.W.F. (13 months old at the time) to visit Fate in jail. Cain disapproved of this visit due to the unsanitary conditions of most jail visiting facilities. According to St. Louis, in June 2009, Cain began to limit her time with M.W.F. because they disagreed about whether M.W.F. should visit Fate in jail.

Because her visitations with M.W.F. were terminated and because of concerns about the adults residing within Ms. Cain's home, St. Louis filed her own third party custody petition[5] along with a "Motion to Establish Regular Weekly Overnight Visitation" in August 2009. Clerk's Papers (CP) at 142, 149. Fate joined St. Louis's petition.[6] St. Louis's custody petition recognized that Grays Harbor Superior Court had "exclusive continuing jurisdiction" over M.W.F.'s custody proceedings because "[t]he court ha[d] previously made a child custody, parenting plan, residential schedule or visitation determination in this matter." CP at 144. The petition further alleged,

> Neither parent is a suitable custodian for the child because of substance abuse, history of domestic violence, and instability of residences.

[4] RCW 46.61.024.

[5] We note that the appropriate legal procedure would have been to bring a modification petition pursuant to RCW 26.10.190(1) and RCW 26.09.270.

[6] Fate also attempted to withdraw her joinder of Cain's previously adjudicated third party custody petition. When a parent voluntarily joins a third party custody petition because they are unfit and a trial court grants custody to a responsible third party, RCW 26.27.211 dictates that the trial court retains jurisdiction over its custody determination absent the child's ties with Washington being significantly severed. And, as noted above, St. Louis's own custody petition recognized the trial court's continuing jurisdiction in this matter.

> The child is presently placed with Judy Cain, who is a non-blood relative of one of the alleged fathers, Joshua Francis. Joshua Francis has not been shown to be the actual father of the minor child. Since the child has been placed with Judy Cain, she and other adults in her household have substantially interfered with the minor child maintaining a relationship with other blood family members, particularly maternal grandmother petitioner Barbara St. Louis. There is no legitimate reason to interfere with this contact. Barbara St. Louis initially supported Judy Cain in her petition, and was promised she would be allowed to maintain substantial contact with the child. The pleadings filed by Judy Cain [in her custody petition] were not provided to petitioner herein, or the mother Jodie Fate. It is reported that there is substantial drug and alcohol use in Judy Cain's household.

CP at 147. In September, St. Louis also brought a "Motion to Set Aside Third Party Custody Decree."[7] CP at 56.

At an October adequate cause hearing (presumably related to St. Louis's custody petition), the trial court consolidated St. Louis's case with the previously adjudicated Cain custody case.[8] In November, by agreement of the parties, the trial court awarded St. Louis weekend visitation rights with the stipulation that she not take M.W.F. to see Fate in jail.

After learning in late 2009 that Francis was not M.W.F.'s biological father,[9] St. Louis

[7] This motion did not reference CR 60(b) or any other legal authority.

[8] The parties did not designate this report of proceedings for our review. However, the trial court's written order, entered on October 19, states that "[a]dequate cause is found on Cause number 09-3-327-1"—the cause number assigned to St. Louis's custody petition—and that "[v]isitation and other motions shall be reviewed on November 9, 2009." CP at 170. The trial court's order fails to state under what authority it consolidated St. Louis's custody petition with the previously adjudicated Cain petition but, presumably, it acted pursuant to CR 42(a) and the court's continued jurisdiction over M.W.F. in light of its previous custody determination. *See* RCW 26.27.211.

[9] Russell Walker was later determined to be M.W.F.'s father. Walker arrived unexpectedly at the June 22, 2010 continuation of the trial. He joined in St. Louis's motion to vacate Cain's third party custody decree, and also requested custody of M.W.F. After conducting an investigation, the GAL reported that Walker tested positive for amphetamines, verbally abused her, and accused her of cursing at a doctor in Missouri. Further investigation revealed that Walker had warrants in Missouri for failure to pay child support and while in Washington nine years earlier, had multiple CPS complaints lodged against him including one instance where CPS temporarily removed his

moved that the trial court immediately transfer M.W.F.'s custody to her temporarily (pursuant to RCW 26.10.110) or, in the alternative, that it grant an "emergency" trial setting addressing her custody petition. In January 2010, the trial court granted St. Louis's motion for an expedited trial setting and trial commenced on April 30.

