

No. 68424-8-I
King County Superior Court No. 11-3-01394-8 SEA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NEHA VYAS CHANDOLA,
Plaintiff-Appellee,

v.

MANJUL VARN CHANDOLA,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable James A. Doerty, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in imposing restrictions against Manjul Varn Chandola under RCW 26.09.191(3)(g) as follows:

(a) limiting residential time with his daughter P.R.C.;

(b) precluding P.R.C. from sleeping in the same room as Varn;¹

(c) prohibiting Varn from having his parents present during more than 20 percent of his time with P.R.C.; and

(d) imposing a variety of conditions that Varn must satisfy in order to increase his residential time.

See CP 80-81, 84 (Parenting Plan at paras. 2.2, 3.2, and 3.10.).

2. The trial court's imposition of restrictions was based on the following erroneous factual findings set out in the Memorandum Findings on Trial (CP 92-94):

(a) Varn "lacked objectivity with respect to [P.R.C.]'s healthy development." CP 92.

(b) Varn "was unwilling or unable to establish boundaries, routines, schedules, and structure." *Id.*

¹ Because the parties and their parents share last names, appellant will generally use first names for these family members. Mr. Chandola, however, generally uses his middle name "Varn."

(c) Varn “discouraged exploration and independence.” *Id.*

(d) Varn was an “ineffective parent.” *Id.*

(e) Varn “actively undermined the mother’s efforts to provide these essential parenting components resulting in an imbalance that appears to have had adverse consequences for the child.” *Id.*

(f) Varn’s parenting was harmful to P.R.C. (assuming that the trial court made such a finding).

3. The trial court made the following legal errors in reaching the conclusion to impose restrictions:

(a) The Court’s restrictions were not based on sufficient findings of harm to P.R.C.

(b) In evaluating Varn’s parenting, the trial court improperly considered the distorting effects of Neha Chandola’s unfounded allegations that Varn sexually abused P.R.C.

(c) The trial court denied Varn’s constitutional rights to substantive due process and equal protection by failing to take his and P.R.C.’s Indian culture into account.

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court impose restrictions without a sufficient showing of harm to the child?

2. Was the trial court's decision influenced by the distorting effect of the unfounded sexual abuse allegations?
3. Did the trial court fail to consider the cultural norms of Indians, in violation of Varn's and P.R.C.'s rights to equal protection and due process?
4. Were the trial court's factual findings supported by substantial evidence in the record?

III. INTRODUCTION

By all accounts, Varn Chandola is a loving, doting father, whose young daughter is deeply attached to him. By the account of all experts to examine or assess her, P.R.C. is a happy, healthy girl, developing normally in all ways. Nevertheless, the trial court imposed significant restrictions on Varn based on the court's opinion that Varn was overly indulgent and did not impose sufficient discipline.

Varn seeks reversal because a mere disagreement over parenting style is not a sufficient showing of harm to justify the restrictions against him. Varn also maintains that the trial court failed to consider the norms of his Indian culture when it limited his ability to co-sleep with P.R.C. and to involve his parents in her life. In addition, the trial court's ruling was based on a distorted picture of Varn's parenting, in view of the mother's

unfounded allegations of sexual abuse which prevented Varn from parenting normally for almost a year preceding the trial.

IV. STATEMENT OF THE CASE

A. HISTORY OF THE MARRIAGE

Manjul Varn Chandola was born in the United States but is of Indian background. He was “raised in an environment where [he] learned a lot about Indian cultural values and family upbringings.” VI RP 842. Both of his parents – Anoop and Sudha Chandola – were born in India, hold Ph.D.s, and have taught at universities in the U.S. VI RP 843. At home they all speak mostly Hindi. *Id.*

Varn went to the University of Arizona for undergraduate and law school and was admitted to the Arizona Bar in 1991. VI RP 843. He was introduced to Neha Chandola, an immigration lawyer, through a mutual friend. After a long distance courtship they decided to marry. The four parents met to discuss this. They accepted Neha’s desire to continue her legal career after the marriage. It was also agreed that the couple would live with Varn’s parents. VI RP 846-47.

Varn and Neha married on May 16, 1998. I RP 29. They lived for four years with Varn’s parents in Tucson. *Id.* They moved in the fall of 2002 to Seattle when Neha obtained a job as legal director of the

Northwest Immigrant Rights Project. I RP 31. Varn closed down his Arizona practice, and in 2003 was admitted to the Washington Bar. VI RP 848-850. In May of 2006, they bought a house in Kent, in which they both lived until their separation. I RP 36.

P.R.C. was born on November 2, 2008. I RP 29. Varn did considerable research in preparation for the birth regarding such things as car seats, nutrition and cribs. VI RP 855. For the first month after P.R.C.'s birth, Varn's parents as well as Neha's mother, Kuldeep Vyas, lived in the home. I RP 39-40. Anoop and Sudha Chandola left in December, 2008, but Kuldeep stayed on. I RP 50.

Neha testified that, early on, she and her mother slept with P.R.C. and took turns getting up to feed her or hold her. I RP 44-48. P.R.C. would wake up frequently during this time and Neha and Kuldeep often held her to help her sleep. This continued until Neha returned to work. I RP 47-48. With Neha's approval, Varn slept in the second bedroom during that time so that he could sleep at night and work on his new law practice during the day. I RP 44. Varn also helped with the grocery shopping, took Neha to her lactician appointments, and spent considerable time researching child care issues. I RP 44-45. This all continued until Neha returned to work in April, 2009, when P.R.C. was five months old. I RP 44; 47-48. Varn's account of this time was similar except that he

maintained he almost always slept in the same room as Neha and P.R.C. and that he took turns holding P.R.C. to help her sleep. VI RP 857.

After Neha resumed work, Kuldeep continued to help out until she returned to India in August of 2009 when P.R.C. was ten months old. I RP 49. About a month before Kuldeep left, Varn's parents had returned. VI RP 876. They continued to live with Varn and Neha most of the time until November, 2010.

