

FILED

NOV 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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OF THE STATE OF WASHINGTON**

IN RE THE MARRIAGE OF:

**TOBIAS MICHAEL LYNN
Appellant**

V.

**AMANDA SUSAN LYNN
Respondent**

NO. 30866-9

APPELLANT'S BRIEF

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WSBA #42696

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ASSIGNMENTS OF ERROR

1. The trial court erred in its Conclusion of Law K when it ruled that “the mother [Amanda Lynn] has been more stable and if the children [Taylour and Liam Lynn] are in her primary custody, it will continue the sibling relationship between the children and their step-brother and their relationship with their nearby maternal grandparents. Primary custody with the mother will also better insure [sic] continuity. RCW 26.09.187(3)(a).” Clerk's Papers (CP) at 811.
2. The trial court erred in entering a Parenting Plan which granted Amanda Lynn primary residential placement of Taylour and Liam Lynn. CP at 836.
3. The trial court erred in denying Tobias Lynn's motion for reconsideration of its placement decision. CP at 877.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in granting primary residential placement of two children to their mother, Amanda Lynn, where the overwhelming evidence suggested that the children were more bonded to their father, Tobias Lynn.

STATEMENT OF THE CASE

The parties, Amanda and Tobias (Toby) Lynn¹ were married on July 25, 2004 in Coeur d'Alene, Idaho. CP at 2. Their first child, Taylour, was born in 2007. CP at 1. On February 3, 2008 a domestic violence incident occurred between the parties. CP at 172-173. Toby was arrested for 4th degree domestic violence. CP at 55. The parties attended counseling together for six months with Dr. Smith following this incident. Toby began attending individual counseling with Deanna Norvell. Amanda attended a few sessions with Deanna Norvell and Toby. The assault charge against Toby was dismissed after this counseling was completed. CP at 56.

In late 2008 the parties' second child, Liam, was born. CP at 1. Toby filed for dissolution on October 19, 2009. CP at 1. At the time of separation Toby was a full time student and Amanda was working shift work for Boise, both full-time and overtime. Prior to separation Toby was providing the primary care for the parties' children. CP at 93. Toby would have care of the children during Amanda's shifts and while Amanda slept or went out with her friends. *Id.* After separation Toby continued to provide the majority of care and continued as the primary attachment figure for the children. CP at 93.

¹ For ease of reference, this brief uses the parties' first names.

On December 22, 2009 Amanda filed a motion for an ex parte restraining order, a petition for an order for protection based on the 2008 domestic violence incident and a spanking incident that occurred on December 13, 2009. CP at 68-72. Prior to the orders being entered on December 22, 2009 and following the spanking incident that occurred on December 13, 2009, Toby continued to provide the majority of care for the children with Amanda's knowledge and consent; there was no parenting plan in place at the time. CP at 93. A temporary parenting plan was issued on March 30, 2012. CP at 412-420. This initial temporary parenting plan made preliminary findings pending a GAL investigation. CP at 412-420. Primary custody was granted to Amanda with supervised visitation for Toby. The paternal grandmother was designated the supervisor for visitation. *Id.* Toby's visitation was every week from Friday at 8:00 a.m. to Sunday at 8:00 a.m. *Id.*

An order appointing Karen Vache as the Guardian ad Litem (GAL) was entered on February 19, 2010. The GAL's preliminary report was filed on April 20, 2010. CP at 436-453. The GAL met with Toby in his home without the children present and at Amanda's home with the children present. CP at 440. The GAL noted that Toby was "forthcoming about the recent spanking incident as well as an incident between [the parties] that occurred in 2008." *Id.* It was further noted, concerning the

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previous domestic violence, that “at no time did he try to excuse himself from the behavior or deny responsibility...” The GAL found that Toby’s response was contrary to the typical behavior of a domestic violence perpetrator. CP at 440.

With regard to parenting, the GAL stated that Toby “was able to describe his children in rich detail suggesting a strong connection and deep familiarity with their behavior, routines, likes and dislikes.” She further noted that “I was very aware in my first interview with Toby of how easily he talked about his children and how they were a part of his conversation in a natural and consistent way.” CP at 441. The GAL further noted that Toby voluntarily brought up the spanking incident with his daughter. She found that Toby was “remarkably clear in his responsibility for the incident. His remorse was apparent and the emotion expressed appeared very authentic.” CP at 442.

