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STATE OF WASHINGTON

BY

DEPUTY

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MICHAEL HARKER,
Respondent,

v.

JESSICA ARVISO,
Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENTS OF ERROR

1. The trial court erred by awarding primary residential placement of Isaac Harker to his father, Michael Harker.
Finding of Fact (Appendix A at 317).
2. The trial court erred by disregarding the reports, recommendations and trial testimony of the Guardian ad Litem.
Finding of Fact (Appendix A at 308-09, 309-10).
3. The trial court erred by disregarding Michael Harker's demonstrated history of alcohol abuse.
Finding of Fact (Appendix A at 308-09).
4. The trial court erred by placing too much emphasis on Michael Harker's cultural heritage.
Finding of Fact (Appendix A at 315-316).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. Did the trial court err by awarding primary residential placement of the child to the father?
Assignments of Error 1,2,3,4.
- II. Did the trial court err by disregarding the evidence of Michael's alcohol abuse?
Assignment of Error 3.
- III. Did the evidence weigh in favor of Michael?
Assignments of Error 1, 2, 3.
- IV. Did the trial court err by disregarding the recommendations of the Guardian ad Litem?
Assignment of Error 2.
- V. Did the trial court err by placing too much weight on Michael's cultural heritage?
Assignment of Error 4.

STATEMENT OF THE CASE

The primary residential placement of the parties' child underlies this appeal. Specifically at issue is the trial court's residential placement of the child with his father, when the child had primarily resided with his mother for over three years at the time of trial.

FACTUAL BACKGROUND

Isaac David Harker was born on January 5, 2006 to Jessica Arviso (Appellant herein) and Michael David Allen Harker (Respondent herein).¹

Michael is Native American, a member of the Zuni Tribe, located in New Mexico. CP 4. Jessica is Hispanic. CP 23.

Jessica and Michael began their relationship in Arizona. CP 85. Jessica became pregnant, and Jessica and Michael moved to Washington when she was in her sixth month of pregnancy, where they lived with Michael's parents. 1 RP 22, 2 RP 172. Jessica cared for Isaac during the day. 1 RP 22. Jessica took responsibility for Isaac's well child visits. CP 70. Michael was initially unemployed but

¹ This writer will refer to the parties as Jessica and Michael throughout this brief for convenience. (Michael sometimes goes by Allen.) No disrespect toward either party is intended thereby. RAP 10.4(e).

attended trade school full-time 1 RP 22, 61; 2 RP 172. Michael was then hired as a fast-pitch coach by Chief Leschi schools in addition to attending school full-time. 1 RP 61-62; 2 RP 172. After the fast-pitch season ended, Michael obtained full-time employment with Boeing. 1 RP 62.

In August of 2007, Michael ended the relationship. CP 80. Jessica believed Michael drank too much (CP 45-54, 85), and she had discovered he was involved with other women. CP 77. Jessica returned with Isaac to Yuma, Arizona to live with/near her family. 2 RP 128. Michael's family provided Jessica's airline ticket (guest pass), and even accompanied Jessica and Isaac on the flight to Arizona. CP 38-39, 81, 84.

PROCEDURAL HISTORY

On September 6, 2007, Michael commenced the proceeding that underlies this appeal. CP 1 - 4. Among other allegations therein, Michael's Petition for Residential Schedule states, at paragraph 1.2:

Michael Harker is the child's acknowledged father and Jessica Arviso is the mother of the child. Both parents signed the Acknowledgment of Paternity, which was filed with the Washington State Registrar of Vital Statistics on January 13, 2006.

CP 1.

In his Proposed Residential Schedule, Michael requested that Isaac be placed primarily with him. CP 7. He also sought restrictions on Jessica's residential time with Isaac, based upon his claims of her: willful abandonment, substantial refusal to perform parenting functions, neglect or substantial nonperformance of parenting functions and withholding his access to Isaac "for a protracted period of time without good cause." CP 7. Jessica had been gone from Washington less than one month. 2 RP 128.

Michael proposed that Jessica be allowed only supervised visitation (to be paid by Jessica) with Isaac in Washington (for eight hours every other weekend and on holidays). CP 8, 10. Michael's attempt to have Jessica ordered to immediately return to Washington and place Isaac in his primary care until the initial hearing on temporary orders was unsuccessful. CP 21.

On November 26, 2007, Kelly LeBlanc (hereafter "Ms. LeBlanc") was appointed Guardian ad Litem for Isaac. Ex. 22 at p. 3.

Temporary orders were entered on October 22, 2007. CP 92-101. The Court ordered that Isaac remain in Jessica's primary care, and allowed Michael to visit Isaac in Arizona. CP 93.

Michael was ordered by the Court to provide Jessica's attorney with a copy of his 2007 "DUI assessment and evaluation." CP 101.

The assessment includes the following, reported to the evaluator by Michael:

I'm in the process of gaining full-custody of my 22-month old son. His mother has made accusations that I abuse alcohol and [am] not fit to take care of my son. My attorney requested that [I] accomplish a drug/alcohol evaluation since I had a DUI in 2005 . . . in Arizona. It is clear that I have addressed the DUI and [have] moved on with my life.

CP 123. The assessment does not contain anything to indicate that Michael told the evaluator he was under Court order to obtain the assessment, nor does it indicate that Michael made the evaluator aware of the underlying situation with the Arizona court system. In addition, there was no collateral information provided to the evaluator. CP 123-25.

Michael sought reconsideration of the temporary orders (CP 102-03), but was only successful in being allowed to have visitation with Isaac in Washington, rather than just in Arizona. CP 145.

Ms. LeBlanc filed her preliminary report with recommendations to the Court on June 18, 2008. Ex. 22. Her observations include the following:

Mr. Harker was ordered to submit for a drug and alcohol assessment following his Arizona DUI conviction. When this action was filed, Mr. Harker was ordered to produce evidence that he had completed a drug and alcohol assessment and complied with treatment recommendations.

Mr. Harker reported that he had complied with all terms and conditions of the Arizona Order. Mr. Harker reported that he had completed a drug and alcohol assessment through Alternative Counseling [in Washington] in November 2007. Mr. Harker stated that there were no recommendations for treatment.

Mr. Harker had previously filed a copy of the Arizona Court Order quashing the requirement for alcohol treatment. It appears that the Arizona Court's action was premised upon . . . findings and recommendations contained in the [2007] report issued by Alternative Counseling.

* * * *

Mr. Harker provided a release of information authorizing me to obtain a copy of the [2007] assessment and speak [with] the evaluator at Alternative Counseling.

In the course of my conversation with the evaluator at Alternative Counseling, I learned that **Mr. Harker had reported that he was seeking an assessment upon advice of his attorney in the custody action. The counselor stated that Mr. Harker disclosed that he had been convicted of DUI in Arizona; that "he had addressed the issue"; and "moved on with his life."**

The counselor stated that he interpreted Mr. Harker's remarks to mean that he had gone through drug and alcohol treatment in Arizona. The counselor was not aware that the Arizona Court had

released Mr. Harker from the obligation to obtain an assessment in Arizona premised upon the belief that assessment and treatment was being pursued in Washington.

Based upon my investigation, it appears that the Arizona [Court] released conditions premised on the belief that treatment was sought in Washington and Washington did not offer treatment recommendations premised upon the belief that services had been obtained in Arizona.

Ex. 22 at 6-7 (emphasis added).