According to Varn, after Neha returned to work he had primary responsibility for P.R.C. during the day since his schedule was flexible. VI RP 861. The grandparents would help out when he had to go to court or meet with a client. VI RP 861-62. He also took on the task of putting P.R.C. to sleep. VI RP 859. Varn would usually be the one who woke up with P.R.C. at night. VI RP 885. He tried many techniques and ultimately found that rocking her to gentle light music worked well. He obtained the music off of YouTube because they did not have a CD player. VI RP 860. Usually he slept in the same room with Neha and P.R.C. VI RP 861. P.R.C. and Varn would wake up between 8:00 and 9:00 in the morning and then he would change her diaper, dress her and comb her hair, and go downstairs to prepare breakfast. *Id.*

P.R.C. had painful skin conditions as a baby including cysts. VI RP 889. Varn took primary responsibility for applying creams and

ointments to P.R.C. VI RP 889-90. He also bathed P.R.C. three times a day as recommended by her pediatrician. *Id.* See also IV RP 536-40 (testimony of pediatrician Dr. Fukura). Sudha confirmed that Varn did much of the parenting, particularly after he closed his legal referral service. IV RP 603-04. See also, VI RP 852 (in 2009 Varn closed his business and began working part time as a hearing officer for the Seattle Housing Authority.)

According to Neha, however, Varn did little or none of the feeding or diapering until May of 2010 when Varn's parents went to Tucson for a while. I RP 94. P.R.C. was then about a year and a half old. *Id.* Neha testified that, when she was at work, Kuldeep and later Sudha did all the parenting, and Neha handled it when she was home. I RP 48-49; III RP 407. Neha agreed, however, that Varn went to all of P.R.C.'s doctors' appointments and did considerable research regarding proper nutrition. III RP 449-50.

Neha also testified that Varn and his parents would not permit her to parent P.R.C. as she wished. She criticized Varn for holding P.R.C. too much and playing her music videos late at night. I RP 107-11. Varn explained that he would show educational and music videos to P.R.C. during the day, which he found more appropriate than the Bollywood videos favored by Neha and her family. VI RP 858-59. Varn agreed that

he held P.R.C. a lot, but everyone in the family did that, including Neha and her mother. VI RP 874.

After Neha returned to full-time work, Varn recognized that P.R.C. was bonding more strongly with him than with Neha and made an effort to give Neha as much time with P.R.C. as possible. VI RP 880-81. As one example, Varn produced an email dated May 5, 2009 which included the following:

Since you did not get back until late last night, I want you to be able to come home early today to spend time with [P.R.C.] How about 4PM tomorrow?

Supp. CP ____ (Ex. 127).

Neha herself recognized this problem in an email to Varn dated July 8, 2009:

Didn't have the guts to take time off before – but have to now for baby [P.R.C.] – the little tricky pooh doesn't even recognize her mama. I am afraid in two months I will not even be able to hold her – she seems to have grown in weight and height since her last doc appointment.

Supp. CP ____ (Ex. 132); VI RP 866. It was not until October, 2010 that Neha rearranged her work schedule so that she could regularly be home with P.R.C. by 4:00. Supp. CP ____ (Ex. 144). Varn made sure he always had P.R.C. home by then so that Neha could greet her. VI RP 886-87. After the separation, however, Neha blamed Varn for interfering with her relationship with P.R.C.

As Varn explained, he and Neha were always primarily responsible for P.R.C.'s care. VI RP 879. But the grandparents "definitely helped us." VI RP 879.

And it was great to have them around because we very much believe in extended families. I didn't just want grandparents. I wanted other family members around as well. . . . I would encourage all family to come, whether it was Neha's side or our side because we very much have an extended family culture.

VI RP 879. It was undisputed that it is the cultural norm in India for an extended family to raise children.

To live with their grandchildren is a social custom and also our cultural customs [sic]. In India, we live with our grandchildren, grandsons and granddaughter. We like to live in joint families.

I RP 155 (testimony of Rupayan Bhattacharyya). *See also, e.g.*, I RP 82-83 (testimony of Rahul Gupta); IV RP 599 (testimony of Sudha). Even Kuldeep acknowledged that Neha never cared for P.R.C. completely on her own. III RP 403, 405.

Likewise, in Indian families, it is common for children to sleep with their parents. *See, e.g.*, I RP 156 (testimony of Bhattacharyya). Mr. Bhattacharyya's son and daughter slept in the same bed with their parents until they were about 12 years old. I RP 156-57.

In September, 2010, Neha and Varn were arguing late at night, and Neha barged into his parents' room. V RP 745-47 (testimony of Neha).

According to Varn, Neha insulted Varn and his parents in a loud voice. VI RP 872, 878. Sudha likewise testified that Neha “slammed our bedroom door open” and was “screaming and shouting.” IV RP 608. Varn convinced his parents to stay until P.R.C.’s second birthday on November 2, 2010, but they left immediately afterwards. VI RP 877-78.

After that, by all accounts, Varn cared for P.R.C. all day until Neha came home from work, even though Kuldeep had recently returned. *See, e.g.*, III RP 375, 378 (testimony of Kuldeep). This continued until the time of separation in February, 2011. *See* I RP 181-82 (testimony of Dr. Wheeler.)

Varn testified that he and Neha had frequent arguments after the “barge-in night.” VI RP 891-92. As things got worse, Neha was criticizing every aspect of Varn’s parenting, including teaching P.R.C. phonics, and around December, 2010, she started to make threats about severing his relationship with P.R.C. VI RP 894. Not long after that, she began to accuse Varn of sexually abusing P.R.C. VI RP 897-900. (This is discussed in greater detail below.)

Also in December, 2010, Neha travelled to Dallas to visit her sister. There, without telling Varn, she sold her wedding jewelry for \$27,000 and secretly opened a bank account. V RP 782-83; Supp. CP ___ and _____. (Exs. 150 and 151). In February, 2011, Neha suddenly

disappeared from the house, taking P.R.C. with her. Supp. CP __ (Ex. 1 at p.19). Neha promptly filed for dissolution on February 15, 2011. Supp. CP __ (Dkt. 1).