Procedural History

Starting with opening statements at the bench trial, the parties disputed whether they were appearing before the trial court to argue a custody modification or a motion to vacate the original custody determination.[10] St. Louis argued that she was "trying to set aside an improperly obtained order, not modify a properly obtained order." Report of Proceedings (RP) (Apr. 30, 2010 am) at 6. Cain responded that she was "a little confused about what the legal issues are here today and this is the first that [she had] heard of a CR 60 motion." RP (Apr. 30, 2010 am) at 8. Essentially, the parties disputed whether St. Louis's September 2009 "Motion to Set Aside Third Party Custody Decree" amounted to a CR 60 motion to vacate:

> [THE COURT:] Maybe we can by agreement allow it to be at least pursued under a CR 60 theory or motion, as [St. Louis] has kind of assumed.

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three-year-old daughter from his home because the child had allegedly tested positive for cocaine and amphetamines. The trial court eventually ruled that it was not in M.W.F.'s best interests to be sent to Missouri to live with Walker and that Walker was currently unfit to serve as M.W.F.'s primary caretaker. *See also* Report of Proceedings (May 11, 2011) at 9 ([Trial Court:] "I want that specifically stated because that's the thrust of my decision is that we need a non-parental custodian because both parents are unfit."). Walker is not a party to this appeal and did not challenge the trial court's findings. However, the parties failed to amend the trial court's findings and conclusions as the trial court directed in open court. The findings designated for our review predate the trial court's specific ruling on May 11 that Walker was currently an unfit parent. On remand, the trial court must assure that the findings appropriately reflect that it found Walker unfit.

[10] The State participated as a party at trial solely to "find out where the child is going to land," RP (Apr. 30, 2011 am) at 12, and never expressed a preference (or objection) related to either St. Louis or Cain as custodian.

> . . . .
>
> [Cain]: I was taken a little by surprise this morning. That's the first I had heard of the CR 60 motion, and --
>
> THE COURT: Because before I can really rule on this new petition, I would have to set aside the decree of Judge Godfrey.
>
> [Cain]: And the way that this had been pursued earlier was as a modification of a parenting plan, and I made an objection at the adequate-cause hearing, which I lost.
>
> THE COURT: . . . [O]nce a decree for a third-party custody is awarded, I suppose a new third party can petition to modify or to seek third-party custody, but then I suppose it would have to be a substantial showing of unfitness. . . .
>
> [St. Louis]: . . . I thought the better approach would be to set aside the original decree just because it was entered so strangely.
>
> THE COURT: I think that's probably the most logical way to proceed on this. *What I'm saying is it hasn't been done*.[11]

RP (Apr. 30, 2010 pm) at 99-100 (emphasis added).

During closing arguments, Cain correctly pointed out that

> [i]n order to modify a parenting plan for the purpose of changing custody or primary time with the child one has to show a substantial change in circumstances, that's the statutory language. You also - other standards that the parents agree to the modification, that the other party - the child became integrated into the other party's family or that the child's present environment is detrimental to that child's well-being or the Court has found that the non-moving parent [has been] in contempt two or more times. There has been no evidence of any of that introduced in the two days that we [have] been in court.

RP (June 22, 2010) at 191-92.

The trial court agreed, ruling that absent a change in circumstances, M.W.F. would remain under Cain's custody as St. Louis had failed to meet the "substantial change" standard for a custody modification and had failed to properly move under CR 60(b) to have the original custody decree vacated:

> [T]here should be a show cause CR 60 motion that Ms. St. Louis would have to make to make it procedurally correct and then the Court would determine whether

[11] During closing arguments of the bench trial, St. Louis admitted that her attorneys "did not file a formal CR 60 motion." RP (June 22, 2010) at 190.

> there was, you know, adequate reason under that civil rule to set aside that prior final residential schedule.

RP (June 22, 2010) at 199.

> And I can't say on a motion to change custody that there's anything along - the standards of the statute, when you typically change the custody you have to show substantial changes in the custodial parent that occurred. It's not the moving party, it's a custodial parent and - and or the person with custody. In this case it's not [a parent], but a person that acquired a residential custody order from Judge Godfrey. And I find there's no substantial changes in Ms. Cain's circumstances where she's done things wrong or created problems or done things detrimental to the child. In fact, she's done the opposite. She's cared for the child and it sounds like there's a close bond there.

RP (June 22, 2010) at 209.