Among her other recommendations, Ms. LeBlanc recommended that Isaac remain in Jessica's primary care, and that Isaac spend seven days per month with Michael in Washington. Ex. 22 at 9. Ms. LeBlanc also recommended that Mr. Harker be ordered to submit for re-assessment with Alternative Counselors, and that he be required to follow any treatment recommendations offered. Ex. 22 at 9, 11.

On June 30, 2008, a Court Commissioner allowed Michael to have two uninterrupted weeks of summertime visitation with Isaac. CP 308-10. There were no further pre-trial changes made to the residential schedule.

Ms. LeBlanc submitted her final report on April 1, 2009. Ex. 8. Ms. LeBlanc once again voiced her concern about the information

Michael provided to the State of Arizona and the Washington alcohol abuse evaluator regarding his treatment requirement. Ex. 8 at 8.

Ms. LeBlanc also had an opportunity to interview Kim Luke, a recently former girlfriend of Michael. Ex. 8 at 9. Ms. Luke stated Michael was still drinking heavily, and reported that she and Michael both drank heavily throughout the course of their one year relationship. She further stated she had ridden with Michael when he was driving, intoxicated, and that Michael gets aggressive when he has been drinking. Ex. 8 at 9.

Importantly, based on her interviews with Jessica and Michael, Ms. LeBlanc stated "it does not appear that either party disputes that [Jessica] occupied the role of primary parent both during the relationship and following their separation," and that Jessica has assumed a greater share of parenting responsibilities for Isaac since his birth. Ex. 8 at 11, 12.

Once again, Ms. LeBlanc recommended that Isaac remain primarily placed with Jessica, subject to liberal visitation with Michael. Ex. 8 at 14. **Importantly, Ms. LeBlanc recommended that Michael's residential time with Isaac in Washington be conditioned upon Michael submitting to a drug and alcohol re-**

assessment at Alternative Counseling Services, and that the evaluator be authorized to interview collateral contacts. Ex. 8 at 15 (emphasis added).

TRIAL

Trial on Michael's petition for primary residential placement of Isaac commenced on July 27, 2009 before Judge Stephanie Arend. 1 RP. It continued through July 28, 2009. 2 RP. Jessica was represented by counsel. 1 RP. Michael appeared pro se. 1 RP.

Throughout the trial, the trial court assisted Michael. The trial court instructed Michael as to how to present documentary evidence. 1 RP 11-13, 17.

For example, very early in the proceeding, the court interrupted Michael, who was testifying on his own behalf, and told him what he needed to present:

[T]he statute specifies the criteria the Court has to look at in order to make a decision regarding primary residential placement and there are criteria set forth in 26.09.187, residential provisions, and there's a number of factors the Court has to consider in order to determine primary residential placement and a residential schedule. So what I would like you to do is speak to those factors.

1 RP 19-20.

Yet, when Jessica's trial counsel ask the Court whether the Court would require her to have Jessica testify as to those factors, the Court responded, "Well, I'm assuming that she has testified to what you want her to testify to." 2 RP 189.

Throughout the presentation of his case, the trial court essentially lead Michael through his testimony. 1 RP 19-39. At one point in the trial, the Court did not allow admission of evidence proffered by Jessica's attorney, due to it being hearsay - **but Michael had not objected to admission of that evidence.** 1 RP 52.

ALCOHOL ASSESSMENT

There was considerable trial testimony devoted to Michael's demonstrated history of alcohol abuse. 1 RP 79; CP 56-66, 101, 123-25; Ex. 8 at 8; Ex. 22 at 6-7. Jessica testified that Michael drank heavily while they were living together. 2 RP 140. Jessica presented photographic evidence of Michael drinking while Isaac was with him. Exs. 24 and 25. She testified in detail about Michael's drinking and related behavior. 2 RP 177-79.

Jessica's father, Ron Arviso, testified at trial that he had observed Michael's drinking early on in Michael's relationship with Jessica on several occasions. 2 RP 153-54.

Michael testified to having had an assessment for alcohol abuse while in the Marine Corps. 1 RP 55. He was charged with driving under the influence of alcohol three times during the time he lived in Arizona and California. 1 RP 57, 80.

As of the first day of trial, Mr. Harker testified that he had submitted to an alcohol abuse re-assessment, but that the report was not completed. 1 RP 36-37. Michael produced the report on the second day of trial. 2 RP 90. Ms. LeBlanc had not been given an opportunity to speak with the evaluator at any time, and she received a copy of the report at approximately 5:40 p.m. the evening before she testified at trial. 2 RP 93. Therefore, the alcohol abuse assessment was once again based solely on Michael's self-serving report. Ex. 21. There was no collateral input provided to or sought by the evaluator. Ex. 21.

When Michael cross-examined Ms. LeBlanc, he questioned why she had recommended he obtain "multiple" alcohol abuse assessments, because his DUIs had occurred prior to Isaac being conceived. 2 RP 105. Ms. LeBlanc explained the basis for her recommendation that Michael be re-assessed was because the Arizona court had ordered that Michael undergo treatment for alcohol abuse

as part of a diversion program, but the Arizona court dismissed the charges against Michael, because the Court believed that Michael had undergone treatment for alcohol abuse in Washington, provided by a "Mr. Statewright." 2 RP 106. However, when Ms. LeBlanc contacted Mr. Statewright, he denied ever having provided such treatment to Michael. 2 RP 106. Mr. Statewright also volunteered that, in performing his evaluation, he had made no collateral contacts. 2 RP 106.

THE GUARDIAN AD LITEM

As already stated above, Ms. LeBlanc had been appointed Guardian ad Litem early in the litigation. Ex. 22 at 2. As part of her investigation, she interviewed several witnesses in addition to the parties themselves. 2 RP 92-93.

Ms. LeBlanc had prepared and provided two reports to the Court prior to trial. Ex. 22 (June 18, 2008 preliminary report) and Ex. 8 (April 1, 2009 final report).

Ms. LeBlanc testified on the second day of trial. 2 RP. Based upon her investigation, Ms. LeBlanc recommended that Isaac remain in Jessica's primary care, allowing for liberal visitation by Michael. 2 RP 93. She testified that she had considered the factors set out in

RCW 26.09.187 in formulating her recommendations. 2 RP 93. She testified she also based her recommendation

principally on the fact that the mother of – the child has resided with the mother, essentially, at all times since his birth, and it is my opinion, based on that, that she has taken the role of parenting, the age and development of the child at this point in time, and also the fact that there has been more or less an informal arrangement between the parties preceding the entry of the Court's order that allowed placement with the mother.

2 RP 93-94.

Ms. LeBlanc further testified that she had concerns about Michael, based upon her interviews of Jessica and Michael's former girlfriend, and based upon her review of Michael's alcohol-related criminal record. 2 RP 93-94. (See also pages 9-11, above.) She also testified that she had no concerns with regard to Jessica as a result of her background investigation. 2 RP 97.

Michael had initially petitioned the Court to place Isaac primarily with him. CP 1-4. At trial, Michael testified that if the Court were to place Isaac primarily with Jessica, he wanted a residential schedule whereby Isaac would spend alternating months with each parent until he reaches school age. 1 RP 24, 33-34. Ms. LeBlanc testified she did not believe a "month on-month off" schedule would

be healthy for a child who was then just three and one-half years old. 2 RP 95. The Court asked Ms. LeBlanc to expand on that point. 2 RP 109. Ms. LeBlanc explained that Isaac was of an age that he should be in a structured pre-school environment in order to develop better social skills and interactions with his peers. 2 RP 110.