At the time of trial, Varn had P.R.C. from 2:00 pm to 6:00 pm three days a week. VI RP 915. There were no difficulties with transfers. VI RP 915-16. When P.R.C. is with Varn, she is “happy” and “well-behaved.” They spend their time on various activities, some of which are games designed to be educational. VI RP 918-19.

Between the time of separation and the trial, Varn took three parenting classes, covering such topics as setting boundaries, imposing discipline and communicating with the other parent. VI RP 919-20. He was on a waiting list for additional courses at the Child and Adolescent clinic, which parenting evaluator Dr. Wheeler recommended. VI RP 920. Varn also signed up P.R.C. for therapy recommended by Dr. Wheeler, after Neha failed to do so. VI RP 921-22.

The parties resolved most issues concerning the divorce by agreement. Supp. CP ____ (Ex. 5). The trial concerned the residential schedule and whether there should be any restrictions under RCW 26.09.191. *See* CP 92. Varn believed P.R.C. would be happiest with equal time with both parents. VI RP 922-23. Neha sought extensive restrictions concerning Varn’s parenting.

B. TESTIMONY OF FRIENDS

Various friends and neighbors testified. Some supported Varn and some supported Neha.

Rahul Gupta criticized Varn for being overprotective of P.R.C. and interfering with Neha's parenting. I RP 64 (Gupta). Anjolie Ganti testified that Varn was lax on discipline and over-protective of P.R.C. IV RP 634-77. Neighbor Carol Johnson testified that Neha or the grandparents did all the work in the house and Varn would keep P.R.C. up late at night watching television. I RP 112-15. She admitted, however, that much of her testimony was not based on first-hand knowledge. II RP 353-55.

Rupayan Bhattacharyya, another neighbor, saw Varn interact with P.R.C. before the separation. Bhattacharyya also served as a supervisor after the separation. I RP 159. He testified that Varn's parenting was "quite normal." *Id.* "As a daughter loves her father and father loves his daughter . . . both of them enjoyed their association." I RP 159-60. When Bhattacharyya visited Varn in Varn's own home, prior to separation, he would often see Varn preparing food in the kitchen and cleaning up. "He was always busy." I RP 162. Varn appropriately encouraged P.R.C. to play with Bhattacharyya's young granddaughter and with some other neighbor children. I RP 166-68.

Sunita Mishra, an internist at Swedish Medical Group and a friend of Varn and Neha, likewise testified that Varn encouraged P.R.C. to play with other children. IV RP 567-68.

Vik Bahl, a professor at Green River Community College, visited with the Chandolas more than some of the other friends because he lived nearby. IV RP 684-84. He described Varn as the primary parent after Neha returned to work. P.R.C. was a bit shy at first when large groups of friends got together because she was the youngest, but she soon adjusted. IV RP 687-88. Varn encouraged P.R.C. to play with others. IV RP 689-90. Bahl was also the supervisor for many of Varn's visits during the temporary orders. IV RP 707-08. Varn would play games with P.R.C. and Vik's son, read to them, and play music. V RP 807-11. Varn would always bring healthy food. IV RP 709-10.

C. SEXUAL ABUSE ALLEGATIONS

At the time of separation, Neha raised concerns about Varn's alleged sexual abuse of P.R.C. VI RP 903. In retrospect, Varn recalled Neha hinting that she would do this.

Beginning around December, 2010, Neha started to make threats about severing Varn's relationship with P.R.C. VI RP 894-95. She would say such things as "You don't know what I have planned for you." VI RP 895-96. Around February 4, 2011, Varn and Neha took P.R.C. to her

pediatrician. VI RP 896-97. Varn thought the purpose of the visit was to address P.R.C.'s flu-like symptoms. But then Neha asked the doctor to assess why P.R.C. was experiencing vaginal pain. VI RP 897. The doctor said there was no problem other than some redness likely due to constipation. VI RP 898.²

On February 14, the day before Neha filed for divorce, she got into an argument with Varn and then said: "Do you know that P.R.C. complains of vaginal pain?" VI RP 898-900. She then said: "What have you done to our daughter?" VI RP 900. Varn later learned that Neha's accusations were based on ambiguous statements made by P.R.C. when she 22 to 26 months old. VI RP 904.

Varn agreed to Neha's request for a temporary order requiring supervised visitation because his attorney said it would be the best way to get immediately in contact with P.R.C. VI RP 904. The agreed interim order went into effect February 18, 2011. Supp. CP ____ (Ex. 11). The supervision was lifted in December of 2011 after mediation. VI RP 915. The impetus for Neha changing her position was apparently the finding of parenting evaluator Jennifer Wheeler that her concerns were unfounded.

² P.R.C. also complained of vaginal pain during a supervised visit months after Varn had his last unsupervised time with her. V RP 823-25.

At trial, Neha disavowed that she was making allegations of sexual misconduct. III RP 416. She claimed she just wanted to get a professional evaluation, and that she would accept Dr. Wheeler's conclusion that there is insufficient evidence of inappropriate sexual contact. She claimed to be relieved that her fears were groundless. III RP 417.

D. THE EXPERT WITNESSES

The parenting evaluator, Dr. Jennifer Wheeler, has substantial experience with psychosexual evaluations and with assessing allegations of child sexual abuse. II RP 249. She believed Neha's concerns regarding sexual abuse of P.R.C. to be unfounded.

In late 2010/early 2011, [P.R.C.] reportedly made statements to Neha and other adults, that raised concerns that [P.R.C.] was focused on her genitals and fearful of Manjul. As a result of these concerns, Manjul's access to [P.R.C.] was restricted and he has had supervised visitation since that time.

