IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re the Parentage of: ISAAC DAVID HARKER, Child, MICHAEL HARKER, Respondent, and JESSICA M. ARVISO, Appellant.	No. 39899-1-II UNPUBLISHED OPINION

Hunt, J. – Jessica M. Arviso appeals a trial court order changing primary residential placement[1] of her son from her to the child's father. She argues that the evidence does not support several of the trial court's findings and that the trial court erred in (1) failing to consider the importance of maintaining the continuity of residential placement, (2) finding that the father's cultural heritage weighed so heavily as to warrant changing the primary residential parent, (3)

[1] We use the term "primary residential placement" to reflect the reality of the parenting arrangement, which no court had incorporated into a written order before this litigation commenced.

minimizing documented evidence of the father's long standing alcohol abuse, (4) disregarding the Guardian Ad Litem's recommendations, and (5) entering the final order before the father filed his affidavit of paternity. We reverse the trial court's order transferring the child to Harker, restore Arviso as the child's primary residential parent, and remand to the trial court to establish a new residential schedule for both parents.

FACTS

I. Arviso – Initial Primary Residential Parent

Jessica Arviso became pregnant when she was living with Michael David Allen Harker in Arizona. When Arviso was about six months pregnant, they moved to Washington to live with his family in Pierce County. Their son was born on January 5, 2006. Arviso took care of their son with Harker's mother's help; Harker attended school full time and coached "fast-pitch" for the Chief Leschi schools. I Verbatim Report of Proceedings (VRP) at 62. When the "fast-pitch" season ended, Harker remained in school during the day and began working at Boeing in the evenings. I VRP at 62.

In August 2007, Arviso ended her relationship with Harker and moved with her son to Arizona to live with her family. Harker remained in Washington. There was no court-ordered temporary parenting plan in place at this time.

II. Harker's Petition To Become Primary Residential Parent; Arviso Named Temporary Primary Residential Parent

On September 6, Harker[2] petitioned the superior court to designate him as the child's primary residential parent. Harker alleged that he was "the child's acknowledged father" and that both parents had signed an Acknowledgement of Paternity, which was filed with the Registrar of Vital Statistics on January 13, 2006. Clerk's Papers (CP) at 1. He attached to his petition a copy of an "Affidavit for Paternity," which he (but not Arviso) had signed and which had been notarized on January 13, 2006, a week after their son's birth, but which did not show that it had been filed with any government agency. CP at 5.

Harker asserted that he and his son were Native Americans and that Arviso had (1) willfully abandoned their son, (2) neglected their son or substantially failed to perform parenting functions, and (3) "withheld from the other parent access to the child for a protracted period without good cause." CP at 7. He supported this assertion with a declaration from his mother, Gloria Harker, who alleged that she had cared for the child because Arviso was unwilling or unable to do so while residing in the Harker home. In an accompanying motion for an ex parte restraining order, Harker asserted that Arviso was withholding the child from him and "depriving [the child] of his native heritage and culture." CP at 17.

Arviso did not contest Harker's paternity, but she opposed Harker's petition to change their son's primary residential placement. She (1) contested Harker's claim that she had neglected or willfully abandoned their son, (2) denied Harker's mother's claims that she (Arviso) had failed

[2] At this point, Harker was represented by counsel.

to care for the child, (3) asserted that Harker had never provided any care for the child, (4) alleged that Harker had a "significant drinking problem" and a history of DUI charges in Arizona, and (5) asserted that it was in their son's best interest to remain in her care in Arizona. CP at 38. Arviso also asserted that despite her ability and willingness to care for their son, Harker's mother had attempted to "push [her (Arviso)] out of the way" and take over caring for the child and that Harker's mother, and not Harker, had initiated this custody action for her own benefit. CP at 39.

In support of her allegation that Harker had a drinking problem, Arviso attached (1) several photographs of Harker drinking, sometimes in their son's presence; (2) several documents relating to Harker's 2006 Arizona DUI conviction, including the requirements for a court-ordered alcohol assessment and completion of any required treatment; and (3) documents showing that Harker had been charged in Arizona with other, non-DUI, offenses in 2003 and 2004.