When meeting with Toby and the children at his mother's house the GAL “was struck with what an involved father he was. Although the visit took place at the paternal grandmothers with her present it was clear that both children are very used to having their needs met by Toby. The children sought Dad out for all their needs including assistance with toys and requests for juice and a snack. They were in continual interaction

with him and it was clear that they are very comfortable with him.” CP at 443.

The GAL also met with Amanda in her home with the children present. The children were napping when the GAL first arrived at Amanda’s home. CP at 443. Amanda initiated the interview by discussing the spanking incident. Amanda reported that when she picked up the child that day there was no indication of any distress. During Amanda’s account of the incident Amanda stated that she had seen Toby spank Taylour before. When asked how many times she had witnessed a spanking, the GAL noted that “she looked at me blankly” and eventually responded with that she had not kept track “but probably two or three times.” CP at 444. When questioned further, Amanda “stumbled to fill in the details and answer my questions.” Amanda later confessed that Toby “has always been a good dad and involved with the children.” CP at 443-444.

When Amanda was asked why she continued to allow Toby to be alone with the children as normal in the week following the incident, Amanda “had trouble formulating a response.” When asked about the outcomes of the police and CPS investigations, Amanda was rather “blasé” about the two investigations. She did not seem to know much

about the outcome of either one nor did she appear to have any interest in the actions or investigation process of either agency. CP at 444-445.

It was revealed through the GAL's visit that Amanda was living in the home of Jeff Beegle. Amanda indicated that it was a "roommate" situation and he was a "friend." Mr. Beegle was present during part of the GAL's visit. "When the children woke up from their nap it was Jeff that went to get them up." CP at 445. The GAL noted that given the "time it took for Jeff to come out of the room with Liam that Jeff changed his diaper." *Id.* "It was Jeff who held and cuddled with Liam while he finished waking up." "When Liam was more alert it was Jeff who put him in the high chair and prepared food for him all without any input from Amanda." *Id.* Amanda stated that the "children are very comfortable with Jeff, and Jeff 'helps her out' with the children and that Jeff 'deals with the kids' when I sleep." CP at 445.

Amanda went on to describe the family schedule, indicating that Jeff is at home while she is working the graveyard shift. After Jeff leaves in the morning for his job, a family friend arrives at the home at 4:30 a.m. to stay with the children and gets them up and feeds them before Amanda arrives home from work. Amanda then states that she watches the children until they go to bed. When asked when she sleeps, Amanda first responded, "I don't." She later stated that "she sleeps for a couple of

hours when her children are napping, but that basically she gets very little sleep and generally feels very sleep deprived.” CP at 446. Later in the visit, Jeff informed the GAL that he cares for the children in the afternoons while Amanda sleeps. *Id.*

The GAL found Amanda’s recounting of the 2008 domestic violence incident “a bit unusual” in her experience. She noted that Amanda showed no emotions at all for most of the telling “other than what seemed to be a little bit of drama in the recounting of several details.” The GAL noted that Amanda’s recounting did not match up with her statement written at the time of the incident.

The GAL found Amanda “to be a somewhat unreliable reporter. This may in part have been due to her sleep deprivation; however there was an edge to Amanda that was outside of a sleep issue. I found her to be less than forthcoming with information and she seemed extremely wary of me and my questions.” CP at 451.

After completing her screening for domestic violence and explored the child abuse allegations, the GAL did not believe that these children were at risk when with Toby. CP at 453. She “strongly recommended that the supervision requirement be lifted and that Toby Lynn be allowed to care for his children unrestricted.” *Id.* She further recommended that Amanda receive a block of time for sleep prior to being in a position of

having to fully attend to her children. “The children should, as schedules allow, be in the care of Dad when Mom is at work or sleeping rather than left in the care of others.” CP at 453.

On April 20, 2010 Toby moved the trial court for an order amending the protection order to no longer include the children and for the court to adopt the GAL’s recommendations. CP at 428-429. A hearing was held before Judge Baker on May 4, 2010 on Toby’s motion. CP at 474, CP at 693-699. In granting Toby’s motion to adopt the GAL’s recommendation Judge Baker noted that supervised visitation was no longer necessary because of the work that Toby has done. CP at 694-695. The court then set a schedule that had the children placed primarily in Toby’s care with Amanda having visitation from Wednesday morning to Friday evening every week and Monday afternoon from 2:00 p.m. to 7:00 p.m. CP at 695.