Although it is beyond scope [sic] of psychological expertise to determine whether or not [P.R.C.]'s statements were due to sexual abuse, it should be considered that, given [P.R.C.]'s young age³, developmental stage, and the fact that she had a recent history of health issues involving medical attention to her vulva, that there are other hypotheses that might explain her statements and behaviors.

Supp. CP ____ (Petitioner's Exhibit 1 at 25).

³ P.R.C. was born in November, 2008, so she would have been barely two years old at the time of the statements at issue.

For example, if [P.R.C.] had a history of participating in playful, comforting, or otherwise rewarding interactions with caregivers while receiving medical attention in the past, her utterances may simply reflect an attempt to initiate such interactions. She could also simply be exhibiting developmentally normal curiosity about her body, but has not yet developed cognitive/linguistic skills to more effectively communicate her questions/concerns/observations to caregivers.

Id. at p. 25, n.2

Although it cannot be ruled out that any of her caregivers has ever touched her in a way that felt uncomfortable, painful, pleasurable, or otherwise “strange” to her, this would not, in and of itself, indicate that she had been sexually abused, by any party. Furthermore, [P.R.C.] has reportedly continued to exhibit similar behavior subsequent to when her father’s visits became supervised, suggesting that there are explanations other than sexual abuse to explain her increased focus on her own psychosexual development over the last year.

Furthermore, [P.R.C.]’s alleged statements that she was fearful of her father are not evidence of sexual abuse. Other hypotheses could explain these utterances, such as the fact that she is feeling anxious in general (corroborated by both parents). [P.R.C.]’s anxiety is likely associated with a number of factors, including (but not limited to) worry/ambivalence about the significant changes in her family structure and routine.

Id.

During personality testing, Dr. Wheeler found Neha’s anxiety-related disorders to be very elevated. II RP 257-58. She had an extremely high score for anxiety on the Personality Assessment Inventory (PAI). II RP 267; Supp. CP ___ (Ex. 8). This could give her a tendency to

overreact, including overreaction to benign childhood behaviors. II RP 269. Partly for that reason, Dr. Wheeler recommended that Neha engage in therapy. II RP 268-69. The concern is that Neha may communicate to P.R.C. that P.R.C. has more problems than she really does. II RP 270. For example, Neha was “pathologizing” P.R.C.’s “normal response” to transitions. II RP 270. Dr. Wheeler was also concerned that if P.R.C. “makes more comments about her vagina” that Neha would view that through a “hypervigilant lens” and raise further allegations of sexual abuse. II RP 270-271.

Despite these findings, Dr. Wheeler criticized Varn for being overly concerned about the sexual abuse allegations against him and, in particular, for wishing to have P.R.C. evaluated for sexual abuse. Supp. CP ____ (Ex. 1 at p. 27-28). On cross-examination, she acknowledged that Varn’s therapist, Dr. John Haygeman, strongly encouraged Varn to push for a sexual assault evaluation at Harborview Hospital. II RP 278-80. Dr. Haygeman did not think that would be harmful to P.R.C. II RP 280. *See also*, Supp. CP ____ (Ex. 4).

Dr. Wheeler generally shared Neha’s concerns about Varn’s parenting. II RP 181. However, “there does not appear to be sufficient evidence to support restrictions to the residential schedule, consistent with RCW 26.09.191. Supp. CP ____ (Ex. 1 at 29). She found no basis for a

finding that he engaged in domestic violence or that he “engaged in a pattern of behavior that would be consistent with sexual abuse.” *Id.* She also ruled out restrictions under RCW 26.09.191(3)(b) (“A long-term emotional or physical impairment which interferes with the parent’s performance of parenting functions as defined in RCW 26.09.004.”) *See* Ex. 1 at 29. Her “overarching concern” was Varn’s “suspiciousness and mistrust of the mother.” II RP 193.

Dr. Wheeler found P.R.C. to be a “very happy, relatively well-adjusted little girl.” II RP 200. “Her teachers and daycare providers were seeing her behavior as being within normal limits, which was consistent with my own observations, whereas the parents were seeing P.R.C. as exhibiting a lot of emotional and behavioral problems.” II RP 208.

Based on her interviews and observations, Dr. Wheeler noted that there was dispute over who did most of the parenting of P.R.C. during some time periods. She agreed, however, that Varn was the primary parent for “several months” after his mother left in November, 2010. (In other words, until the temporary orders were issued restricting his time with P.R.C.).

Dr. Wheeler recognized that “involvement of extended family appears to be consistent with Indian culture,” but found it “unclear” whether Varn would be able “to effectively perform all necessary day-to-

day parenting functions, without the support of his parents.” Supp. CP ___ (Ex. 1 at 27). Her only observation of his parenting, however, was during a 40-minute supervised visitation when others were necessarily present. II RP 217-18.⁴ She praised him, however, for engaging P.R.C. in educational activities, which “fosters her cognitive development.” II RP 219. In the observation session she watched, P.R.C. was interacting appropriately with the son of the supervisor. II RP 220-21.

Dr. Wheeler recommended a residential schedule which provided Varn with even less time during some weeks than he had under the restrictive temporary orders. Supp. CP ___ (Ex. 1 at 29).

Dr. Marsha Hedrick did not perform a full parenting evaluation but rather reviewed the work of Dr. Wheeler. III RP 460-61. She noted that Neha’s extremely high scores for anxiety-related disorders and traumatic stress were well beyond the typical values for someone going through a divorce. III RP 477-78. In fact, they were the highest she had ever seen. III RP 477. She agreed with Dr. Wheeler that this helped explain why Neha would interpret “relatively benign data” as evidence of sexual abuse. III RP 478-79.

⁴ She defended this by noting that she asked Varn whether this session was “normal” and he agreed that it was. II RP 217-18. Varn explained that he thought she was asking whether it was typical of the *supervised* sessions, rather than what was normal when P.R.C. was living with him. VI RP 914.