Ms. LeBlanc testified that she agreed with Michael that Isaac would benefit from being in a structured preschool/daycare environment, but that a month on-month off schedule (as proposed by Michael, 1 RP 70) would disrupt the continuity of Isaac's relationships with his peers. 2 RP 110. Ms. LeBlanc also testified that larger, uninterrupted blocks of time with each parent would be appropriate during the summer. 2 RP 112.

CULTURAL BACKGROUNDS

Despite Michael's claims that Jessica had been disparaging of Native Americans, Jessica testified that Isaac had contact with friends and acquaintances of varied cultural backgrounds. 2 RP 131. She also testified that her own father coached a softball team that has members who are from the Quechan Tribe. 2 RP 132. Isaac was friends with their children. 2 RP 132. In addition, Isaac and Jessica participated in other tribal activities in Yuma. 2 RP 131.

Michael also complained that Jessica did not allow Isaac to wear a tribal necklace called an “ungi” (a bear) that he had given to Isaac. 1 RP 32. However, Jessica testified that she meant no disrespect whatsoever toward Michael’s heritage. 2 RP 132-33. Instead, she simply took the necklace off of Isaac because it has a sharp bottom edge, and she was fearful that Isaac would cut himself on his throat, neck or chest. 2 RP 132-33.

Michael argued on “direct examination” that he should have primary placement of Isaac, because Isaac would be able to participate in Native American activities here in Washington with his family. 1 RP 31-33.

On direct examination, Jessica testified that she is supportive of Isaac’s Native American heritage, but she emphasized the fact that Isaac is half Native American and half Hispanic. 2 RP 131, 223.

EVIDENCE PRESENTED PERTAINING TO RCW 26.09.187(3).

There was conflicting testimony presented at trial pertaining to the statutory factors used by trial courts in determining primary placement of children.

The relative strength, nature, and stability of the child's relationship with each parent.

Ms. LeBlanc testified at trial that by age 3½, a child's primary attachments have been formed. 2 RP 110. She also testified that Jessica had occupied the primary parenting role for Isaac since his birth. 2 RP 93; Ex. 8 at 12. She has also reported that she believes Isaac is well bonded with both parents. Ex. 8 at 13.

The agreements of the parties, provided they were entered into knowingly and voluntarily.

Ms. LeBlanc testified that, based upon her investigation, she believed there was an informal arrangement between Jessica and Michael preceding entry of any Court orders that allowed Isaac to be primarily placed with Jessica. 2 RP 94.

Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child.

Ms. LeBlanc testified that, based upon her investigation (including interviews with several collateral witnesses), Jessica has occupied the primary role of parenting Isaac. 2 RP 94.

Jessica testified that she had always taken Isaac to his wellness/immunization appointments, except for Isaac's two-year check-up. 2 RP 136. This is corroborated by a doctor from the Puyallup Tribal Health Authority. CP 70. At trial, Jessica testified that

she had informed Michael two to three months in advance that she had made Isaac's appointment, and Michael immediately took Isaac to the doctor in Washington instead. 2 RP 137.

Michael testified that he is currently able to care for Isaac at least seven and a half hours a day. 1 RP 25. However, he works a 3:30 p.m. to midnight shift. 1 RP 25.

The emotional needs and developmental level of the child.

Ms. LeBlanc testified that based upon Isaac's current age and developmental level, she did not believe that a rotating, month on-month off visitation schedule would be in Isaac's best interest. 2 RP 95. She also testified that she believes Isaac should be enrolled in a structured preschool/daycare environment, because that would provide continuity in terms of Isaac establishing relationships with peers. 2 RP 110. She further testified that Isaac needed to develop the ability to form relationships necessary for him to succeed once he begins kindergarten, and that a month on-month off schedule would not allow that to happen. 2 RP 112.

The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.

Jessica lives in Arizona, as does her large, extended family. It includes her parents, two sisters, a grandmother, nieces, nephews, cousins, etc. 2 RP 133, 139, 155, 156.

Michael testified that his family in Washington consists of five people – Michael, his parents and two sisters. 1 RP 29, 3 RP 251. The remainder of his family lives in New Mexico and Arizona. 3 RP 251-52.

The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule.

Jessica essentially testified that she agreed with the visitation schedule recommended by Ms. LeBlanc. 2 RP 127.

Michael testified that he preferred that Isaac reside primarily with him. 1 RP 33. In the alternative, he testified if the court were to primarily place Isaac with Jessica, his desire would be for Isaac to spend equal amounts of time with each parent until Isaac is school age. 1 RP 33, 34.

Each parent's employment schedule, and . . . accommodations [made] consistent with those schedules.

As already stated, Ms. LeBlanc testified that she believes Isaac should be enrolled in a structured preschool/daycare environment. 2 RP 110.

Jessica testified that her work schedule is 8:00 a.m. to 5:00 p.m. 2 RP 130, 192. She also testified that she was able to switch work shifts in order to work around Isaac's schedule, and that she works during the hours Isaac is a pre-school. 2 RP 130, 192-93.

Jessica had enrolled Isaac in the Preschool Express for those times she had to work. Isaac enjoyed attending, and had made friends with other children. 2 RP 146; Ex. 5. In addition, Jessica's parents are able to care for Isaac while Jessica is working. 2 RP 157, 193.

Michael testified that his work schedule is from 3:30 p.m. to midnight, allowing him to spend seven and a half hours with Isaac each day before he left for work. 1 RP 20. He testified by because he was living with his parents, he had "built-in daycare." 1 RP 20.

However, Michael also testified that he wanted Isaac to participate in the "FACE" program provided by the Chief Leschi schools. 1 RP 65.

Support of cultural background.

Michael testified that his family participates in tribal activities in New Mexico every year, and that his family also participates in Nisqually and Puyallup pow-wows and other local Native American activities. 1 RP 31. Michael also testified that he did not believe Jessica would foster Isaac's cultural heritage if Isaac were placed in her primary residential care. 1 RP 32-33.

During his cross-examination of Jessica, Michael stated that if Jessica and Isaac were to participate in tribal activities in Arizona, they would be "third-party" activities unrelated to his tribe. 2 RP 220.

However, when Michael asked Jessica if she would be supportive of Isaac being raised in a multi-cultural family, she responded affirmatively. 2 RP 221.

Ron Arviso also testified that the Arviso family has many friends who are Native American. 2 RP 155-56. Jessica also testified that she and her family had recently begun to take Isaac to Quechan tribal activities. 2 RP 22-29. She also stated she had no problem with taking Alex to tribal events and helping him learn about his Native American culture. 2 RP 230.

Jessica is Hispanic. 2 RP 226. She testified that Michael has spoken derogatorily about her heritage. 2 RP 233. She also testified that while they were together, Michael never took Isaac to any Hispanic-oriented activities, such as Cinco de Mayo or other festivals. 2 RP 234. With Jessica and her family, Isaac is being taught Spanish as well as sign language, because Isaac has two paternal uncles who are deaf. 2 RP 155, 235.

AFFIDAVIT/ACKNOWLEDGEMENT OF PATERNITY

The only acknowledgement of paternity Michael filed with his petition was a typewritten document entitled "Affidavit for Paternity."² CP 5.