In June 2010, the youngest child, Liam, then about one and a half years of age, fell while in the care of Toby and ended up with a swollen lip. Amanda reported this incident to the sheriff and CPS. CP at 45. CPS investigated the incident and issued a finding of unfounded. CP at 501. The incident was also investigated by the GAL, who found that there was no evidence of neglect or abuse by Toby. CP at 619.

In July 2010, Amanda alleged that Toby pushed her at an exchange of the children. Amanda contacted the police and subsequently refused to turn over the children to the paternal grandmother for a visit. Amanda filed for restraining order and sought modification of the parenting plan. CP at 516- 522. Toby filed a contempt motion for the missed visit and also sought his own restraining order restraining Amanda from coming on Toby's property based on Amanda's false reporting of the pushing incident and reporting Liam's fall to CPS. CP at 505-508. A mutual no contact order was entered by Judge Neilson on July 14, 2010. Amanda's visitation was also expanded by Judge Nielson. CP at 524-525, 701-705.

At the request of the GAL the court ordered that both parties submit to psychological assessments. Amanda completed her assessment in August 2010 and Toby completed his assessment in September 2010. CP at 551-557. On November 2, 2010 another hearing was held before Judge Baker to modify the temporary parenting plan. CP at 577; 706-707. Again Judge Baker noted that "I hear over and over how bonded these, these children are with their dad. I think they're no doubt, close to their mom too, but they're really super bonded to their dad, they're extremely comfortable with him and these safety issues, I think, are really overblown at this point. Toby has done a lot of good work dealing with those issues, through his therapy. He continues to be plugged in. I am

comforted by his psychological assessment...” CP at 707. Judge Baker noted that she did have some concern that a change in the children’s schedule could be disruptive as the children “are very close to their dad...”. CP at 707.

In July 2011 Amanda brought another motion to expand her residential time prior to her starting school in the fall. CP at 511-515. A hearing on expanding Amanda’s summer residential time was held before Judge Baker on July 18, 2011. CP at 611, 709-712. While Judge Baker expanded Amanda’s summer residential time until she started school in September, Judge Baker noted that she believed this additional time would be disruptive to the children. CP at 710. Judge Baker based her opinion on “Ms. Vache’s description of Toby’s interaction with the children and conversely, the children’s interaction in Amanda’s home, and yes there might have been some extenuating circumstances there and so forth...” CP at 710. Judge Baker went on to find “it appears that the children are very bonded with Toby, that he is their primary care giver, at least now, and has been somebody that they have been very comfortable with...” CP at 710. Judge Baker further ordered that the children were to remain in daycare with Jamie Baskin as they appeared to be doing well with “other skilled adults who are providing a safe setting for them to spend their days.” The GAL’s schedule for the summer was adopted but it was ordered that

following Amanda starting school the schedule would revert back to 5 days a week in daycare with Ms. Baskin until the time of trial. Judge Baker went on to note that “I don’t like experimenting with kids, I frankly think they’re probably doing pretty well on the current schedule, but it sounds as if they were having a few behavioral issues and, and are benefitting from daycare, as opposed to being, you know, somehow punished themselves by it.” CP at 710-711.

On November 30, 2011 the GAL filed her final report. CP at 614-660. The GAL incorporated her preliminary report discussed above. CP at 615. The GAL recalled her second visit with Amanda, which occurred shortly after Amanda left her work situation on medical leave. CP at 631. The GAL noted that Amanda’s attorney was present at this visit. The GAL went on to note that “At this second visit Mom, at the prompting of her attorney, was more elaborate in her reporting of her fear of Dad.” CP at 631. However, when questioned further by the GAL, “she could not report any new basis for the reported increase in fear.” CP at 631. The GAL reported that Amanda started the visit by talking about the spanking incident. Amanda indicated that the reports from the sheriff were wrong. She also stated that CPS had not adequately investigated either the spanking incident or Liam's tumble. CP at 631.