Dr. Hedrick criticized Dr. Wheeler for failing to observe Varn and P.R.C. together without others around. III RP 488. She noted that Dr. Wheeler could herself have served as the supervisor during her observation. III RP 489. The evaluator should not “allow the supervisor to be there because it’s a confounding variable.” For one thing, it prevents a fair comparison of how the child interacts with one parent as opposed to the other. *Id.* Dr. Hedrick “would have set up the situation so that I was observing Manjul by himself with this child.” III RP 490.

Her strongest disagreement, however, was with the amount of residential time Dr. Wheeler recommended. III RP 498-502. In her view, the information in Dr. Wheeler’s report “doesn’t support such a limited contact with the child.” III RP 498. “[T]he problem with the limited schedules is they do marginalize the parent.” III RP 499. “The child begins to see that parent as not very important, not very relevant to their day-to-day existence because they’re not there.” *Id.* This is damaging to the child because research shows that “children do better . . . if they have two parents involved rather than one.” III RP 500. Like Dr. Wheeler, Dr. Hedrick saw no basis for restrictions under RCW 26.09.191. *Id.*

When asked what would be the minimum acceptable frequency for overnight visitation, Dr. Hedrick responded: “You would minimally want one overnight a week. And that’s really minimal.” III RP 501. The

minimum would also include at least one other visit during the week. III RP 501-02.

Dr. Fukura, P.R.C.'s pediatrician, testified that her development was normal in terms of gross motor, fine motor and social and adaptive behavior. IV RP 542. He did not detect any fear of either parent. *Id.* They both seemed very caring and involved in P.R.C's health, and expressed appropriate concerns. *Id.* Dr. Fukura had no suspicion of abuse or neglect. IV RP 544-45.

E. THE COURT'S RULING

The trial court entered "Memorandum Findings On Trial" (Memorandum) in support of its parenting plan. CP 92-93. The Court found that restrictions against Varn were appropriate under RCW 26.09.191(3)(g). CP 92. "The father was unwilling or unable to establish boundaries, routines, schedules, and structure. He discouraged exploration and independence." He described Varn as a "doting father but ineffective parent." *Id.* "It is telling that subsequent to separation the child's behavioral repertoire increased dramatically." CP 93.

Although neither party had requested at trial such a restriction, the Court imposed significant limitations regarding the paternal grandparents. "Varn's opportunities to parent and to learn from the opportunities must in large part be without the presence of his parents." CP 93. "Varn's

residential time must exclude his parents with occasional exceptions.” CP 94.

The Court disagreed with Dr. Wheeler’s concern about Varn’s reaction to the sexual abuse allegations.

Further it would be unfair in this court’s judgment to hold those reactions against Varn without some recognition that Neha’s documented over-reactive tendencies played a part. With the benefit of hindsight and a thorough trial it appears to the court that Neha may have needed to precipitate a crisis in order to escape the marriage and extended family dynamic.

Id.

While the Court agreed with Dr. Hedrick that the amount of residential time recommended by Dr. Wheeler would “marginalize” Varn, CP 93, the Court authorized only the *minimum* time that Dr. Hedrick deemed advisable.

In the parenting plan, “[t]he court finds that the father’s parenting history has had an adverse effect on the child’s best interest pursuant to RCW 26.09.191(3)(g).” CP 80. The Court imposed limitations on Varn’s residential time, among other restrictions, based on this finding. CP 84.

The Court’s plan includes three “stages” of parenting. In stage one, which begins immediately, Varn has P.R.C. for a total of about 30 hours per week, with one visit limited to five hours and a second visit including an overnight stay. CP 81.

Stage two does not begin until August 1, 2014. It provides about five additional hours per week on average, most of that taking place every other weekend. CP 81.

Stage three begins just prior to P.R.C. commencing third grade (presumably September 1, 2015). This adds another 15 hours by extending the conclusion of the weekend visit from Sunday at 6:00 p.m. to Monday at 9:00 a.m. CP 82.

Varn may progress from one stage to another only if

[t]he father has routinely abided by the mother's bedtime routine and time (unless otherwise recommended by the case manager); the child sleeps in her own room at the father's house (unless otherwise recommended by the case manager); the father has remained compliant with counseling requirements; the father has successfully completed parent training; the father has abstained from discussing the case or any disputed facts/claims in the case with the child; the father has complied with the restrictions regarding paternal grandparent contact in section 3.10; and the father has complied with any and all recommendations by the child's therapist, the parent trainer, and the case manager.

CP 81.

Paragraph 3.10 includes a provision prohibiting Varn's parents from being present during more than 20% of his time with P.R.C. CP 84.

V. ARGUMENT

A. STANDARD OF REVIEW

The trial court must consider a number of provisions in the Parenting Act in adopting a parenting plan. The guidelines set forth in RCW 26.09.187(3) must be read in conjunction with RCW 26.09.184 (listing the objectives and required contents of a permanent parenting plan), RCW 26.09.002 (stating the policy of the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with a child). *See In re Marriage of Littlefield*, 133 Wn.2d 39, 50, 940 P.2d 1362 (1997).

RCW 26.09.002 provides, in part:

[T]he best interests 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.

A trial court's decision regarding a parenting plan is generally reviewed for abuse of discretion, *Littlefield*, 133 Wn.2d at 47, which is defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

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.

Littlefield, 133 Wn.2d at 47.

The trial court's factual findings may be reversed if they are not supported by substantial evidence in the record. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).

Non-constitutional error requires reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220, 1229 (1991) (citations and internal quotation marks omitted). “Constitutional error is presumed to be prejudicial, and the [opposing party] bears the burden of proving that the error was harmless.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error can be deemed harmless only if the appellate court is persuaded beyond a reasonable doubt that the error did not affect the outcome of the trial and that the trier of fact would have reached the same result without the error, *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The same constitutional harmless error rule is applied in a civil case where the constitutional right of a parent is implicated. *See, e.g., Dependency of A.W.*, 53 Wn. App. 22, 30, 765 P.2d 307 (1988) (due process error at dependency hearing harmless beyond a reasonable doubt); *In re Welfare of H.S.*, 94 Wn. App. 511, 526, 973 P.2d 474, *review denied*, 138 Wn.2d

1019, 989 P.2d 1140) (1999), *cert. denied*, 529 U.S. 1108, 120 S.Ct. 1960, 146 L.Ed.2d 792 (2000) (same).