At the conclusion of trial, the trial court ruled that "entry of final paperwork in this case will be contingent on [a proper Affidavit of Paternity] being filed [with the Washington State Dept. of Vital Records] or at the same time as the final paperwork. 2 RP 192. No such document was provided at presentation of final orders, yet Judge Arend entered final paperwork nonetheless. 3 RP; CP 355-58.

FINAL RULING

Judge Arend rendered her oral ruling on August 10, 2009. 3 RP. Judge Arend's oral findings are not included in the written

² This writer believes this may be a form used by and for the Puyallup Tribe.

Findings of Fact. CP 355-58. Therefore, the relevant portion of her oral ruling is appended hereto at Appendix A for the Court's convenience and reference.

Judge Arend ruled as follows with regard to the factors enumerated in RCW 26.09.187:

- (i) The relative strength, nature, and stability of the child's relationship with each parent. Factor (i) shall be given the greatest weight.

Judge Arend ruled that there was no evidence to distinguish the strength of Isaac's relationship with either parent, so she weighed the other factors to determine primary residential placement. 3 RP 309.

- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily.

Judge Arend stated it was not clear to her whether there was any such agreement, because the current residential schedule had been court ordered. 3 RP 309. She concluded that this factor did not balance in favor of either parent. 3 RP 310.

- (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child.

Judge Arend acknowledged that Jessica performed the majority of parenting functions early on. 3 RP 310-11. Judge Arend also observed that because Isaac was spending one week per month with Michael, it demonstrated that Michael “has the ability to perform parenting functions.” 3 RP 311. Judge Arend did not feel this factor weighed in favor of either parent. 3 RP 311.

(iv) The emotional needs and developmental level of the child.

Judge Arend ruled that because there was no testimony to suggest that Isaac has any special or developmental needs, this factor also did not weigh in favor of either parent. 3 RP 312.

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.

Judge Arend ruled that Isaac benefits from strong, loving relationships with extended family members of both parents. 3 RP 312. Judge Arend also interpreted this factor to refer to Isaac's cultural heritage. 3 RP 313.

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule.

Judge Arend observed that Isaac is not sufficiently mature to express his own independent preferences as to where to live. 3 RP 313.

(vii) Each parent's employment schedule, and ... accommodations [made] consistent with those schedules.

Judge Arend found that Michael's employment schedule allows him to be more present in Isaac's life for a greater period of the time when Isaac is awake. 3 RP 314. She found that this factor weighs more heavily in favor of Michael "because he will be present with [Isaac] and not be placing him in daycare." 3 RP 314-15.

Judge Arend went on to consider the evidence as applied to RCW 26.09.184, allowing a court to consider the cultural heritage and religious beliefs of a child in establishing a permanent parenting plan. 3 RP 315.

Judge Arend determined that this factor weighed "very heavily" in her determination. 3 RP 315. The court found that Michal had demonstrated he would make sure Isaac is aware of his cultural heritage, and that Jessica had not. 3 RP 315-16.

Finally, Judge Arend considered which parent would do the better job of nurturing Isaac's relationship with the other parent. 3

RP 316. Judge Arend found that Michael had done the better job in this regard. 3 RP 316.

Judge Arend also briefly commented on Ms. LeBlanc's reports. 3 RP 316-17. Judge Arend believed that Ms. LeBlanc had "dramatically change[d] her opinion" between her reports, and could not get a sense of why that was the case. 3 RP 317.

Judge Arend awarded primary residential placement of Isaac with Michael. 3 RP 317.

Final orders were presented and entered on August 21, 2009. Jessica timely appealed. CP 342-61.

ARGUMENT

I. THE TRIAL COURT ERRED BY AWARDING PRIMARY RESIDENTIAL PLACEMENT TO MICHAEL.

Standard of Review

A trial court is vested with broad discretion in making residential placement decisions. *In re the Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Possinger*, 105 Wn. App. 326, 335, 19 P.3d 1109 (2001). This is due to the trial court's ability to observe the parties, assess their credibility, and sort out conflicting evidence. *In re Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982). Appellate courts are reluctant to

disturb a trial court's residential placement decisions. *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001).

A trial court abuses its discretion when it renders a decision that is manifestly unreasonable or based on untenable grounds. *Kovacs*, 121 Wn.2d at 801. A trial court's decision is manifestly unreasonable when it is outside the range of acceptable choices, given the facts and the applicable legal standards. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004). A trial court's decision is based on untenable grounds if its factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). An appellate court may not substitute its own findings for those of the trial court where there is ample evidence in the record to support the trial court's determination. *Kovacs*, 121 Wn.2d at 810.

A trial court's application of the law is reviewed de novo. *In re Marriage of Rossmiller*, 112 Wn. App. 304, 309, 48 P.3d 377 (2002) (citing *In re Marriage of Flynn*, 94 Wn. App. 185, 192, 972 P.2d 500 (1999)).

a. THE TRIAL COURT ERRED BY DISREGARDING THE EVIDENCE OF MICHAEL'S ALCOHOL ABUSE.

The best interest, safety and welfare of a child are the paramount concern in establishing residential placement, overarching every statutory consideration. RCW 26.09.002. *See, e.g., In re Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) (parenting plan decisions are based on factors bearing on best interests of the child); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 795 (1993) (residential placement is to be in best interests of the child and is to be made only after certain factors have been considered by the court); *Custody of Smith*, 137 Wn.2d 1, 40, 969 P.2d 21 (1998) (best interests of the child is the touchstone by which all other rights are tested and concerns addressed in various contexts dealing with children) (citations omitted).

In light of the overwhelming evidence of Michael's alcohol abuse, placing Isaac primarily with Michael is not in Isaac's best interest, and places Isaac at risk of great and irreparable harm. Ms. LeBlanc voiced her well-founded concern in both of her reports. Ex. 22, Ex. 8. Ms. LeBlanc obtained documentation of Michael's DUIs. Ex. 22, Ex. 8. Not only did Jessica confirm Michael's history of alcohol abuse, but Ms. LeBlanc also spoke with a collateral witness, Kim Luke,

who reported that not only was Michael was continuing to drink heavily, but he drives while intoxicated. Ex. 8 at 9.

Ms. LeBlanc's reports and trial testimony revealed a concerted effort by Michael to obfuscate the issue of his alcohol abuse. Michael deliberately misled the Arizona Courts by reporting to them he had obtained alcohol abuse treatment in Washington, in order for them to release him from their requirement that he obtain treatment. He then used the release of that requirement to convince the Washington evaluator that he had satisfied the Arizona Courts, as evidenced by there no longer being a requirement for treatment in Arizona. He took over one year after being ordered by the Court to obtain a second alcohol abuse evaluation, which he provided to Ms. LeBlanc on the eve of her trial testimony. 1 RP 36-37; 55, 57, 79, 80; 2 RP 90, 93, 105, 106, 140, 153-54, 177-79; CP 56-66, 101, 123-25; Ex. 8 at 8, 9; Ex. 21; Ex. 22 at 6-7; Ex. 24; Ex. 25.

However, in rendering her final rulings, the trial court observed:

[A]lthough there are obviously history issues with [Michael] regarding his DUI . . . my notes reflect that [Ms. LeBlanc] testified, as does her report, that neither parent should be subject to [a limitation on visitation pursuant to RCW 26.09.191]. So there are – should not be any limitations on either parent's residential time.