The GAL also had an opportunity to once again observe the children with Amanda. In observing the youngest, Liam, the GAL noted that “Mom was very accepting of this [reckless] behavior and made no attempt to assist the toddler. She clearly was aware of what he was doing and her lack of assistance suggests a parenting style wherein she allows the young toddler to explore his environment at will. This would suggest that she is fully aware of the nature of this little boy to take risks and behave somewhat recklessly. I would think that she would fully understand and maybe even expect her son was going to take tumbles and have his fair share of bumps and bruises.” CP at 632. Regarding Taylour, the GAL noted that she was very cranky during the visit. “She was combative with her mother.” CP at 633. “In general, Taylour was not particularly responsive to Mom and did not seek reassurance from her despite the presence of two strangers; myself and Mom’s attorney.” “Both children appeared oddly disconnected from their mother and appeared to be somewhat unaccustomed to her interventions.” CP at 633.

The GAL also made another visit to Toby’s home. This visit occurred shortly after Liam suffered a swollen lip from falling while Dad was shoveling snow. The GAL noted that “I was again impressed with how these children interact with their father.” CP at 641. “The family clearly had its routine and was very connected to each other. At this visit,

both children were much more interactive with me, but routinely returned to Dad or did an eye check of him for reassurance. Again, this behavior was indicative of the strong healthy attachment these two young children have with their father.” CP at 641. The GAL also noted that the children’s daycare provider reported that when the children were “tired or distressed it is always their father that they cry for or request.” CP at 647.

The GAL found that the 2008 domestic violence incident was “an extreme situation incident that turned violent that is not indicative of a pattern of domestic violence by Dad. In addition, Mom acknowledged a role in the conflict in the marriage.” CP at 653-654.

The GAL also reported that she does “not believe the spanking incident to be as severe as reported.” CP at 654. The GAL relied on “having viewed the color pictures of the reported bruising from the spanking incident, I was unable to ascertain whether the marks depicted bruising.” *Id.* Further, “when I compared the Sunday and Monday pictures, I did not see any change in coloration which one would expect if the marks had been bruising.” *Id.* The GAL found that Toby “displayed none of the typical behaviors or patterns commonly associated with domestic violence perpetrators, individuals with anger management issues or habitual child abusers.” CP at 655. The GAL went on to state that “Dad’s relationship with his children had an ease and rhythm to it that was

indicative of very active and consistent parenting over time. Neither child displayed fear of or disconnect from Dad that would point to abuse or neglect.” CP at 655. “Overall, the information I was able to glean from my investigation does not support a picture of Dad as a domestic violence perpetrator or child abuser.” The GAL concluded in stating that “I do not believe the children to be at risk for abuse when in the care of their father.” CP at 656.

The GAL found Amanda to be a “somewhat unreliable reporter.” CP at 656. In particular the GAL noted that “I found her to be less than forthcoming with information and she seemed extremely wary of me and my questions.” *Id.* The GAL went on to note that there were several instances “of Mom’s information supporting Dad’s assertions about the relationship.” With regard to Amanda’s relationship with the children, the GAL stated that “My first witnessing of Mom’s relationship with her children seemed a little off.” *Id.* “My second observation of the children when they were with their mother, suggested to me that there is less of an attachment between Mom and the children.” CP at 657. In particular, the GAL pointed out that “Except for Liam’s one instance of seeking protection from his mother both the children seemed detached from their mother.” *Id.*

The GAL found that there was “an abusive use of conflict in this case.” She believed that “both parties have a role in the use of conflict, but I believe that Mom tends to instigate and exasperate the conflict more.” CP at 657. The GAL noted that “Throughout this case Mom has made numerous requests to change the schedule to suit her own needs. She is the one who has made what appear to be relatively minor incidents into court battles.” The GAL also noted that “Mom’s recounting of incidents tended to become more exaggerated each time I spoke with her. While I can understand her wanting to make sure I took the information seriously, stories changed such that the events become totally different over time.” Of particular note, “when she [Amanda] first recounted the 2008 domestic violence incident she did not express any fear of Dad. By my next visit she was telling me that she lived in total fear of Dad showing up at her home. It seems to me that the well-being of the children sometimes gets lost in the fight.” CP at 658. The GAL's final recommendation was to have the “children reside primarily with their father and he be designated the custodial parent.” CP at 658 The GAL further recommended that Amanda’s time with the children be reduced to avoid “disruption to the routine of the children.” CP at 658-659.