On October 21, 2010, St. Louis filed a motion for order to show cause and an order to vacate, citing CR 60(b)(1), (4), (6), and (11). The trial court found adequate cause to support St. Louis's motion. On January 14, 2011, the court addressed St. Louis's motion to vacate the nonparental custody decree awarding Cain custody of M.W.F., stating in its oral ruling,

> So that leaves me with the issue of whether or not I'm going to set aside the nonparental custody decree that was entered back on May 4th, 2009. There wasn't actually a motion to vacate that, despite my earlier invitation, until June 24th of 2010,[12] more than a year later.
>
> And, frankly, the rule even limits what I can do when more than a year has passed. I recognize there was some action, even though it wasn't the appropriate legal action, before the one-year period. But even if I don't strictly apply that one-year rule regarding the first three listed reasons for setting aside a decree or order, which the first one starts out with mistakes, inadvertence; the second one starts out with for erroneous proceedings; and the third one is newly discovered evidence, I recognize this rule says that the Court may relieve the parties from a final judgment or order.
>
> In this case I recognize all the arguments both ways, but it's just a fact that [Cain] stepped forward and took on primary care of this child back when the parents -- the mother and the father that was, I guess, assumed to be the father at

[12] The record reflects that St. Louis filed a CR 60(b) motion on June 24, 2010, but failed to serve Cain with the motion as required by CR 60(e)(3). St. Louis then refiled the motion on October 21, 2010.

> that time -- were certainly not capable of caring for the child.
>
> And it was after discussion with Ms. St. Louis, and I'm not saying anything negative about her, but both [she] and Ms. Cain ultimately decided that Ms. Cain was better to be the primary household where the child would be, with regular contact with Ms. St. Louis.
>
> And one thing that was well understood at the beginning was that Ms. Cain is not a blood relative. There was no mistake or misimpression there. I mean, she was an aunt by marriage, and she stepped up, which is quite unusual, frankly, for non-blood relatives, or I guess she was assumed to be a non-blood relative. It turns out that she was not even a relative by marriage, because Mr. Walker is the actual father.
>
> But her willingness to step forward and take on this responsibility is impressive to me, and that's where the child has been primarily since he was quite young.
>
> I'm going to keep the situation the way it is. I'm not going to set aside that decree. I do want a full visitation plan with Ms. St. Louis. And I think the one that is ongoing sounds like it's a good one.

RP (Jan. 14, 2011) at 124-25.

On April 8, 2011, the trial court entered findings of fact and conclusions of law. Concluding that it was in M.W.F.'s best interest to remain with Cain, the trial court noted that "[t]he child was voluntarily placed in the home of [Cain] after intervention by [CPS] and the concurrence of [St. Louis]."[13] CP at 109. The residential schedule granted Cain custody of M.W.F. but allowed St. Louis visitation each weekend (for either two or three days). This schedule mirrored the one used by the parties in early 2009 following the Family Team Decision Meeting, prior to either party's petition for third party custody.[14]

[13] The parties accidentally left blank the trial court's determination that Cain would be custodian in the conclusions of law portion of the findings. The trial court instructed the parties to amend the findings to correct this omission, but we did not receive amended findings for our review. On remand, the parties should ensure that the findings properly reflect the trial court's express oral ruling that Cain would remain as M.W.F.'s custodian.

[14] The final residential schedule designated for our review also includes a number of errors that fail to properly reflect the trial court's decisions. Following the trial court's initial decision to have Cain remain M.W.F.'s custodian, the parties returned to court to dispute the residential schedule. The trial court ruled that St. Louis would have M.W.F. from Thursday at 6 pm until Friday at 6

ANALYSIS

Trial Court's Findings of Fact 2.7

St. Louis argues that substantial evidence does not support the trial court's finding that she agreed to M.W.F.'s placement with Cain when CPS became involved with Fate and Francis. But substantial evidence shows that St. Louis agreed to this arrangement and we will not substitute our own judgment for that of the trial court.

We review "findings of fact under a 'substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006) (quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). This is a deferential standard, which views reasonable inferences in a light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). If there is substantial evidence, then "a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently." *Sunnyside Valley*, 149 Wn.2d at 879-80.