On October 22, 2007, a superior court commissioner issued a temporary parenting plan allowing the child to remain in Arizona with Arviso while giving Harker two visits per month in Arizona. The commissioner also ordered Harker to provide Arviso with a copy of his completed alcohol assessment.[3] Four days later, Harker moved for reconsideration, asking the trial court to change the location and duration of his visitation for financial reasons. Arviso responded that she had not received Harker's completed alcohol assessment. Harker replied that his original alcohol assessment was "done by the military" and that it was "no longer available"; instead, he provided a new assessment that he had obtained from Alternative Counseling. CP at 119. This assessment, performed by Clay V. Statewright, indicated that Harker had reported that he had "addressed" a

[3] The order did not specify when Harker was to provide this information.

2005[4] DUI charge in Arizona. CP at 123. Based on several tests and Harker's self-reporting, Statewright concluded that no treatment was required, contingent, however, on the accuracy of Harker's disclosures.

On November 26, the trial court appointed a guardian ad litem (GAL) for the child. On December 13, the trial court granted Harker's motion for reconsideration in part and revised the temporary residential schedule to allow Harker to bring the child to Washington for visits but reduced these visits to one five-day visit per month.

III. GAL Reports

A. Harker's Alcohol-Related Criminal History and Need for New Assessment

In June 2008, the GAL filed a preliminary report stating that Harker had acknowledged two sets of criminal charges in 2003 and 2004, and a 2005[5] DUI, all in Arizona. The GAL further reported that Harker had admitted that alcohol had been involved in the 2003 criminal charge, which he characterized as a "domestic dispute." Ex 22 at 5. Harker did not mention to the GAL any charges or convictions in other states.

The GAL expressed concern about Statewright's assessment, noting that (1) Harker had told Statewright that he (Harker) had "'addressed'" an Arizona DUI and had "'moved on with his life,'" which remark Statewright interpreted to mean that Harker had completed treatment in Arizona; but (2) Statewright was unaware "that the Arizona Court had released Mr. Harker from the obligation to obtain an assessment in Arizona premised upon [his] belief that [the] assessment

[4] This reference is apparently to the 2006 DUI conviction.

[5] This reference is apparently to the 2006 DUI conviction.

and treatment was being pursued in Washington." Ex. 22 at 5-7. Acknowledging the possibility of a "misunderstanding," the GAL recommended that the superior court order Harker to obtain another alcohol assessment. Ex 22 at 7. The GAL also recommended that Arviso remain the child's primary residential parent until she (the GAL) could conduct a more complete investigation and Harker obtained a new alcohol assessment.

Almost a year later, on April 1, 2009, the GAL submitted a supplemental report reiterating her concern about Harker's first alcohol assessment and commenting that Harker had not yet submitted a new assessment. In the interim, the GAL had interviewed Harker's former girlfriend Kim Luke, who had expressed concern about Harker's excessive drinking and his willingness to drive while intoxicated. The GAL had also spoken to Harker's current girlfriend, Kathryn Bacchus, who did not characterize Harker's drinking as "excessive." Ex. 8 at 10.

B. Recommendation that Arviso Continue as Primary Residential Parent

The GAL further reported that (1) Arviso and Harker did not dispute that Arviso had been the child's "primary parent" during their relationship and had remained the primary parent after their separation; (2) Harker claimed that, before the couple separated, he had taken an active role in parenting the child when he (Harker) was home; but (3) Arviso had disputed Harker's claim, asserting that, although Harker may have played with their son and occasionally helped her with diapering and feeding, Harker rarely participated in "'parenting' functions while they were together." Ex. 8 at 11. The GAL concluded that Arviso had "assumed a greater share of parenting responsibilities for the child since his birth" and that although Arviso had provided most of the care, Harker had "played an active role in providing care and support for the child" and had

made consistent efforts to exercise his visitation after the couple separated.[6] Ex. 8 at 12.