A four day trial was held February 1, 2012 to February 6, 2012. CP at 718-757. The trial testimony was consistent with the facts outlined

above. The GAL repeated her recommendation that primary residential placement of the children be with Toby. Transcript of Trial (Tr.) at 306. Jamie Baskin, the children's daycare provider testified that there was marked difference in the children's behavior after visits with Amanda. The day after these visits, the children were extremely aggressive. Tr. at 310. After a day or two in Toby's care, the children return to normal. *Id.* There was testimony that the spanking incident with Taylour was reported to CPS, which found child abuse had occurred, and that this finding was being appealed. Tr. at 157-158. Jeffrey Beegle testified that the care he normally provided for the children was similar to that which he provided during the GAL's visit. Tr. at 315-316. Several friends and family members testified as to Toby's parenting. William Danekas, Tr. at 97-98; Fran Lynn, Tr. at 121-122; Joshua Tripp, Tr. at 77, 79.

In its oral ruling, the trial court found the GAL report to be a "professional document." Tr. at 582. The court also observed the report exhibited an "objective professionalism." Tr. at 582-583. The court found the spanking incident did not constitute abuse. Tr. at 579. The court further found that Liam's tumble did not constitute abuse. *Id.*

On April 11, 2012, the trial court issued its written Findings of Fact and Conclusions of Law. CP at 823-830. The trial expressly incorporated its oral ruling at trial into these findings. CP at 829. The

trial court found that Amanda had "pushed harder and accelerated the rancor" when it came to the legal conflict between the parties. CP at 806. The court also found that while Toby "has, over the past two and a half years, worked for a mother/child relationship," "[Amanda] has, as time has gone by, become less inclined to remember the wisdom of father/child relationships." *Id.* The court found that Toby had not "engaged in physical abuse of his children." CP at 810. The trial court ultimately ruled that residential placement be with Amanda, because she had been "more stable," this placement would foster a relationship with the children's step-brother, and such placement would "better insure [sic] continuity." CP at 811.

The trial court did not inform the parties that it had issued its ruling. Tr. at 602. On April 26, 2012, Toby moved to reconsider the court's placement decision. CP 844-849. This motion was based upon Amanda's having unilaterally moved the children to a daycare in Spokane and because Liam was exhibiting symptoms of distress. CP at 852-857. The trial court denied reconsideration. CP at 877. This appeal followed. CP at 879-880.

ARGUMENT

This court reviews trial court decisions on residential placement for abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801,

854 P.2d 629 (1993). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Id.* "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the 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, 47, 940 P.2d 1362 (1997).

The trial court's decision to award primary residential placement to Amanda was based on untenable reasons.

While this Court gives considerable deference to a trial court's decision on residential placement, where the trial court fails to properly apply the statutory factors regarding placement decisions, reversal or remand is required. *See Matter of Marriage of Cabalquinto*, 100 Wn.2d 325, 328, 669 P.2d 886 (1983)(remand necessary where court made finding of harm based upon parent's status as a homosexual).

RCW 26.09.187 gives the criteria the court is to consider when determining permanent parenting plans. In terms of determining a residential schedule for the children the court is to consider the following:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided

they were entered into knowingly and voluntarily;

(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;

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

(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;

(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; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

RCW 26.09.187(3).

In considering these factors, the court must consider the “best interest of the child” as found in RCW 26.09.002. “The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further,

the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.” RCW 26.09.002. This standard is at the heart of every parenting plan decision.

The Court of Appeals in *In re Marriage of Allen*, 28 Wn. App. 637, 648 (1981), elaborated on this standard in relation to residential placement decision: “the ‘best interest of the child’ test compares the parents’ competing home environments and awards custody, by a preponderance of the evidence, for the better environment.”

The criteria of RCW 26.09.187(3) also require the court to keep in mind the definition of parental functions as set forth in RCW 26.09.004.

(2) "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are

within the social and economic circumstances of the particular family;

(c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;

(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

(e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) Providing for the financial support of the child.

RCW 26.09.004(2).

The court must also consider the factor and limitations outlined in RCW 26.09.191. However, “if the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact

on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection. RCW 26.09.191(2)(n).