B. THE EVIDENCE AND FINDINGS ARE INSUFFICIENT TO SUPPORT THE TRIAL COURT’S RESTRICTIONS

1. Legal Standards

A trial court may not impose restrictions on residential time without a finding that one of the provisions of RCW 26.09.191 applies. *Katare v. Katare*, 125 Wn. App. 813, 825-26, 105 P.3d 44 (2004), *review denied*, 155 Wn.2d 1005, 120 P.3d 577 (2005). Further, “any limitations or restrictions must be reasonably calculated to address the identified harm.” *Id.* at 826 (footnote omitted). “Parental conduct may only be restricted if the conduct would endanger the child’s physical, mental, or emotional health.” *Marriage of Wickland*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996).

The *Katare* Court rejected an argument that section .191 – when properly applied – violated any constitutional right of a parent. *Id.* at 823. It is clear, however, that the standards set out in *Katare* and *Wickland* are mandated by the federal constitution. “The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel v. Granville*, 530 U.S. 57, 72-73, 120

S.Ct 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, the Court struck down a Washington statute permitting a judge to order third-party visitation based on the “best interest” of the child without a finding that the parent was unfit or that the child was harmed by the lack of visitation. Similarly, the due process clause prohibits imposing restrictions under RCW 26.09.191 without a showing that they are necessary to avoid an identified harm to the child.

Courts should be particularly careful about imposing restrictions when, as here, they are made under RCW 26.09.191(3)(g). The other bases for restrictions under .191 require the presence of a specific, harmful factor. For example, there can be no doubt that a history of domestic violence, or sexual abuse of a child, justifies restrictions. *See* RCW 26.09.191(2)(a). Subsection .191(3)(g), however, permits restrictions based only on “[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child.” This is so open-ended that there is a great risk of a judge imposing restrictions based only on personal preference.

2. In This Case, There is an Insufficient Showing of Harm to Justify Restrictions

In this case, the trial court found only that Varn was “ineffective” as a parent because he did not “establish boundaries, routines, schedules,

and structure” and “discouraged exploration and independence.” CP 92 (Memorandum at 1).

As for the “exploration and independence” issue, there was simply no evidence that this was a problem by the time of trial. It is true that P.R.C. liked to be held by Varn and Varn liked to hold her, but that is hardly a sign of dysfunction. In fact, many parents and experts view it as a positive practice because it furthers “attachment” and bonding.⁵ There was some testimony that Varn held P.R.C. during gatherings that took place several times a year with a certain large group of friends. But it was undisputed that P.R.C. was the youngest child in the group and that the affairs were crowded and noisy. It is hardly unusual that a two-year-old would hold back in such a setting. Other witnesses testified that in less intimidating settings, Varn encouraged P.R.C. to play with peers and she did so. In fact, Dr. Wheeler noted that P.R.C. happily played with the son of Varn’s supervisor when Wheeler observed one of Varn’s supervised visits.

Varn conceded that he could use some help regarding imposing discipline. No doubt the same concern applies to a vast number of first-time parents. The critical fact here is that, by the account of every

⁵ See http://en.wikipedia.org/wiki/Attachment_parenting;
<http://www.attachmentparenting.org/>

professional familiar with her, P.R.C. is, and has always been, a perfectly happy, healthy child, with normal development. In fact, Dr. Wheeler noted that the objective evidence showed less concern for P.R.C. than either Varn or Neha expressed. Notably, neither Dr. Wheeler nor Dr. Hedrick found that any concerns about Varn's parenting rose to a level requiring restrictions.

In any event, Varn readily acknowledged that he could benefit from some training. By the time of trial Varn had learned how to better impose routine and discipline in P.R.C.'s life. *See* section IV(A), above. In fact, prior to trial, he entered into a CR 2A agreement that included following the schedule P.R.C. had become accustomed to while living with Neha. Supp. CP ___ (Ex. 5 at para. 3.2).

But even if he had not changed, Varn's parenting was not sufficiently harmful to justify .191 restrictions. Our society must tolerate a variety of parenting styles. Some parents follow an authoritarian approach, requiring unquestioning obedience, perhaps enforced by corporal punishment. Others favor "attachment parenting," with an emphasis on developing strong emotional bonds and understanding the child's emotional needs. The growing "Taking Children Seriously" movement posits that children should not be required to do anything

against their will.⁶ Absent demonstrable harm to the child, a judge has no business imposing his own preference regarding parenting style.

Further, it is quite common for two parents to differ on the proper level of discipline. One may favor stricter rules while the other favors a looser approach. Perhaps it would be “better” for the children if the parents were always on the same page. (Or perhaps not: maybe the child benefits in some ways from seeing two different perspectives.) But whether the parents are married or divorced, a judge may not enforce a uniform approach unless it is necessary to avoid harm to the child.

To illustrate the concern about imposing restrictions without a sufficient showing of harm, one could easily make arguments for restrictions against Neha as readily as Judge Doerty did against Varn. By the account of both psychologists, Neha suffers from severe anxiety and tends to “catastrophize.” As Dr. Wheeler explained, this can be harmful to P.R.C. because she may get the message that there is something wrong with her when really there is not. Further, when Neha’s actions are viewed in the light most favorable to her, her anxiety led her to seek unnecessary restrictions against Varn, due to her unfounded belief that Varn sexually abused P.R.C. This likely harmed P.R.C. by depriving her

⁶ http://en.wikipedia.org/wiki/Taking_Children_Seriously

of normal, unsupervised time with her father, thereby marginalizing his involvement in her life. It also raised the possibility that P.R.C. would come to view herself as a victim of sexual abuse when she was not.