The GAL also reported that (1) the child was having trouble adjusting because of the frequent transitions between homes; (2) there were ongoing problems between the parents in coordinating visitation; (3) the parents' extended families were often drawn into these conflicts; (4) the "tone and substance of some of the parties' exchanges" over the phone, by email, and in written requests, were sometimes "concerning"; and (5) the parents sometimes had "difficulty in separating their personal needs and interests from those of the child." Ex. 8 at 12-13. Nevertheless, the GAL concluded that "[o]n balance, . . . the parties have demonstrated an ability to coordinate and work together on behalf of their child despite their differences" and that, although their communication skills would benefit from parenting classes, there was nothing indicating that the parents should be subject to any "limiting provisions." Ex. 8 at 13.

Ultimately, the GAL recommended that Arviso remain the child's primary residential parent, "subject to [Harker's] liberal visitation." Ex. 8 at 14. But the GAL also recommended that the trial court condition Harker's "authorization to continue residential contacts in Washington" on his (1) "submitting for a drug and alcohol re-assessment" that allowed the evaluator the ability to make "collateral contacts and [to] have access to a complete criminal history at the time of re-assessment"; and (2) following "any treatment recommendations." Ex. 8 at 15.

IV. Trial

[6] The GAL also noted that Harker's former and present girlfriends, Luke and Bacchus, had stated that Harker cared for his son during his residential time with the child.

The case went to trial on July 27, 2009. During the course of the trial, Arviso was represented by counsel; Harker represented himself. Harker waived his opening statement. In her opening statement, Arviso asserted that the child's "residential placement" was "not disputed" and that the disputed issues were limited to how often the child would visit Harker in Washington and who would pay the expenses related to those visits.[7] I VRP at 7.

Throughout the trial, the trial court questioned pro se Harker for his entire direct examination, coached Harker through the process of admitting exhibits, raised sua sponte and directed Harker to address specific issues (including issues related to the child's cultural heritage and each of the seven statutory factors the trial court was required to address), questioned Arviso's witnesses directly and coached Harker through his cross examination of Arviso's witnesses, and coached him during his closing argument.

A. Harker's Testimony[8]

1. Parenting ability

When the trial court asked Harker if he agreed with Arviso's characterization of the issues, Harker explained that (1) he and Arviso had not agreed to any residential plan or to who should be the child's primary residential parent, and (2) he was asking the court to designate him as the primary residential parent instead of leaving the child with Arviso. He testified that before the couple separated and before he returned to school, he had spent considerable time with their son during his first several months of life, often in the evenings and at night. When their son was

[7] There are no child support or other financial issues at issue in this appeal.

[8] Harker was his only witness.

about six months old, Harker had returned to school and was either coaching baseball or working at Boeing; but he cared for their son as much as possible given his school, work, and coaching schedules. Although Harker stated that his mother helped Arviso care for their son when Harker was not there, Harker did not assert that Arviso was unwilling or unable to care for their child during those times.

Harker claimed that (1) his current work schedule, 3:30 pm to 12:00 am, allowed him to spend more time with the child, who was awake during the daytime, than Arviso, who worked 8:30 am to 5:30 pm; (2) Arviso's schedule required their son to be in daycare; and (3) if he (Harker) were the primary residential parent, their son would not have to go to daycare because he (Harker) was available most of the day and the child's paternal grandfather was available when Harker was at work or had to be elsewhere.[9] Harker further noted that the Family and Child Education (FACE) program through the Chief Leschi School, an early childhood educational program emphasizing Native American culture and heritage, would allow him to "go to school with" his son during the day.[10] I VRP at 20. Harker also stated that he had applied for, and was

[9] Although Harker testified that his father would be a primary caretaker for the child when Harker was at work or had to be elsewhere, Harker never testified or provided any specifics about what his father actually would do with or how he would care for the child. Nor did the grandfather testify to fill in these gaps. Nor does the GAL's report mention interviewing the grandfather or evaluating his fitness to care for the child. Harker did testify, however, that his mother was now working and not available to care for the child during the day.