Here, a full investigation into the domestic violence incident and spanking incident with the child has been accomplished. Amanda's own actions following the spanking incident contradict any finding or claim that Toby presents a risk of child abuse. The incident occurred in early December 2009. Following the incident Amanda continued to leave the children in Toby's care until she obtained an ex parte restraining order on December 22, 2009. When questioned by the GAL as to why Amanda allowed the children to be cared for by Toby after this incident, she had trouble formulating a response. Amanda finally indicated it took her over a week to contact her attorney. Amanda also indicated that this was out of character for Toby.

The trial court correctly agreed with all professionals who have worked with Toby in concluding that he is not at risk for domestic violence or child abuse. The very nature of the interaction between Toby and his children specifically supported the GAL's finding that there has been "active and consistent parenting over time." Further, the lack of fear or disconnect between Toby and the children further supports that there has been no pattern of emotional or physical abuse perpetrated by Toby.

As such, the trial correctly found that provision of RCW 26.09.191(2)(n) would apply and no restriction on Toby's parenting time is required.

Keeping in mind the best interest of the children, the statutory factors of RCW 26.09.187(3) also supported a finding that the children should primarily reside with Toby. Here, factors (ii) and (iv) do not apply. The parents have not entered into any agreement on parenting nor are the children of sufficient age or maturity to give a reasoned and independent preference to their residential placement. However, their interactions and behaviors while with each parent speaks to their preference and what is in their best interests.

Factor (vii) of RCW 26.09.187(3) required the court to take into account the parties work schedules and make accommodations consistent with those schedules. With no real analysis, the trial court concluded that this factor weighed in favor of Amanda. Tr. at 585. But Toby was returning to work. Amanda was currently not working at the time of trial but was completing classes in Spokane. The children were doing well and thriving in daycare in Colville. Amanda's school schedule has not been consistent for the children. Her classes are in Spokane and require long drive times both ways. Amanda had previously requested that the trial court allow her to place the children in day care in Spokane. The court refused to do so, noting that the time on the road and lack of continuity

would not benefit the children. When Amanda finishes school there is no indication of where she will be employed and at what hours. At this point, Amanda has a variable school schedule that she must commute to Spokane to meet, and upon completion of school there is no indication of what or where her job prospects will be. Amanda's actions immediately following placement with her demonstrate her lack of concern for the well-being of the children. Rather than maintaining the existing day-care or placing the children in a local day-care, she placed the children in the very day-care which the trial court had previously ruled was not good for the children. And she did this with no notice to Toby. The trial court refused to act on this new evidence on reconsideration.

Factor (v) of RCW 26.09.187(3) required the court to take into account the relationships the children have with other family members, siblings or individuals in each parents home. The trial court called this factor a draw as to other individuals but found it weighed in favor of Amanda when it came to other siblings. Tr. at 585. Here, the children have a half-brother that resides in Amanda's home. While this factor seemed to initially weigh in Amanda's favor, given the presence of the children's half-brother in Amanda's home, the court must consider all the factors in determining a permanent residential schedule for the children. The trial court abused its discretion by giving this factor more weight than

factor (i), the bond between children and the parents, specifically Toby. Put another way, while factor (vii) might have been “tie breaker” where all other factors were equal, it cannot be a “tie breaker” where it is clear that Toby is better bonded with the children than Amanda.

The court should have also taken into account whether each parent helps to facilitate a relationship with the other parent or other significant family members as required by RCW 26.09.004(d). Here, Amanda has shown time and time again that she is unwilling to facilitate a relationship between Toby and the children. She has filed both CPS and police reports which have come back unfounded. She has increased the conflict in this case to the point that the GAL found that most of the conflict between the parents has been instigated and exacerbated by Amanda. The GAL went so far as to state that Amanda has demonstrated an “abusive use of conflict” through the courts. The trial court found that Toby has attempted to facilitate a relationship between the children Amanda, while Amanda has not reciprocated in this effort. The trial court also found that Amanda has "pushed harder and accelerated the rancor" between the parties. Without explanation, the trial court failed to consider these findings when deciding that placement was more appropriate with Amanda.