Paragraph 2.7 of the trial court's factual findings states,

> It is in the best interest of the child(ren) to be placed in the custody of the petitioner(s), and at this time:
> The child(ren) have not been in the physical custody of either parent since March 2, 2009 because:
> The mother and the assumed father were addicted to drugs and physically and

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pm every other week and from Friday at 6 pm to Sunday at 6 pm the rest of the time. The parties failed to appropriately initial some of the changes made on the residential schedule to reflect the trial court's ruling. On remand, the parties should ensure that the final schedule is correctly entered. The final residential schedule also purports to grant Walker Father's Day with the child. In light of the trial court's finding of Walker's unfitness, we assume this is a scrivener's error and expect that the parties will also correct this mistake on remand.

> emotionally unable to care for themselves or the child. The child was voluntarily placed in the home of the petitioner after intervention by [CPS] and the *concurrence of the respondent Barbara St. Louis*.

CP at 109 (emphasis added).

This factual finding addresses only the *initial* placement of M.W.F. with Cain—not Cain's subsequent petition for third party custody. At trial, St. Louis acknowledged that Cain offered to care for M.W.F. until Fate could receive treatment for her drug use. In addition, the notes from the Family Team Decision Meeting in March 2009, state that the "[p]arents have discussed having Dawna [Shapansky] and [Cain] get temp third party custody." CP at 104. More telling is the parties' actual conduct subsequent to that meeting. There is no disagreement that M.W.F. resided with Cain during the week and with St. Louis during the weekend for a number of months following the Family Team Decision Meeting.

This evidence adequately supports the trial court's finding that the initial placement of M.W.F. with Cain occurred with St. Louis's consent. When viewing these facts in a light most favorable to Cain, there is sufficient evidence to persuade a rational, fair-minded person that St. Louis agreed to placement with Cain initially.

The GAL's Recommendation

St. Louis also argues that the trial court abused its discretion in concluding that it was in M.W.F.'s best interest to stay with Cain and in rejecting the GAL's recommendation that St. Louis be granted custody. Because substantial evidence supports the trial court's custody decision and because the trial court's decision was not manifestly unreasonable or based on untenable grounds, we disagree.

We review a trial court's determination of a child's best interest, custody, and visitation

under an abuse of discretion standard. *See In re Custody of S.H.B.*, 118 Wn. App. 71, 78, 74 P.3d 674 (2003) ("A trial court's decision involving custody and visitation rights will not be disturbed on appeal unless the court manifestly abused its discretion."), *aff'd*, 153 Wn.2d 646, 105 P.3d 991 (2005). More specifically, "[a] trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *S.H.B.*, 118 Wn. App. at 78-79.

A GAL's role is "to investigate and report factual information regarding the issues ordered to be reported or investigated to the court" and "always represent the best interests of the child." RCW 26.12.175(1)(b). In fulfilling this investigative purpose,

> [a GAL] is not appointed as an "expert." Rather, [a GAL] is appointed to investigate the child and family situation for the court and make recommendations. In effect, [a GAL] acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court. But the court is also free to ignore the [GAL's] recommendations if they are not supported by other evidence or it finds other testimony more convincing.

Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380, *review denied*, 133 Wn.2d 1014 (1997); *see also In re Guardianship of Stamm v. Crowley*, 121 Wn. App. 830, 837, 91 P.3d 126 (2004) ("In both guardianship and custody cases, the role of the GAL is the same: to investigate and supply information and recommendations to the court in circumstances where family dynamics make a neutral assessment particularly important.").

A GAL's contributions to the trial court's decision-making process are the reports, perspective, and facts provided to the trial court, not his or her conclusions. Trial courts do not consider these contributions "in a vacuum, but as part of an extended trial" including the full testimony of witnesses and those exhibits submitted by the parties. *In re Custody of Brown*, 153 Wn.2d 646, 655, 105 P.3d 991 (2005).

Here, the GAL "interviewed a number of witnesses in addition to the parties, conducted background checks on adults living in each respective household, and requested urinalysis tests when deemed appropriate." Br. of Appellant at 28. While recommending that St. Louis receive custody, the GAL expressed no concerns with Cain herself. RP (Apr. 30, 2010 am) at 23-24 ("I believe Ms. Cain has done a good job raising [M.W.F.] but I have concerns over adults in her household.").

St. Louis focuses on the GAL's concerns regarding those living in the Cain household on appeal: Dawna Shapansky tested positive for marijuana use, Jeremy Shapansky has a history of drug use in addition to his criminal record,[15] and Cain failed to list Jeremy Shapansky as a resident in her original petition for third party custody. At trial, the court heard testimony related to these concerns.