[10] Exhibit 12, a flyer from the Chief Leschi Schools that describes the FACE program, states that the program offers a "[c]enter-based preschool" for three- to five-year-old children and their parents. Ex. 12 at 2. In this program, the children attend preschool while the parents attend class in a separate classroom. This program is an "all day" program that runs Mondays through Thursdays. Ex. 12 at 2.

likely to be granted, a shift change that would allow him more evening hours with his son once he was "school age." I VRP at 25.

2. Cultural awareness

Conducting the direct examination of Harker, the trial court asked questions about his desire to raise his son with an awareness of Native American culture and how Harker thought Arviso would or would not promote the child's awareness of this culture.[11] Harker testified that (1) Arviso had "denied [the child his culture] numerous times," I VRP at 24; (2) Arviso had refused to allow the child to wear a necklace with a "religious symbol" that he had given the child because she did not want to be responsible for the child's safety when wearing it, I VRP at 32; (3) Arviso had refused to sign paperwork to enroll their son in his tribe; (4) he (Harker) believed that Arviso would not foster any Native American cultural awareness; (5) Arviso thought that all Native Americans were "drunks," I VRP at 33; (6) although the FACE program offered many culturally-based activities in which their son could participate, the visitation schedule hampered Harker's ability to involve their son in FACE's cultural programs; (7) his family regularly attended the Zuni Tribe's annual saint's day recognition in New Mexico; (8) the Puyallup and Nisqually Tribes and the FACE program held many "local" functions, including powwows, in which he and his son could participate, I VRP at 31, if he were the child's primary residential parent; and (9) in this way he would ensure that his son was raised with an awareness of and experience his Native

[11] For example, the trial court asked Harker to explain how he would "nurture" the child's "cultural experience" differently than Arviso would. I VRP at 30-31. The trial court did not similarly ask, however, how Harker would nurture their son's awareness of Arviso's Hispanic culture.

American heritage. I VRP at 31.

3. Alcohol reassessment

On direct examination, the trial court asked Harker whether he had obtained a new alcohol assessment.[12] Harker responded that Statewright had referred him to another counseling center, All For You Counseling, and that although he (Harker) had recently completed the reassessment, he did not yet have the results. Harker agreed that he would try to obtain the results as soon as possible. On cross examination, Harker admitted that before his son was born, he had been charged with three DUI's in Arizona and California,[13] but one California DUI had apparently been reduced to "wet and reckless."[14] I VRP at 56-57, 80. Harker also denied Luke's assertion that he had a drinking problem, asserting that Luke was just "a little bitter" because they had broken up. I VRP at 64.

On the second day of trial, Harker provided the trial court, Arviso, and the GAL with a July 25, 2009 alcohol assessment report from All for You Counseling. In this new report, evaluator Louis W. Horton stated that he had considered (1) Harker's assertion that he had not engaged in "significant use of alcohol or other drugs in the last five years," (2) Harker's self-assessment, (3) a variety of tests, (4) the Alternative Counseling's assessment, and (5) the GAL's

[12] Before the trial, the trial court had apparently ordered Harker to comply with the GAL's recommendation that he obtain a second alcohol assessment. The record does not show that Harker had completed or produced such assessment before trial began.

[13] It is not clear from the record how many of these charges were in Arizona and how many were in California. Apparently, however, Harker had not told the GAL about any California charges or convictions.

[14] The record does not explain what "wet and reckless" means.

report.[15] Ex. 21 at 2. Horton concluded that Harker was not currently showing any indications of "Chemical Dependency or Abuse," and did not recommend any treatment. Ex. 21 at 3.

4. Paternity affidavit

When Arviso asked about the paternity affidavit, Harker testified that he had the affidavit. The trial court, however, noted that the copy in the court file did not show that the affidavit had been filed with "Vital Statistics or anything." I VRP at 73. The trial court later told Harker that (1) he needed to request and to file in this case a copy of the official affidavit that had been filed with "Vital Statistics," and (2) the trial court's "entry of final paperwork in this case [would] be contingent on [the affidavit's] being filed first or at the same time as the final paperwork." II VRP at 191-92.