Viewed in a more negative light, as Judge Doerty seemed to, Neha may have deliberately raised false allegations to justify a divorce, which would otherwise be culturally unacceptable. Such conduct raises even greater concerns that Neha would continue to create conflict to P.R.C.'s detriment. Nevertheless, Varn did not argue for restrictions against Neha because, by the time of trial, he came to realize that it was best for P.R.C. to have substantial time with her mother.

3. Time Restrictions

As Judge Doerty expressly stated, the limitations on Varn's time with P.R.C. were based on his finding that .191 restrictions should apply. Varn, who had been the primary parent during much of P.R.C.'s life, is now limited to only about 30 hours out of the 168 hours in a week – much of that taking place while P.R.C. is asleep. Further, he must wait two years before he can receive even a modest increase in time, and then another three years for a further modest increase. There is no finding – nor evidence that could support such a finding – that more time with Varn would be harmful to P.R.C. The court seemed to treat Dr. Hedrick's

recommendation regarding the *minimum* acceptable residential time as the *appropriate* amount of time.

4. The Conduct Restrictions are not Based on Sufficient Findings, and Also Violate Varn's Right to Due Process

The trial court placed two unusual restrictions on Varn's conduct: that his parents could be present for only 20% of Varn's time with P.R.C. and that P.R.C. must sleep in her own room. Because there is insufficient evidence and findings to support these restrictions, they must be set aside. Further, substantive due process rights are implicated here because there is no dispute between the parents regarding these aspects of parenting style; Neha herself engages in co-sleeping and has almost always relied on the assistance of grandparents for child care.

Judge Doerty insisted that Varn must learn to parent primarily "without the presence of his parents." He stated that the "so called 'team' approach at this time needs to stop." CP 93-94. (Memorandum at 2-3). He did not suggest that the grandparents were unfit to care for P.R.C. Apparently, Judge Doerty believed that Varn would learn to parent better if he did it primarily on his own. Once again, however, restrictions cannot be based on what the court thinks is "best" but only on a showing that the restriction prevents actual harm. If a team approach to raising P.R.C. is not harmful, the court cannot prohibit it.

Neither expert testified that the involvement of Varn's parents was harmful to P.R.C. Dr. Wheeler specifically stated that she identified no problem with their parenting. II RP 323-24. She also noted that Neha continues to receive the assistance of her parents. II RP 325. Dr. Wheeler noted in her report: "P.R.C.'s relationships with her maternal and paternal grandparents should be supported by both parents." Supp. CP ___ (Ex. 1 at 28).

This restriction raises constitutional as well as statutory issues because it was made sua sponte; Neha did not request it. Further, Neha obviously does not disapprove of an extended family approach to parenting since her mother assisted with child care during the marriage and after separation. III RP 403, 405. That is not surprising because, as discussed above in section IV(A), it is the norm in India for children to be raised by an extended family.

A trial judge may properly rely on the "best interest of the child" standard when it is balancing the wishes of two divorcing parents. But when the parents have no disagreement, there is nothing to balance. In that case, the due process clause prohibits a judge from interfering with a parent's right to raise his daughter as he sees fit unless his choice is actually harmful. Because there is nothing harmful about Anoop and

Sudha Chandola, Varn's due process rights were violated by restricting his ability include them more fully in P.R.C.'s life.

In addition, Judge Doerty explained that Varn could move from stage 1 to stage 2 only if, among other requirements, "the child sleeps in her own room at the father's house (unless otherwise recommended by the case manager)." CP 81. There is no explanation for this restriction in either the parenting plan or the memorandum findings. There was no testimony that sleeping in the same room as her father would cause harm to P.R.C.

Neha did request this condition, perhaps because she was still anxious about the possibility of sexual abuse (despite her testimony to the contrary). She acknowledged, however, that this requirement would be inconsistent with P.R.C.'s established pattern. During the marriage, Neha, P.R.C., Kuldeep and Varn all slept with P.R.C. at various times. *See, e.g.*, V RP 766-67. Neha currently co-sleeps with P.R.C. V RP 765. Dr. Wheeler saw no need for a condition that P.R.C. sleep in her own room when staying with Varn, and suggested that the sleeping arrangements be left up to the parent trainer's recommendation. "[B]ut I'd want the emphasis to be on complying with the parent trainer recommendations versus abiding by what the mother wants." II RP 241.

RCW 26.09.002 provides, in part:

[T]he best interests 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.

Here, P.R.C.'s existing pattern is to sleep in the same room as her parents.

It could be unsettling and frightening to P.R.C. to sleep all alone in her own bedroom when she is not used to that.

In any event, the restriction must be struck down because there is no showing that it is necessary to prevent some identified harm. Further, because neither parent is generally opposed to children sleeping in their parent's bedroom, the Court violated Varn's right to due process by prohibiting him from deciding on his own how P.R.C. should sleep at his residence.

C. THE TRIAL COURT FAILED TO CONSIDER THE DISTORTING EFFECTS OF FALSE SEXUAL ABUSE ACCUSATIONS

In this case, Varn's ability to develop and demonstrate his parenting skills were hampered by Neha's unfounded accusations of child molestation. For nearly a year before the trial, Varn was limited to supervised visitation, which necessarily involved another family. This caused everything to be viewed through a distorted lens. Dr. Wheeler criticized the high-energy nature of the visit without attempting to see Varn in a one-on-one setting. Her only observation was for less than an

hour during playtime in an artificial environment at the supervisors' home with another child present. She never observed him in a normal parenting situation. Judge Doerty assumed that Varn's parenting was now no different from when P.R.C. was a baby, even though Varn had now taken several parenting courses. Varn had no chance to show that his parenting had improved as a result of the classes.