3 RP 308. This comment constitutes the entirety of consideration given to Michael's alcohol abuse by the trial court.

But in her final report, Ms. LeBlanc specifically recommended that Michael's residential time with Isaac be conditioned on Michael submitting to re-assessment for alcohol abuse, and that the evaluator be authorized to interview collateral contacts. Ex. 8 at 15.

Importantly, Michael was aware of Ms. LeBlanc's findings and recommendations long before trial, but he provided nothing at trial to refute them. He could have called Ms. Luke to impeach her at trial, but did not. He could have provided other witnesses to testify on his behalf, but he did not. He had a year to obtain an alcohol abuse re-assessment that satisfied Ms. LeBlanc's recommendations and the then existing court order, but he did not. Therefore, the trial court's disregard of this evidence was an abuse of discretion. The findings in this regard were based on untenable reasons – they were not supported by facts in the record. *Littlefield*, 133 Wn.2d at 46. This is error sufficient to justify remanding this matter to the trial court for further proceedings.

**b. THE TRIAL COURT ERRED BY DESIGNATING
MICHAEL THE PRIMARY RESIDENTIAL PARENT.**

A trial court's decisions with regard to residential placement of a child must be made in the best interest of the child, and after considering the factors enumerated in RCW 26.09.187(3). *In re the Parentage of J.H.*, 112 Wn. App. 486, 492-9, 49 P.3d 154 (2002) (citing *Kovacs*, 121 Wn.2d 801)). "The 'best interests of the child' control when determining who will parent a child daily." *In re the Parentage of J.H.*, 112 Wn. App. 493 (quoting *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001)).

**1. The Evidence Presented Pertaining to the
Statutory Factors at Issue did not Weigh in
Favor of Placing Isaac with Michael.**

The written findings of fact do not contain any reference to the statutory factors found in RCW 26.09.187(3) CP 355-58, but the trial court did orally make factual findings in this regard. 3 RP 309-18 (attached at Appendix A). *In re the Marriage of Lawrence*, 105 Wn. App. 683, 686, 20 P.3d 972 (2001) ("Inadequate written findings may be supplemented by the trial court's oral decision or statements in the record"). Many of the trial court's factual findings are not supported by the evidence. In fact, many are completely contradicted by the evidence presented at trial.

In announcing her findings and rulings with regard to the factors enumerated in RCW 26.09.187, the trial court found that subparts (i), (ii), (iv), (v) and (vi) did not favor either Jessica or Michael. The trial court emphasized subparts (iii) and (vii):

(iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child.

The trial court did not feel this factor weighed in favor of either parent. 3 RP 311. But the trial court stated that Jessica had performed the majority of parenting functions early on. 3 RP 310-11. Ms. LeBlanc corroborated this in her report. 2 RP 93; Ex. 8 at 12. Ms. LeBlanc also testified that, based upon her investigation (including interviews with several collateral witnesses), Jessica occupied the primary role of parenting Isaac. 2 RP 94.

The trial court observed that because Isaac was spending one week per month with Michael, it demonstrated that Michael “has the ability to perform parenting functions.” 3 RP 311. However, the thrust of this factor is not a parent’s *ability* to perform parenting functions per se; rather, it is “whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child.” RCW 26.09.187(iii). Therefore, on balance, this

factor clearly favors Jessica, and the trial court's finding in this regard is contrary to the evidence.

(vii) Each parent's employment schedule, and . . . accommodations [made] consistent with those schedules.

The trial court found that Michael's employment schedule allows him to be more present in Isaac's life for a greater period of the time when Isaac is awake. 3 RP 314. She found that this factor weighs more heavily in favor of Michael "because he will be present with [Isaac] and not be placing him in daycare." 3 RP 314-15.

However, Michael had worked the same work schedule when Jessica was still living with him. Jessica testified that Michael often worked well beyond the 12:00 a.m. end of his shift, and she testified that he often went out for extended periods of time before coming home, and then often slept in. 2 RP 176, 177.

Although the trial court found that Michael's schedule would allow him to spend more time with Isaac when Isaac is awake, she neglected to consider Michael's testimony that he wants Isaac to attend the Chief Leschi FACE program during the day. 1 RP 65. This is no different that Isaac attending pre-school while Jessica works during the day. 2 RP 130, 192-93. In addition, Jessica's work schedule is flexible enough to allow her to be more available for Isaac. 2 RP

130, 192-93. Also, Ms. LeBlanc testified that Isaac would benefit from being in a pre-school setting. 2 RP 110. Therefore, Michael is not available to spend more time with Isaac than Jessica is. The trial court's finding was not supported by evidence in the record, and was error.

c. THE TRIAL COURT ERRED BY NOT MAINTAINING CONTINUITY OF RESIDENTIAL PLACEMENT.

Although a trial court is not to draw any presumptions from a temporary parenting plan, there is a strong presumption in favor of custodial continuity and against modification of parenting plans, due to custodial changes being highly disruptive to children. RCW 26.09.191(4); *In re Marriage of Shryock*, 76 Wn. App. 878, 850, 888 P.2d 750 (1995) (citations omitted).

Continuity of residential placement is a consideration when modifying permanent parenting plans. However, in this case, even though Isaac had regular contact with Michael, the evidence indicates that Isaac had lived primarily with Jessica for the first 3½ years of his life.

**d. THE TRIAL COURT ERRED BY NOT ADOPTING THE
GUARDIAN AD LITEM'S RECOMMENDATIONS.**

A guardian ad litem does not serve as an "expert." Rather, she is appointed to investigate the child and family for the court and makes recommendations based upon that investigation. The guardian ad litem is thus a neutral advisor to the court. In this regard, the guardian ad litem is an "expert" as to the status and dynamics of the family at issue, and is in a position to offer a common sense impression to the court. But the trial court remains free to ignore the guardian ad litem's recommendations **if they are not supported by other evidence or it finds other testimony more persuasive.** *In re Guardianship of Stamm*, 121 Wn. App. 830, 836, 91 P.3d 126 (2004); *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997) (emphasis added).

In this case, the trial court chose to disregard Ms. LeBlanc's recommendations. Although the trial court is vested with the discretion to do so, this was error because Ms. LeBlanc's recommendations were supported by significant evidence that indicated a different result should have been obtained. Ms. LeBlanc had performed criminal background checks, reviewed criminal records, reviewed Michael's alcohol abuse assessments and

interviewed several collateral witnesses. At trial, Michael's self-serving testimony was the sole contradiction to Ms. LeBlanc's testimony and investigative findings. Thus, this was error because there was no evidence or more persuasive testimony to justify disregarding Ms. LeBlanc's recommendations.

e. MICHAEL'S CASE CONSISTED PRIMARILY OF HIS OWN SELF-SERVING TESTIMONY, AND WAS CONTRADICTED BY JESSICA, HER FATHER AND THE GUARDIAN AD LITEM.

The issue of whether self-serving testimony should be discounted is a credibility issue for the trier of fact, and is not subject to review. *Watson v. Labor & Indus.*, 133 Wn. App. 903, 910, 138 P.3d 177 (2006) (citing *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)). However, several courts have observed that paternity adjudications are highly susceptible to error because of the absence of eyewitness testimony and the likelihood of self-serving testimony. *See, e.g., State v. James*, 38 Wn. App. 264, 271, 686 P.2d 1097 (1984); *Kennedy v. Wood*, 439 N.E.2d, 1367, 1371 n.13 (1982); *Salas v. Martinez Cortez*, 593 P.2d 226, 232 n.7, 154 Cal. Rptr. 529 (1979). That is very similar to this case.