B. GAL's Testimony

The GAL testified that Arviso had been the child's primary caregiver since his birth and that "there has been more or less an informal arrangement between the parties preceding the entry of the Court's order that allowed placement with the mother." II VRP at 94. The GAL emphasized that she had requested the alcohol reassessment because she was concerned about Harker's history of drinking, his DUI history, Luke's claims that Harker was a problem drinker and often drove drunk, and Harker's apparent misrepresentations to Statewright during his first alcohol assessment. She acknowledged, however, that she had just received a copy of the new assessment report.

[15] Horton did not specify which GAL report he had considered, but both GAL reports noted concerns about the accuracy of Harker's previous alcohol assessment.

When Harker asked the GAL why she had recommended a second assessment, she responded:

> The basis for my concern is that when I spoke with Mr. Statewright, it appeared to me that he did not have the information from the Arizona court and the Arizona recommendations for treatment when he made his report. When I then checked with Arizona, I found that the court dismissed the charges, the diversion requirements, the treatment requirements based on the belief that Mr. Statewright had provided treatment. Mr. Statewright denies that he provided treatment. In fact, he did an assessment where there were no treatment recommendations made. Mr. Statewright also expressed to me that he made no collateral contacts, meaning he hadn't talked to anybody else in the course of his assessment. And, you know, your son is little. He is not really able to report on his own circumstances. So when I am put in a situation where I have reports of alcohol or substance abuse, and I have always wanted to err on the side of safety of the child, and if there is something that leaves a potential for concern, then I would prefer to have it ruled out. And so what I wanted and the reason why I recommended to the Court that there be another assessment is I wanted to make sure that an evaluator who knew about the charges, the diversion and the history would still conclude that no treatment was indicated. *And based on my conversation with Mr. Horton this morning, it appears that he did have access to that information. He was aware of both DUIs. He was aware of the discrepancy with respect to my concerns in my report, and based upon his application of the ASEM*[16] *standards concluded that no treatment was indicated.*
>
> So that's all I wanted, and I believe I clarified that or at least tried to clarify that at the status conference in May.

II VRP at 106-07 (emphasis added). The GAL recommended primary placement with Arviso.

C. Arviso's Testimony

Arviso testified that she had left Harker after discovering that that he was cheating on her and because she "basically got tired of his drinking," which "caused a lot of verbal abuse and a lot of neglect on (sic) [the child]." II VRP at 128. She emphasized that Harker's excessive drinking was her "biggest concern," asserting that (1) when he was drunk, Harker would not behave

[16] The record does not define "ASEM."

responsibly and would leave beer bottles where the child could reach them; and (2) she was concerned that Harker would possibly drive drunk with the child in the car. II VRP at 139.

Arviso also testified about the couple's communications problems, including that when she and Harker spoke, he would often put her down and yell at her and that he would sometimes make it difficult for her to reach him when he had the child. Noting their problems coordinating and paying for the child's visits with his father, she asserted that Harker frequently changed his visitation plans with little notice to her and that his primary concern was the expense.

According to Arviso, (1) she was the parent who normally took care of the child's checkups and who provided most of the child's care before the couple separated; (2) neither Harker nor his mother provided significant care for the child before the couple separated; (3) she (Arviso) was always with her son when she was not working; and (4) their son was enjoying his daycare or preschool in Arizona and had made friends there, and she wanted him to continue in that school until he was old enough for kindergarten.

Arviso controverted Harker's assertion that she believed all Native Americans were drunks. She testified that her father coached a local baseball team on which many Native American's from the Quechan Tribe played and that her father often took the child with him to practices and other baseball related activities where the child had significant exposure to Native Americans. Arviso emphasized that, in addition to being part Native American through Harker, their son was also half Hispanic through her. She further testified that (1) although the Native Americans her son saw in Yuma were not Zuni, she did not prevent their child from interacting with Native Americans and she did not object to Harker's exposing their son to any Native

American culture; (2) she would not let her son wear the religious necklace Harker had described because it had sharp edges; (3) she had previously attended some Native American functions with Harker; and (4) she would willingly teach her son about "any information [she could] get" related to his Native American heritage. II VRP at 133.