Cain testified that Dawna Shapansky's positive sample for marijuana must have been laboratory error and that after receiving the results, Dawna Shapansky immediately retested and was found to be drug free. According to the GAL, Jeremy Shapansky's two drug tests came back negative. Cain testified that M.W.F. has very limited contact with Jeremy Shapansky and, further, that he has never used drugs while in her home.

Cain also explained that she did not list Jeremy Shapansky as a resident of her home in the original petition because he did not live there at the time. Dawna Shapansky testified that she and Jeremy Shapansky were having marital problems and were separated for almost six months when

[15] The GAL reported that Jeremy Shapansky's criminal record consists of convictions for second degree criminal trespass, driving without insurance, driving under the influence, second degree malicious mischief, and a felony conviction dated 2007 for violating the Uniform Controlled Substance Act.

Cain was seeking custody of M.W.F.

This testimony, along with testimony related to the circumstances surrounding M.W.F.'s initial placement in Cain's home and how M.W.F. has thrived under the current arrangement, allowed the trial court a broader perspective on M.W.F.'s circumstances and what served the child's best interests for custodial placement. The trial court is uniquely positioned to observe the demeanor and candor of witnesses and weigh all the relevant facts.

Because M.W.F. was bonded with Cain's family and it was the home M.W.F. was most familiar with—and because no concerns regarding Cain's custody and care of M.W.F. overcame M.W.F.'s bonds with the family—the trial court concluded that it was in M.W.F.'s best interest to remain with Cain as the primary residential adult with substantial visitation time allotted to St. Louis. In determining M.W.F.'s best interests, the trial court possessed sufficient evidence to support a reasonable, tenable conclusion that it was in M.W.F.'s best interests to remain with Cain, despite the GAL's recommendation that M.W.F. reside with St. Louis.

We hold that the trial court's decision was neither manifestly unreasonable nor based on untenable grounds. St. Louis's claim that the trial court abused its discretion in rejecting the GAL's placement recommendation and concluding that M.W.F. should remain with Cain fails.

Denial of St. Louis's Motion to Vacate under CR 60(b)

St. Louis further argues that the trial court abused its discretion in denying her motion to vacate the Cain custody decree under CR 60(b)(4), (5), or (11).[16] The trial court did not abuse its

[16] CR 60(b) requires that "[t]he motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken." Because the trial court decided the motion on the merits and St. Louis does not raise CR 60(b)(1)-(3) on appeal, the timeliness of St. Louis's motion is not at issue.

discretion in refusing to vacate the decree after fully considering St. Louis's arguments, and we hold that this argument also lacks merit.

A. Standard of Review

"A trial court's denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion." *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). CR 60(b) exists to prevent injustices based on "reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982). Thus, "[e]rrors of law are not correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors." *Keller*, 32 Wn. App. at 140. We will find an abuse of discretion only if a trial court "exercised its discretion on untenable grounds or for untenable reasons." *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991). "[I]f the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Lindgren*, 58 Wn. App. at 595. We need only address those subsections of CR 60(b) raised on appeal. *Haley*, 142 Wn.2d at 156.

B. Void Judgment for Lack of Jurisdiction

St. Louis argues that Cain's failure to provide her notice of the May 4, 2009 hearing awarding Cain permanent custody affected the regularity of the proceedings and, thus, "[t]he judgment is void" pursuant to CR 60(b)(5). This argument fails.[17]

[17] We note that St. Louis never, in fact, raised a CR 60(b)(5) challenge below. However, as CR 60(b)(5) implicates jurisdiction—an issue that can be raised at any time—we address the merits of the argument under the assumption that St. Louis challenges the trial court's subject matter jurisdiction. Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). A judgment entered by a court that lacks subject matter jurisdiction is void. *Marley v. Dep't of*

RCW 26.10.030(2) requires that "[n]otice of a child custody proceeding shall be given to the child's *parent, guardian and custodian*." (Emphasis added.) But under no theory or construction can St. Louis be construed as M.W.F.'s parent, guardian, or custodian at the time Cain filed for custody. The purpose of the May 4, 2009 decree was to transfer the legal authority and duty to care for M.W.F. from Fate and Francis to a third party. Prior to its issuance, only Fate and Francis possessed legal rights to M.W.F.[18] While the parties agreed at the March 2009 Family Team Decision Meeting that M.W.F. would stay with Cain during the week and with St. Louis on weekends, that agreement did not change the parties' legal relationships with M.W.F.