Factor (iv) of RCW 26.09.187(3) required the court to look at the emotional needs and developmental level of the child. The trial court

concluded that the children were fine and their needs were being met. Tr. at 584-585. The GAL report supported a finding that the children's emotional and developmental needs are being met by Toby in the arrangement prior to trial. There is no indication that either child has any special emotional or developmental needs at this time. However, the difference in the interactions between the children and each parent suggests that the children's emotional and developmental needs were better met when in the custody of Toby. The GAL consistently reported that the children appear detached from Amanda while in her care, but seemed more closely bonded and regularly interact with Toby when in his presence. The children also respond more quickly to Toby's instruction than when directed by Amanda. The day care provider has noted the same. When the children are hurt or desire a parent they ask for Toby.

Factor (iii) of RCW 26.09.187(3) required the court to look at each parent's performance of "parenting functions" as defined in RCW 26.09.004. The trial court apparently concluded that the parenting functions had been performed by both parents roughly equally.

Conclusion of Law B, CP at 809. Similar to factor (iv) the interaction between the children and each parent supported a finding that Toby had historically and at the time of trial provided the majority of the parenting functions for these children. While the GAL and the court had noted that

these children are bonded with Amanda and Amanda has performed parenting functions, such as taking the children to the doctor, she had not performed parenting functions to the extent that Toby had performed them. Indeed, it appears that just as Toby had performed the majority of parenting functions when he was married to Amanda, Amanda's new boyfriend, Jeff Beegle, currently performs more parenting functions than Amanda. In addition as outlined above, Toby also has a history of facilitating the relationship between Amanda and the children, while Amanda has increased conflict and made several attempts to limit Toby's time with the children by seeking to change the residential schedule to suit her needs without consideration of the best interests of the children and their needs. This is in direct contradiction to the parenting functions outlined in RCW 26.09.004.

Reports from the children's daycare provider also support a finding that Toby has better met the children's emotional and developmental needs as well as effectively providing the majority of the parenting functions. The children are better behaved and more emotionally stable when coming from Toby's home. The children request Dad when hurt or sick. CP at 647.

The trial court improperly applied a presumption in favor of placement with the mother.

The foregoing factors all support primary placement with Toby. But it is factor (i) of RCW 26.09.187(3) which is to be given the most weight. In effect, factor (i) incorporates most of the other factors. This factor focuses on the best interest of the children as determined by the bond between the parent and the child. Here, there is no doubt that Toby is the primary attachment figure for these children. The trial court and the GAL consistently found that the relationship and interaction between Toby and the children speaks to a long-term active parent-child relationship. The trial court itself in its oral ruling at trial stated, "I don't remember a case I've had where I've had a father at this level of ability, this excellence in detailing [sic] with his children." Tr. at 584. The court further stated that it gave the "nod" on factor (i) to Toby based on his "outstanding bonding ability." *Id.* The court then reversed course and called this factor a draw because "I start by stating these are two good parents." *Id.*

What the court appears to be saying here is that there is a presumption in favor of placing children with the mother, and that unless Toby demonstrates Amanda is unfit, he cannot be awarded placement. The trial court's comments about Amanda's closing argument further illustrate this point, "as Ms. Twyford [Amanda's trial counsel] put it in her closing Where, Judge, is the evidence here of the mother being unfit?"

What has she ever done to these kids? and I can't find anything when I go through all the evidence from top to bottom." Tr. at 583. But no demonstration of unfitness is required to place a child with someone other than the mother. See *"In re Marriage of Allen*, 28 Wn. App. 637, 649, 626 P.2d 16 (1981) ("unfitness of the parent need not be shown" to justify placement decision).

The court's comment that it knew nothing "negative about the mother's care of these little kids and that's got to be a big part of their mental health and their development," Tr. at 583, is additional evidence supporting the inference that the court was applying a presumption in favor of placement with the mother before applying any of the evidence produced at trial. The fact that the court did not see fit to comment on whether Toby was unfit is more evidence that an improper presumption guided the court's decision on placement. Such a presumption is not the correct legal standard and therefore, it was an untenable reason for the court's decision on placement. Washington Court's have made clear that only the statutory factors are to be considered in residential placement decisions. See *In re Marriage of Kovacs*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993)(presumption in favor of parent with temporary placement is improper); *Matter of Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886, 888 (1983)(status as homosexual is not relevant to custody and

visitation decisions); *Malfait v. Malfait*, 54 Wn.2d 413, 417, 341 P.2d 154 (1959)(custody and support are not awarded for reward or punishment of behavior of parents). The status of one parent as mother or father is not one of statutory factors for residential placement decisions. It was an abuse of discretion for the trial court to ignore Toby's better bond with the children simply because Amanda was the children's mother and Toby did not demonstrate that she was an unfit parent.