When on cross-examination, Harker asked why Arviso did not want to enroll their son in Harker's tribe, she responded that she thought that their son should not enroll until he was old enough to make that decision himself. She added:

> I don't see how he would benefit from it. I don't know much about your tribe or your—I don't know what tribe you're trying to put him in. You went from, like, two different ones.[17]

II VRP at 201. Arviso further testified that (1) she tried to expose their son to many cultures, including her own Hispanic culture; (2) she was supportive of his Native American heritage; and (3) Harker could expose their son to Native American culture even if she were the primary residential parent.

Immediately after Arviso's redirect but before Harker's recross, the trial court questioned Arviso about the "specific[ ]" nature of the cross-cultural activities in which she engaged with her son. II VRP at 225. Arviso responded:

> I don't know too much on his—on the cultural, the past and what—how they teach. But like I said before, the programs—I mean, that the [Quechan] tribe does for other people, I believe, like Thanksgiving they had where they would help feed other people and the fireworks thing. Other than that then I haven't really, I guess, participated.

[17] When Harker asked Arviso whether she was aware that their son would have access to health clinics, health benefits, and educational opportunities if he was enrolled in the tribe, Arviso appeared to believe that he could receive the same benefits under a state program in which she was trying to enroll him.

II VRP at 225. Acknowledging that most of her son's contacts with the Quechan tribe were baseball related through her father, Arviso admitted that she had not taken her son to or involved him in any Native American cultural events since leaving Washington; nor had she involved him in any Hispanic cultural events. But she stated that she had no "problem" with the child being engaged in any cultural events, "even if it's just Native." II VRP at 230. And she explained that she had agreed with Harker not to circumcise their son out of respect for his Native American heritage.

Arviso also testified that Harker (1) was not supportive of their son's Hispanic heritage and had not made any effort to involve the child in Hispanic cultural celebrations, (2) had frequently referred to Hispanics as "beaner(s)" and "wet backs," (3) was not open to talking about her Hispanic heritage, and (4) was known to use the "N-word" on occasion. II VRP at 233.

D. Closing Arguments

During closing, Harker asserted that his mother had assisted Arviso to some extent when they all lived in Washington.[18] But he did acknowledge that Arviso had been their son's primary caregiver since Arviso had moved with the child to Arizona. Nevertheless, he argued that he had consistently exercised his visitation; that his work schedule allowed him to be with the child more than Arviso could, given her schedule; and that he could also provide the child with better health

[18] During the trial, Harker did not refer to the declarations from his mother that he had submitted with his initial petition; nor did he present any testimony from his mother or anyone else to support his mother's petition allegations that Arviso was unable or unwilling to care for the child when Arviso lived in Washington. In short, Harker presented no evidence from his mother on this point to the trial court.

care. Apart from briefly noting that the trial court could consider the child's "culture," Harker did not mention any Native American cultural issues in his closing argument. III VPR at 295.

In her closing, Arviso argued that her testimony and the GAL reports proved that Harker had not been involved in raising their son until after the couple separated. She asserted that the evidence showed she was involved with the child and was willing to expose him to his father's Native American heritage. In contrast, she contended that Harker did not respect their son's Hispanic heritage. Arviso asked the trial court to adopt the GAL's recommendations, including designating her (Arviso) as the child's primary residential parent.

E. Trial Court's Oral Ruling

The trial court found that the testimony and the GAL reports did not establish any limiting factors under RCW 26.09.191:

> [The GAL], although there are obviously history issues with Mr. Harker regarding his DUI, testified—and my notes reflect anyway that she testified, as does her report, that neither parent should be subject to 191 [alcohol limiting] factor. So there are—should not be any limitations on either parent's residential time.

III VRP at 308.