The terms "guardian" and "custodian" are not defined in RCW 26.10 et seq. *Black's Law Dictionary* states that a "custodian has either legal or physical custody" and defines "physical custody" as "[t]he right to have the child live with the person awarded custody by the court." Black's Law Dictionary 441, 1263 (9th ed. 2009). Similarly, "guardian" is defined as "[o]ne who has the legal authority and duty to care for another's person or property." Black's Law Dictionary 774 (9th ed. 2009). Because St. Louis was never awarded legal or physical custody of M.W.F., St. Louis could not have been a guardian or custodian under this definition.

When Cain filed her petition for third party custody, St. Louis was neither M.W.F.'s custodian nor guardian for the purposes of RCW 26.10.030(2). Thus, notice to her was not required. Accordingly, Cain's failure to notify St. Louis of her pending custody hearing did not

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Labor & Indus., 125 Wn.2d 533, 541, 886 P.2d 189 (1994). There is no time limit for attacking a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994).

[18] Again, at the time the initial third party custody decree issued, it was unknown that Walker was M.W.F.'s biological father. After custody was confirmed, Walker did join St. Louis's motion to vacate the decree and, as previously noted, sought custody himself. But the trial court expressly found Walker unfit and he has not appealed that ruling or joined the appeal currently before us.

deprive the trial court of jurisdiction.

C. CR 60(b)(4): Fraud or Misrepresentation

St. Louis next asserts that the trial court should have set aside the May 4, 2009 decree for "[f]raud . . . misrepresentation, or other misconduct of an adverse party" under CR 60(b)(4). Specifically, St. Louis claims (1) Cain misrepresented the permanent versus temporary nature of the parties' plan when obtaining the decree, (2) Fate had multiple illegal drugs in her system when Cain secured her joinder, (3) Cain purposefully omitted visitation for St. Louis, (4) Cain failed to "include in the petition the names of any adult members of the petitioner's household" as required by RCW 26.10.030(3), and (5) Cain listed herself as aunt and is now known to be an unrelated party.

Procedurally, St. Louis was not a party to Cain's petition for third party custody. Section 1.2 of the required form, titled "Identification of Respondent(s)," asks for "each parent, any alleged biological parent, guardian, custodian, and any other person with court ordered time with the [child]." CP at 2. St. Louis had no court-ordered time with M.W.F. when Cain filed for custody.

Cain completed the petition and other forms without the assistance of an attorney as a pro se litigant who sought the help of a court facilitator. At trial, Cain testified that she sought a permanent decree at the suggestion of a court facilitator. Although the court facilitator contested this at trial, Cain emphasized that "[t]he plan was always that [Fate and Francis] were going to go to treatment and get jobs" so that they would eventually obtain custody of M.W.F. RP (Apr. 30, 2010 pm) at 50. The trial court allowed Fate and Francis, the biological parents as known at the time, and who had joined Cain's petition, an opportunity to be heard at the original custody

hearing, which they waived. The trial court discerned no fraudulent intent from these circumstances and our independent review of the record does not support St. Louis's allegations of Cain's fraud.

With regard to Fate's drug use when she signed the joinder, Cain testified at trial that Fate seemed coherent when she signed the custody decree. And Cain accurately stated in the petition that (as far as she was aware at that time) no other parties were entitled to or seeking custody, as St. Louis had not expressed an interest in obtaining custody at that time and Walker was not known to be M.W.F.'s father. Furthermore, because Jeremy Shapansky was not living at Cain's home when she filed for custody, she did not list him as a resident. In addition, when she completed the required form, Cain believed herself to be M.W.F.'s great aunt by marriage. The trial court later noted,

> And one thing that was well understood at the beginning was that Ms. Cain is not a blood relative. There was no mistake or misimpression there. I mean, she was an aunt by marriage, and she stepped up, which is quite unusual, frankly, for non-blood relatives, or I guess she was assumed to be a non-blood relative.

RP (Jan. 14, 2011) at 125.

As the trier of fact, the trial court was uniquely positioned to resolve conflicting testimony and gauge witness credibility. It found no fraud or misrepresentations justifying vacating the May 4, 2009 custody decree.