The trial court's conclusions regarding stability and continuity were not supported by its findings or the record at trial.

The trial court's ruling that Amanda is more "stable" and that "continuity" would be better served by having primary residential placement with her is unsupported by the trial court's own factual findings or by the record produced at trial. As such, the ruling is based on untenable reasons. As an initial matter, it appears that when the trial court was talking about "stability" it was referring to the personalities of Amanda and Toby. But the legal standard is "stability of the child's relationship with each parent." RCW 26.09.187(3)(i) (emphasis added). There is no evidence that Amanda had a more stable relationship with the children with Toby. In fact, just the opposite is true, the children look to Toby for reassurance when they need assistance. Even if the standard were stability of personality, which it is not, there was no evidence that at

the time trial Amanda was more stable. Indeed, the evidence suggests that as the children have grown older, Toby has become more stable and Amanda has made abusive use of conflict to satisfy her own needs rather than doing what is best for the children. The trial court's findings of fact support this conclusion. *See* Finding of Fact G, CP at 806 (Amanda has "accelerated" conflict and is "less inclined to remember wisdom of father/child relationships").

The trial court provided no evidence in its oral ruling or its findings of fact to support its conclusion that placement with Amanda would ensure "continuity." While it is true that a court cannot presume that the temporary placement is best, the court can use the evidence from behavior in temporary placement to decide on permanent placement, provided they use this evidence to evaluate "prospective" parenting functions. *See In re Marriage of Kovacs*, 121 Wn.2d 2d 795, 801, 854 P.2d 629 (1993). The children had thrived in Toby's care. This is no question that they are better bonded with him than with Amanda. Reducing Toby's time with the children from 57% to 20% (from four out of seven days per week to six days per month) was a substantial change in "continuity" which was not supported by the facts in this case.

Furthermore, evidence produced in the motion for reconsideration specifically contradicted the trial court's finding that Amanda would

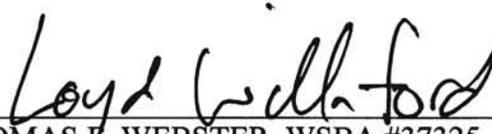
provide a more stable environment for the children. Upon gaining primary custody, Amanda immediately moved the children from the day care that had been attending for over a year and placed in them in a day care which requires hours of driving each day for the children. There was no adjustment period for the children and no notice to Toby that this was occurring. Amanda made a major change in the children's life for her own benefit without considering the effect of that change on the children.

While a trial court is not bound by a GAL report, where appellate courts have affirmed a rejection of a GAL recommendation, there has been some evidence justifying the rejection of the report. *See, e.g., Magnuson v. Magnuson*, 141 Wn. App. 347, 352, 170 P.3d 65 (2007)(uncertainty over future gender status of parent justified rejection); *State ex rel. Campbell v. Cook*, 86 Wn. App. 761, 771, 938 P.2d 345 (1997)(GAL was unqualified to make a recommendation). In this case, despite the fact that the trial court found the GAL report to be "objectively professional," and the trial court agreed with the factual information in the report, the court failed to reach the logical conclusion which the GAL reached; Taylour and Liam Lynn's best interests are best served by residential placement with their father, Toby Lynn.

CONCLUSION

Toby Lynn respectfully requests that this reverse the trial court's decision on residential placement and remand for a residential placement order which reflects the fact Toby is the parent with whom the children have their primary attachment.

Submitted November 5, 2012 by:

A handwritten signature in black ink that reads "Loyd Willaford". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

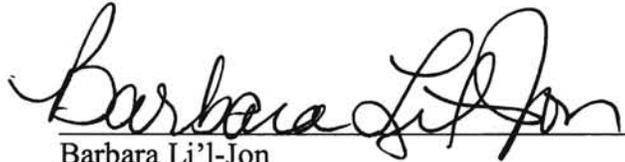
I declare under penalty of perjury of the laws of the state of Washington that on November 5, 2012 I provided a true and correct copy of Appellant's Brief, served by the method indicated below, and addressed to the following:

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