Addressing the RCW 26.09.187(3)(a) factors,[19] the trial court concluded that factors (i),

[19] RCW 26.09.187(3)(a) establishes seven factors that the trial court must consider when determining a child's residential placement:

> The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:
>
> *(i) The relative strength, nature, and stability of the child's relationship with each parent;*

(ii), (iii), (iv), (vi), were either neutral or irrelevant, and that factors (v) and (vii) weighed in favor of Harker. As to the third factor (past and potential for future performance of parenting functions and whether one parent had taken greater responsibility for daily parenting functions), the trial court recognized that Arviso had been the child's primary residential parent and had continuously provided most of the child's care throughout the child's life. The trial court also found that (1) despite having been in school and working, Harker had provided some child care before the couple separated; (2) Harker had demonstrated that "he has the ability to perform parenting functions," and (3) Harker had had considerably more contact with the child after the couple separated than most parents in his position. III VRP at 311. Apparently without according weight to its finding that Arviso had continuously taken far greater responsibility for the child's throughout his life, the trial court concluded that because Harker had demonstrated his "ability to perform parenting functions," this factor was "balanced" because both parents were "certainly

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

(Emphasis added.)

capable of performing parenting functions in the future." III VRP at 311 (emphasis added).

The trial court also concluded that factor five ("child's relationship with siblings and other significant adults as well as the surroundings, school or other significant activities") was generally neutral because the child was involved with and integrated into both Arviso's and Harker's extended families, and there was little testimony about the child's daycare in Yuma. III VRP at 313. But the trial court also concluded that, under RCW 26.09.184(3),[20] the child's cultural heritage was relevant to his "other significant activities." III VRP at 313, 315. The trial court stated:

> [The child] has two cultural heritages, if you will, Native American and Hispanic, and I was somewhat dismayed at Ms. Arviso's testimony in this regard. It is clear to me that Mr. Harker fully participates in the Native American culture and wants to raise his son in a way that he is exposed to that, participates in it, and has the opportunity to learn and grow in it.
>
> Ms. Arviso, on the other hand, does not. She is either unaware of what that is, including her own cultural heritage, or it's not important to her or both. And because the Court *may* consider the cultural heritage of a child in making a parenting plan determination, *this factor, to me, weighs very heavily*.
>
> And *it weighs very heavily* for Mr. Harker to be the primary residential parent because I believe that Mr. Harker going forward, as he has already demonstrated to this Court, will make sure that [the child] is aware of his cultural heritage, not just by teaching it to him, but by having him experience it. And I believe that's very important. *I believe the legislature has stated that that's a very important factor for the Court to consider.*

III VRP at 315-16 (emphasis added). Accordingly, the trial court concluded that factor five weighed in favor of placing the child with Harker.

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[20] RCW 26.09.184(3) provides:

> CONSIDERATION IN ESTABLISHING THE PERMANENT PARENTING PLAN. In establishing a permanent parenting plan, the court *may* consider the cultural heritage and religious beliefs of a child.

(Emphasis added.)

The trial court further concluded that factor seven (each parent's employment schedule) weighed in Harker's favor based on its finding that Harker's schedule allowed him more time with the child during the child's waking hours and that "[Harker] will be more able to assist [the child] because he will be present with him and not be placing him in daycare." III VRP at 315.

In addition to addressing the statutory factors, the trial court found that there had been frequent communication problems and conflicts between the parents when they tried to comply with the temporary orders and that it was likely these problems would continue regardless of who was designated the primary residential parent. Therefore, the trial court considered which parent would likely "do the better job in nurturing the [child's] relationship with the other parent" and "believe[d]" that Harker would be better at fostering the child's relationship with the other parent, in part because Harker had been the one who had made the effort to maintain his relationship with his son when he resided primarily with Arviso. III VRP at 316. The trial court further noted that it "didn't get any sense" that Arviso had done anything to "facilitate the relationship between [the child] and Mr. Harker." III VRP at 316. But the trial court did not find that Arviso had hindered Harker's relationship with their son, despite some of the visitation scheduling difficulties.

Finally, the trial court ruled, "On balance, taking everything that I just said together, I believe it weighs in favor of placing primary residential care of [the child] with Mr. Harker, and not Ms. Arviso." III VRP at 317-18.

F. Trial Court's Written Findings of Fact and Conclusions of Law

The trial court did not issue detailed findings of fact and conclusions of law addressing each of the statutory and other factors it discussed in its oral ruling. It did, however, included the

following finding:

> 2.2 Period for Challenge to the Acknowledgement or Denial of Paternity
> Michael A. Harker, the child's acknowledged father and Jessica M. Arviso, the child's mother signed the Acknowledgment of Paternity, which was filed with the Washington State Registrar of Vital Statistics on (date) _____. Will be filed in the Court file by Mr. Harker upon receipt.