Michael's entire case consisted of self-serving testimony. This is not just an issue of credibility – this is also an issue of Michael, as

the petitioning party, not meeting his burden of production. The burden of production, which is the burden of both pleading and producing evidence, is the burden to "produce evidence, satisfactory to the judge, of a particular fact in issue." *Federal Signal Corp. v. Safety Factors*, 125 Wn.2d 413, 433, 886 P.2d 172 (1994) (quoting Edward M. Cleary, *McCormick on Evidence* § 336, at 947 (3d ed. 1984)). In this case, Michael produced *nothing* to substantiate or corroborate any of his assertions or testimony. On the other hand, Jessica's testimony was supported by documentary evidence, her father's testimony, and the testimony of Ms. LeBlanc, who had performed an extensive investigation. Yet, the trial court ruled in favor of Michael. This, too, was error.

f. THE TRIAL COURT ERRED BY GIVING TOO MUCH WEIGHT TO THE FATHER'S CULTURAL HERITAGE.

The trial court is permitted to consider cultural heritage in determining primary placement of a child. RCW 26.09.184. However, nothing in this statute, related statutes or case law indicates this factor is dispositive in primary placement determinations.

A case from Alaska is directly on point with this case. *Rooney v. Rooney*, 914 P.2d (1996). Virginia Rooney, the mother, is Tlingit; and Tom Rooney, the father, is Caucasian. *Rooney*, 914 P.2d at 214.

Virginia had one child from a prior relationship. Virginia and Tom had a child, Tom, Jr. Pursuant to their divorce in 1987, Virginia and Tom were granted joint custody of Tom, Jr. However, after the divorce, they continued their relationship and ignored the court-ordered custody provisions. During a period of separation, Virginia had another child, Morgan Michael. Tom was not Morgan's biological father, nor did he adopt Morgan, but he assumed a parental role with Morgan. *Rooney*, 914 P.2d at 214. The Rooneys permanently separated in 1992. By that time, the two older boys had reached the age of majority. Virginia unilaterally moved to Sitka, Alaska with Morgan. *Rooney*, 914 P.2d at 214. Tom sought modification of the prior custody decree (which apparently included Morgan). A Guardian ad Litem recommended split custody, observing that Morgan was a child of "mixed ethnic background" who needed exposure to both his Tlingit and Caucasian heritages. *Rooney*, 914 P.2d at 214. The superior court awarded primary placement (physical custody) of Morgan to Tom during the school year. *Rooney*, 914 P.2d at 214. Virginia appealed.

In affirming the trial court, the Alaska Supreme Court first observed that the evidence indicated that Tom had ignored certain of

Morgan's cultural needs in the past. *Rooney*, 914 P.2d at 218. Virginia also argued that there was a lack of cultural opportunities for Morgan in Wrangell, where Morgan would be living with Tom. *Rooney*, 914 P.2d at 218.

Nonetheless, the Alaska Supreme Court pointed out that, similar to Washington law, “[a]lthough it seems clear from the evidence that the opportunities for Morgan to be exposed to his Tlingit heritage are greater in Sitka than in Wrangell, this is not the sole test in custody disputes.” *Rooney*, 914 P.2d at 218. Instead, “the court must consider the child’s cultural needs as one factor in the overall context of his best interests.” *Rooney*, 914 P.2d at 218. The court went on to observe that during his time with Virginia, Morgan would have these needs met, and mandated that Tom ensure that Morgan have adequate contact with Virginia’s family members in Wrangell and otherwise address Morgan’s cultural needs. *Rooney*, 914 P.2d at 218.

In this case, Michael discounted the opportunities Isaac had to share with Native American (Quechan) children in Arizona, arguing that those were “third-party” activities unrelated to his tribe. 2 RP 132, 220.

But Michael also testified that the Native American activities Isaac would participate in while in Washington would be affiliated with the Puyallup Tribe. Michael is Zuni. Were the trial court to adopt a residential schedule similar to that recommended by Ms. LeBlanc, Michael would have ample time to expose Isaac to their Native American culture, through activities sponsored by the Puyallup Tribe, as well as Zuni activities. Because Jessica lives nearer to the Zuni reservation than Michael does, she would also have opportunities to see that Isaac could participate in Zuni activities in Michael's absence. It was error for the trial court to elevate Michael's cultural heritage above Jessica's, and above all other applicable statutory factors.

II. THE TRIAL COURT ERRED BY ENTERING FINAL ORDERS WITH THE REQUISITE AFFIDAVIT OF PATERNITY HAVING BEEN FILED.

Final orders were presented and entered on August 21, 2009. 3 RP; CP 355-58. The record does not include the Affidavit of Paternity as utilized by the Department of Vital Records, yet final orders were entered despite the trial court's ruling that no final orders would be entered without that proper Affidavit of Paternity being filed first. 2 RP 192.

ATTORNEY FEES

RAP 18.1 provides

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

In addition, RCW 26.09.140 provides:

Upon 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 attorney's fees in addition to statutory costs.

Jessica respectfully requests an award of attorney's fees and costs for the necessity of this appeal.

CONCLUSION

Isaac Harker should be returned to his mother's primary residential care, subject to liberal visitation with Michael.

Michael's demonstrated history of alcohol abuse, combined with testimony that he continues to abuse alcohol, places Isaac at risk of serious harm while in his care. Michael did not timely comply with the pre-trial orders to obtain a re-assessment. Instead, he waited until the eve of trial to obtain a re-assessment based only upon his self-report to the evaluator. The report issued by the evaluator

indicates the evaluator was not furnished with key information necessary to perform an accurate evaluation. At a minimum, the evaluator should have spoken with Ms. Le Blanc. It was error for the trial court to disregard this evidence.

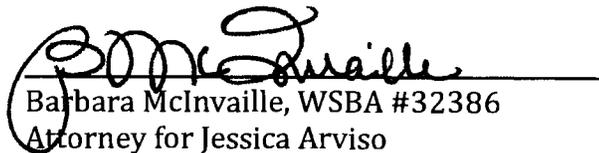
Ms. LeBlanc did a thorough investigation. Her reports were well-supported by documentary evidence, as well as interviews of several collateral witnesses. Her recommendations are in Isaac's best interest, and it was error for the trial court to disregard them.

Isaac is not just Native American. He is also Hispanic. If Isaac were to remain in his mother's primary care, he will still have significant opportunities to remain exposed to his entire cultural heritage.

Jessica has limited finances. As such, and as permitted by statute, she should be awarded reasonable attorney fees for the necessity of bringing this appeal.

DATED this 8th day of February, 2010.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Jessica Arviso

Declaration of Transmittal

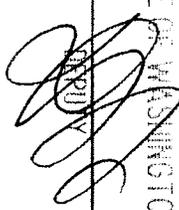
Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by personal service, and delivered a copy of this document via United States Postal Service, postage prepaid, to the following:

Michael David Allen Harker (Respondent pro se)
16915 20th Avenue E.
Spanaway, WA 98387

Signed at Tacoma, Washington on this 8th day of February, 2010.