The Court also relied on testimony that, since separation "P.R.C. is a changed child, more outgoing, interactive." CP 93 (Memorandum at 2). He credited the change to Neha's unfettered parenting. CP 92-93 (Memorandum at 1-2). The court's reasoning is faulty because, since separation, P.R.C. is a year older. It is not surprising that a three-year-old would be more outgoing and interactive than a two-year-old. *All* children change considerably during that year of their lives.

Further, although the judge did not explain why he imposed a restriction on Varn and P.R.C. sleeping in the same room, it may be that he was influenced by the unfounded allegations.

The Court of Appeals dealt with a similar situation in *Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006). In that case, as here, the mother alleged that the father sexually abused their young daughter. *Id.* at 226. The mother obtained a protection order during the lengthy wait for a trial. *Id.* The trial court found the allegations were unproven, but also

noted that he could not say the abuse did not happen. *Id.* at 227. Relying on RCW 26.09.191, the court restricted the father's time with the daughter based on "substantial impairment of emotional ties" between the father and daughter.

The Court of Appeals found no substantial evidence to support the restrictions. *Id.* at 233. In particular, there was insufficient evidence that the father's "involvement or conduct" caused the restricting factor. *Id.* at 234. "On the contrary, the evidence shows only that Watson did the most parenting he could under the restrictive conditions available to him." *Id.* at 234 (internal quotation marks omitted). It was improper for the trial court to "permit the effects of the lawsuit itself to constitute grounds for modifying a parenting plan, inviting potential abusive use of conflict." *Id.* The court also noted that "the provisions of a temporary parenting plan or other temporary order should not adversely affect the final determination of a parent's rights." *Id.*, citing RCW 26.09.191(4) and RCW 26.09.060(10)(a). *See also, Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013, 31 P.3d 1184 (2001) (trial court improperly relied on mother's "success as a temporary residential parent as a factor in naming her the permanent primary residential parent"). "The trial court abused its discretion when it imposed continued

visitation restrictions after concluding that the sexual abuse allegations were unproven.” *Watson*, 132 Wn. App. at 235.

Similarly, in this case, the Court unquestionably relied on the mother’s apparent success with P.R.C. during the time that her restrictive temporary orders were in effect. The court then largely preserved this unnatural status quo by placing P.R.C. with Neha the vast majority of the time.

Had the court disregarded Varn’s marginalized status during the temporary orders, it would have looked instead to the situation that existed prior to Neha’s accusations. As noted above, “[T]he best interests of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered” as little as possible. RCW 26.09.002. Prior to Neha’s unfounded accusations, P.R.C. spent most of her time with Varn, often with her paternal grandparents present as well. The trial judge improperly disrupted this pattern by relying on the situation during the temporary orders.

D. THE TRIAL COURT DENIED VARN'S RIGHTS TO SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION BY FAILING TO TAKE HIS AND P.R.C.'S INDIAN CULTURE INTO ACCOUNT

The trial court's restrictions on co-sleeping and grandparent visitation conflict with Varn's and P.R.C.'s cultural heritage and amount to national origin discrimination.

In *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the Supreme Court noted that minorities dealing with family courts are "often vulnerable to judgments based on cultural or class bias." *Id.* at 763 (citation and internal quotation marks omitted). Partly for that reason, the Court required a "clear and convincing" standard of proof before a state court could terminate parental rights. *Id.* at 769.

In particular, there is a constitutional right to live as an extended family. In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), the U.S. Supreme Court struck down a law that so tightly defined single-family zoning that it prohibited a grandmother and her grandchildren from living together. The Court noted that it had "'long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 499, quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640, 94

S.Ct. 791, 796, 39 L.Ed.2d 52 (1974). “It is through the family that we inculcate and pass down many of our most cherished values, moral *and cultural*.” *Id.* at 503-04 (emphasis added).

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, *and especially grandparents* sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

Id. at 504 (emphasis added). “Decisions concerning child rearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children.” *Id.* at 505. “[T]he choice of relatives in this degree of kinship to live together may not lightly be denied by the State.” *Id.* at 505-06.

In his concurring opinion, Justice Brennan noted that the “nuclear family” was largely a product of “white suburbia.” *Id.* at 508, citing J. Vander Zanden, *Sociology: A Systematic Approach* 322 (3d ed. 1975). “The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living.” *Id.*

There is little case law in Washington dealing with cultural considerations in parenting plans. RCW 26.09.184(3), however, specifically authorizes the trial court to consider a child's "cultural heritage." *See also, In re Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) (noting that "culture" and "family history" should be taken into account when crafting a parenting plan.)

In a recent case involving children of Indian background, the Oregon Court of Appeals noted the importance of preserving their ties to extended family, in part because it would further their "cultural and religious growth." *Marriage of Maurer*, 245 Or. App. 614, 634-35, 262 P.3d 1175 (2011).

As discussed above in section IV(A), it is customary in Indian culture for extended families to raise children together and for children to sleep with adults. The trial court's rulings on these issues amounted to national origin discrimination and violated Varn's constitutional rights to due process and equal protection.

VI. REQUEST FOR ATTORNEY FEES AND COSTS

Varn asks this Court to award him attorney fees and costs based on the relative resources of the parties and the merits of the appeal. *See* RCW

26.09.140; RAP 18.1; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999).

**VII.
CONCLUSION**

For the foregoing reasons, this Court should reverse the trial court and remand for the court to enter a new parenting plan with no restrictions against Varn. In the alternative, the Court should remand for a new trial.

DATED this 9th day of July, 2012.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Manjul Varn Chandola

CERTIFICATE OF SERVICE

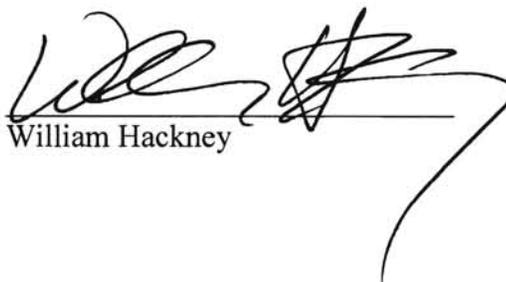
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