The trial court fully considered St. Louis's motion to vacate Cain's May 4, 2009 permanent third party custody decree. Acknowledging the one-year limitation for dismissal motions brought pursuant to CR 60(b)(1)-(3), the trial court stated that even if that limitation did not "strictly apply," it would not exercise its ability to "relieve the parties from a final judgment or

order." RP (Jan. 14, 2011) at 124. The trial court recognized both the biological grandmother's and Cain's "willingness to step forward and take on this responsibility" of caring for M.W.F. RP (Jan. 14, 2011) at 125. The record does not support St. Louis's claim that Cain obtained her third party custody by fraud and the trial court properly rejected St. Louis's motion to vacate the decree on that basis.

D. CR 60(b)(11): Any Other Reason

Last, St. Louis invokes CR 60(b)(11), "'[a]ny other reason justifying relief from the operation of the judgment,'" and argues that Cain's "failure to comply with the agreement reached at the [Family Team Decision Meeting] for temporary placement" provides grounds for relief. Br. of Appellant at 25.

CR 60(b)(11) "is limited to situations involving 'extraordinary circumstances.'" *Jennings v. Jennings*, 91 Wn. App. 543, 546, 958 P.2d 358 (1998), *rev'd on other grounds*, 138 Wn.2d 612, 980 P.2d 1248 (1999). Whether a circumstance is "extraordinary," justifying relief under CR 60(b)(11), has been narrowly construed. *Jennings*, 91 Wn. App. at 547-48.

In *Hammack v. Hammack*, 114 Wn. App. 805, 807, 60 P.3d 663, *review denied*, 149 Wn.2d 1033 (2003), for instance, we upheld the trial court's vacation of a dissolution decree under CR 60(b)(11) because it constituted "an unenforceable attempt to avoid child support." As noted, "[i]t is well settled that an agreement to waive child support is against public policy." *Hammack*, 114 Wn. App. at 811.

In *In re Marriage of Furrow*, 115 Wn. App. 661, 664, 63 P.3d 821 (2003), a mother voluntarily relinquished her parental rights "as a means of resolving parenting disputes in a parenting plan modification action." No GAL represented the children, Family Court Services was not consulted, and no one adopted the child following the relinquishment. *Furrow*, 115 Wn. App. at 664, 674. In allowing the mother to relinquish, the trial court impermissibly deviated from the procedural requirements of Washington's adoption statutes. *Furrow*, 115 Wn. App. at 664. Based on this "irregularity of egregious proportions" and the public policy prohibition against parents bartering away parental rights and obligations, Division One of this court held that

"[v]acation of the order under CR 60(b)(11) is an appropriate remedy." *Furrow*, 115 Wn. App. at 664, 674.

This case is unlike *Furrow* or *Hammack*. Although St. Louis has been disappointed with the outcome of custody proceedings involving her minor grandchild, the facts of this case are not "extraordinary" and do not justify relief under CR 60(b)(11).

We hold that the trial court did not abuse its discretion in maintaining M.W.F.'s placement with the family that provided care and custody voluntarily for a lengthy period when needed with the parents' approval. The trial court did not abuse its discretion by denying St. Louis's motion to vacate under any of the asserted grounds under CR 60(b).

Attorney Fees

Both parties request attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. In appeals related to custody determinations, the prevailing party standard does not apply and appellate courts consider the financial resources of both parties. *In re Marriage of Wilson*, 117 Wn. App. 40, 51, 68 P.3d 1121 (2003). RCW 26.09.140 provides that "[u]pon any appeal, the appellate court may, *in its discretion*, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." The record does not reflect that St. Louis brought this appeal frivolously or that Cain had no grounds for making St. Louis maintain an appeal. The record also does not reflect that one party has significantly more resources than the other. Accordingly, we decline to award attorney fees to either party.[19]

Although we affirm the trial court's decision, we remand pursuant to RAP 7.2(e) to ensure that the trial court's findings of fact and conclusions of law, and the final residential

[19] The Brief of Appellant indicates that St. Louis intended on filing a RAP 18.1(c) affidavit of financial need but it does not appear in our record.

schedule, appropriately reflect the trial court's rulings appearing in the verbatim reports of proceedings provided for our review. CR 60(a). The findings should reflect that the court acknowledged Walker was M.W.F.'s father, that it found that he is an unfit parent, and that Cain shall remain M.W.F.'s custodian. The residential schedule should be corrected to reflect that, as an unfit parent, Walker is not entitled to residential visitation with M.W.F. on Father's Day, and that M.W.F.'s time between the St. Louis and Cain households accurately reflects the trial court's decision from May 11, 2011.

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

JOHANSON, A.C.J.