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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

Appendix A

3 RP 306-18

1 that, with a very good parenting plan in place, that
2 these parents will be able to reach a good stride for the
3 benefit of their child and have the -- have the trial
4 behind them and everything.

5 And the child will not have to have the frequency of
6 travel and avoid those problems, Ms. LeBlanc testified
7 to, as it's not a benefit to him, and we would ask that
8 the Court consider Ms. LeBlanc's concerns with the
9 frequency of travel and consider the harm that would be
10 brought to the child if he were removed from the place
11 where he has lived and the parent that has been parenting
12 him.

13 Thank you, Your Honor.

14 THE COURT: Okay. We're going to take
15 a recess until about eleven o'clock. I'm going to take a
16 look at the admitted exhibits, refresh my memory with
17 respect to the notes, look at the statute, and I'll come
18 back with my oral ruling.

19 THE CLERK: All rise. Court is at
20 recess.

21 (Recess from 10:42 a.m. to
22 11:11 a.m.)

23 THE COURT: Okay. I've just taken a
24 few moments to go back through all of my notes from the
25 testimony, especially since we had an interrupted trial,

1 and to review all of the exhibits that were admitted in
2 light of the statute.

3 And I think I brought this out when Mr. Harker first
4 testified a week or two ago, the statutory factors. I'm
5 going to go through those first and then tell you how I
6 see the facts as they relate to the statutory factors.

7 The statute is found in Chapter 26.09 of the RCWs,
8 and there is basically two sections of that chapter that
9 are applicable to the establishment of a permanent
10 parenting plan. One is RCW 26.09.187, which is titled
11 "Criteria for Establishing Permanent Parenting Plan."
12 The other is RCW 26.09.184, "Permanent Parenting Plan."

13 In 184 it sets forth what the objectives of the
14 permanent parenting plan are and the contents of the
15 permanent parenting plan consideration in establishing a
16 permanent parenting plan, dispute resolution, allocation
17 of decision-making authority, residential provisions for
18 the child, parents' obligations, and provisions to be set
19 forth in the permanent parenting plan.

20 And then the criteria for establishing the permanent
21 parenting plan, as I already said, are found in
22 26.09.187. In 26.09.187, Subsection 3, it sets forth the
23 residential provisions, which is really what's at dispute
24 in this case.

25 And it says, "The court shall make residential

1 provisions for each child which encourage each parent to
2 maintain a loving, stable, and nurturing relationship
3 with the child consistent with the child's developmental
4 level and the family's social and economic circumstances.
5 The child's residential schedule shall be consistent with
6 RCW 26.09.191."

7 And I believe the testimony in this case, including
8 that of guardian ad litem Kelly LeBlanc, is, there is no
9 evidence of a 191 factor by either Mr. Harker or
10 Ms. Arviso. And 191 factors are -- basically are
11 shorthand ways that we all know in family court to talk
12 about limiting factors.

13 So, for example, if a parent's residential time with
14 the child would be limited because they have a history of
15 domestic violence or they might be limited because of
16 their ability to provide parenting functions has been
17 substantially impaired by drug or alcohol -- a history of
18 drug and alcohol abuse.

19 And even Ms. LeBlanc, although there are obviously
20 history issues with Mr. Harker regarding his DUI,
21 testified -- and my notes reflect anyway that she
22 testified, as does her report, that neither parent should
23 be subject to 191 factor. So there are -- should be not
24 any limitations on either parent's residential time.

25 The statute then goes on to say, "Where the

1 limitations of RCW 26.09.191 are not dispositive of the
2 child's residential schedule, the Court shall consider
3 the following factor."

4 Okay. The first factor, "Relative strength, nature,
5 and stability of the child's relationship with each
6 parent." Clearly the evidence in this case demonstrates
7 that Isaac has a very strong and stable relationship with
8 both parents, both his mom and his dad.

9 And later in the statute, it says, "Factor I be
10 given the greatest weight," and that is Factor I, "The
11 relative strength, nature, and stability of the child's
12 relationship with each parent."

13 Since that's supposed to be given the greatest
14 weight and since this Court has no evidence before it to
15 distinguish the strength of Isaac's relationship with
16 either Dad or Mom, one from the other, then the Court
17 will necessarily weigh in the other factors to make a
18 determination on primary residential placement.

19 The second factor in the statute is the agreement of
20 the parties, provided they were entered into knowingly
21 and voluntarily. It's not completely clear to me whether
22 some of the past residential schedule has been on
23 agreement of the parties or because it was court-ordered.

24 Clearly the guardian ad litem, in a preliminary
25 report -- and I -- let's see if I can remember which one

1 that was -- Exhibit 22, had recommended that -- she says,
2 "I would support a claim whereby Mr. Harker would have up
3 to seven days per month in Washington with the child."

4 So in June of 2008, even the guardian ad litem was
5 recommending one week a month that Isaac would spend with
6 his dad.

7 Now, whether or not that was ultimately agreed to,
8 it's a little unclear to me, or whether it was
9 court-ordered. So I can't really, based on the evidence
10 in front of me, say that that factor, agreements of the
11 parties, is going to balance it one way or another.

12 The third factor is each parent's past and potential
13 for future performance of parenting functions as defined
14 in RCW 26.09.004, Subsection 3, including whether a
15 parent has taken greater responsibility for performing
16 parenting functions relating to the daily needs of the
17 child.

18 Okay. So what do we know in this regard? We know
19 that, when the child was first born, the parties lived
20 together with Mr. Harker's parents apparently and that
21 Ms. Arviso, when the child was a baby, provided more
22 parenting functions than Mr. Harker did because
23 Mr. Harker was in school or working.

24 And so that responsibility was with Ms. Arviso,
25 although she did testify or at least it was in the

1 guardian ad litem report that Ms. Arviso said that he did
2 change diapers. He did feed the child. He did do
3 certain things to care for the child during the period of
4 time of that time.

5 Ms. Arviso then left in August of 2007, and the
6 child has resided primarily with Ms. Arviso, although has
7 been with Mr. Harker for significant periods of time,
8 much more, I would tell you, than we typically see in a
9 long distance relationship.

10 Typically, in a long-distance parenting
11 relationship, we see two or three times a year is what
12 the child goes and visits the nonresidential parent. So
13 the fact that Isaac has been with his dad every month, it
14 seems to me, and for at least a week or two weeks every
15 month, is really significant to me and demonstrates that
16 he has the ability to perform parenting functions.

17 There hasn't been any dispute that while Isaac is in
18 his care in the early part of the day until he leaves for
19 work -- I believe he said at 3:15 is my memory of his
20 testimony -- that he is the caretaker for Isaac.

21 So this factor also, performance of parenting
22 functions, seems to me that both parties, when Isaac is
23 in their care, take care of Isaac, and both are certainly
24 capable of performing parenting functions in the future.

25 The next factor, No. 4, is the emotional needs and

1 developmental level of the child. There wasn't any
2 testimony that I recall that suggests that there are any
3 special needs of this child that cannot be addressed or
4 any developmental needs for that matter that cannot be
5 addressed equally by one parent or the other.

6 So that factor doesn't really help me very much
7 either. We're still on balance between Ms. Arviso and
8 Mr. Harker.

9 Subsection 5 says, "The child's relationship with
10 siblings and other significant adults as well as the
11 child's involvement with his or her physical
12 surroundings, school or other significant activities."

13 Both parties have testified that extended family
14 members have been important in Isaac's life and at times,
15 perhaps even on a day-to-day basis, provide some care for
16 Isaac because both Ms. Arviso and Mr. Harker have to
17 work, which is understandable, in order to provide for
18 themselves as well as provide for Isaac.

19 And there wasn't any suggestion that there was any
20 harmful relationships or that either side is any more
21 connected or less connected. It sounds like both sides
22 Isaac benefits from having strong, loving relationships
23 with extended family members by both Mr. Harker and
24 Ms. Arviso.

25 With regard to his or her -- well, his, Isaac's,

1 physical surroundings, school, or other significant
2 activities, he is currently in the daycare. There wasn't
3 a lot of testimony really about the daycare and how
4 connected he may or may not be with that.

5 Other significant activities, I would interpret in
6 this context to mean and include cultural heritage, and
7 I'm going to get back to that in a minute.

8 So everything else with respect to Factor No. 5, the
9 relationship with extended family and so forth, again,
10 does not weigh more heavily in favor of either parent.

11 Factor No. 6 is the wishes of the parents and the
12 wishes of a child who is sufficiently mature to express
13 reason and independent preferences as to his or her
14 residential schedule.

15 Well, I'm going to suggest that Isaac, at his tender
16 age, is not sufficiently mature to express a reason and
17 independent preferences as to where he lives.

18 I appreciate that, when Mr. Harker testified that
19 Isaac doesn't want to return, that those of us who deal
20 with family law matters all the time, know that
21 transition, especially of small children, between
22 households is often difficult for the child and that they
23 often express to either parent that they happen to be
24 with at the time that they don't want to leave because
25 it's the separation from the parent with whom they are

1 with, not that they don't want to go be with the other
2 parent, but they don't want to separate from the parent
3 they're with.

4 And I suspect that Isaac is expressing similar
5 feelings, whether he's leaving Mom or he's leaving Dad,
6 and that, to me, doesn't mean anything negative about the
7 other parent. It just means it's difficult at that age
8 for that child to separate from the parent with whom he
9 is.

10 And certainly the wishes of the parents are diverse.
11 Both parent wants to be the primary residential parent,
12 so that factor does not reach a conclusion for me.

13 Factor No. 7, "Each parent's employment schedule and
14 to make accommodations consistent with those schedules."
15 Mr. Harker's employment schedule allows him the
16 opportunity to be more present in Isaac's life for a
17 greater period of the time of the day when Isaac is
18 awake.

19 And while I appreciate that everybody has to work
20 and your job is what your job is -- I mean, I certainly
21 work during the day, not in the evening or graveyard
22 shift or whatever -- the statutory factor is the
23 employment schedule.

24 And so based on the employment schedule alone, that
25 factor would weigh more heavily in favor of Mr. Harker

1 being a primary residential parent because he will be
2 more able to assist Isaac because he will be present with
3 him and not be placing him in daycare.

4 Now, I want to go back to the other significant
5 activities and what I referred to as cultural heritage,
6 and this takes me to another section of the statute, and
7 that is RCW 26.09.184, Subsection 3, "Consideration in
8 establishing the permanent parenting plan."

9 And it states, "In establishing a permanent
10 parenting plan, the Court may consider the cultural
11 heritage and religious beliefs of a child."

12 Isaac has two cultural heritages, if you will,
13 Native American and Hispanic, and I was somewhat dismayed
14 at Ms. Arviso's testimony in this regard. It is clear to
15 me that Mr. Harker fully participates in the Native
16 American culture and wants to raise his son in a way that
17 he is exposed to that, participates in it, and has the
18 opportunity to learn and grow in it.

19 Ms. Arviso, on the other hand, does not. She is
20 either unaware of what that is, including her own
21 cultural heritage, or it's not important to her or both.
22 And because the Court may consider the cultural heritage
23 of a child in making a parenting plan determination, this
24 factor, to me, weighs very heavily.

25 And it weighs very heavily for Mr. Harker to be the

1 primary residential parent because I believe that
2 Mr. Harker going forward, as he has already demonstrated
3 to this Court, will make sure that Isaac is aware of his
4 cultural heritage, not just by teaching it to him, but by
5 having him experience it. And I believe that's very
6 important. I believe the legislature has stated that
7 that's a very important factor for the Court to consider.

8 It's also an important factor for the Court to
9 determine if there is conflict between the parents and
10 the parents have a difficult time co-parenting, as these
11 two parents apparently do have some communication
12 difficulty, to look at who is probably going to do the
13 better job in nurturing the relationship with the other
14 parent.

15 And this factor I find that I believe it's
16 Mr. Harker who is going to do the better job of nurturing
17 Isaac's relationship with Ms. Arviso than the other way
18 around. He is the one who has repeatedly taken the
19 laboring or in having to maintain his relationship, and I
20 don't see -- didn't hear any evidence, didn't get any
21 sense that Ms. Arviso has done anything to facilitate the
22 relationship between Isaac and Mr. Harker.

23 So having said all that, I did want to refer to a
24 couple of comments by the guardian ad litem in her
25 reports. I already indicated in her -- in Exhibit 22,

1 her preliminary report, in June of 2008, she talks about
2 supporting a plan where Mr. Harker would have up to seven
3 days a month in Washington with the child.

4 She then in -- I think it's April, yeah, April 2009,
5 that she issues another report, and I think her testimony
6 at trial was consistent with that. She abandons that
7 idea, and she moves to, well, he should have a rather
8 traditional long-distance parenting plan with -- not
9 going back and forth every month because it's harmful for
10 the child, having all of these transition at this age.
11 Which is interesting to me that, over the course of less
12 than a year, she would so dramatically change her
13 opinion, and I didn't get a sense, quite frankly, of why
14 she changed her opinion.

15 She then goes on to say, though, that, "For summer
16 of 2009 through 2011 I would recommend Mr. Harker be
17 entitled to spend two separate two-week periods of
18 uninterrupted residential time with the child during the
19 course of the summer break." And I think that's sort of
20 consistent with what's been happening, although I think
21 that he's testified it's been two weeks per month during
22 the summer.

23 On balance, taking everything that I just said
24 together, I believe it weighs in favor of placing primary
25 residential care of Isaac with Mr. Harker, and not

1 Ms. Arviso.

2 MS. ARMIJO: Please don't take my son.
3 He's my life.

4 THE COURT: And as the guardian ad
5 litem said in her report, should Ms. Arviso choose to
6 relocate so that she is in geographic proximity to
7 Mr. Harker, then I think that it should be -- that he
8 should have contact with her at least once a week, if not
9 every two or three days.

10 But as long as he is here and she is in Arizona,
11 we're going to adopt a parenting plan that is somewhat
12 similar to the guardian ad litem's recommendation, only
13 in reverse, except I disagree with long periods of time
14 for the child to not see the other parent.

15 I'm going to order Mr. Harker to purchase, if the
16 parties do not already have this, computers that have Web
17 cams so that Isaac can have daily contact with his mother
18 via Web cam, and she with him, and that is to occur
19 within 30 days of today's date.

20 The ability -- the technology provides us the
21 ability to hear each other's voices, but also to see each
22 other's faces, and I think, for a child of this age, that
23 is extremely important to have that regular contact.

24 Ms. Arviso should be able to have contact with Isaac
25 at any time that she is in the state of Washington,