CP at 336. As in its oral ruling, the trial court concluded that the child should reside the majority of the time with the Harker and gave Arviso visitation rights.

Arviso appeals.[21]

ANALYSIS

Arviso challenges the trial court's findings and conclusions related to several RCW 26.09.187(3)(a) factors and RCW 26.09.191 and the trial court's conclusion that Harker should be the child's primary residential parent. She argues that we should reverse the trial court's designation of Harker as the primary residential parent for their son and restore her as the primary residential parent. We agree.

I. Standard of Review

When ordering a parenting plan, the trial court must consider the factors listed in RCW 26.09.187(3)(a) and the limitations mandated in RCW 26.09.191. Although the trial court did not enter specific findings on the RCW 26.09.187(3)(a) statutory factors or on whether any RCW 26.09.191 restrictions applied, its oral ruling demonstrates that it considered each factor and RCW 26.09.191. *See In re Marriage of Croley*, 91 Wn.2d 288, 291-92, 588 P.2d 738 (1978) (we presume that the trial court considered the statutory elements as long as the record shows

[21] Harker did not respond to our perfection order on appeal; nor did he file a Brief of Respondent.

that it reviewed evidence on each factor).[22] Because there are no written findings on these factors, we treat the trial court's oral statements as its findings of fact. *See Murray v. Murray*, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981) (when there are no written findings on the statutory factors, the appellate court can look to the trial court's oral opinion) (citing *In re Marriage of Dalthorp*, 23 Wn. App. 904, 598 P.2d 788 (1979)).

We review a trial court's ruling addressing the placement of a child for abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Kovacs*, 121 Wn.2d at 801. A 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). We do not review the trial court's credibility determinations or weigh conflicting evidence. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

II. RCW 26.09.187(3) Factors

Although Arviso generally challenges the trial court's findings on the RCW 26.09.187(3)(a) factors, her argument addresses only factors (iii), (v), and (vii). Thus, we limit our analysis to these three factors.

[22] *Croley* addressed RCW 26.09.187's predecessor, former RCW 26.09.190 (1973), which the legislature repealed in 1987. *See* Laws of 1987, ch. 460 § 61.

A. Factor (iii)–Greater Responsibility for Parenting

Arviso first argues that the trial court erred in finding that factor RCW 26.09.187(3)(a)(iii) was neutral despite determining that she had been the child's primary caregiver.[23] We agree.

RCW 26.09.187(3)(a)(iii) requires the trial court to consider:

> Each parent's past and potential for future performance of parenting functions as defined in [another statute], *including whether a parent has taken greater responsibility for performing parenting functions* relating to the daily needs of the child.

(Emphasis added). In considering the first part of this factor, "past and potential for future performance of parenting functions," the trial court found that Harker (1) had participated to some extent in caring for the child before the couple separated, (2) saw the child more often than is usual in a long-distance parent-child relationship, and (3) was the child's primary caregiver when the child resided with him during their visitations. III VRP at 310. The trial court then

[23] Arviso also argues that the trial court erred in failing to consider the importance of maintaining continuity of residential placement. She cites RCW 26.09.191(4), which does not apply here and does not address continuity of placement, and *In re Marriage of Shryock*, 76 Wn. App. 848, 850, 999 P.2d 750 (1995), which addresses petitions to modify a residential schedule.

Shryock addresses a modification rather than an initial final residential placement and schedule; nevertheless, it emphasizes that "[c]ustodial changes are viewed as highly disruptive to children, and there is a strong *presumption* in favor of custodial continuity and against modification." 76 Wn. App. at 850 (citing *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993)). Although this presumption does not exist when a court is making an initial placement, continuity of placement is something the court can consider when determining a child's best interests; continuity of placement is also relevant to factors (iii), (iv), and (v). *See In re Parentage of LB*, 155 Wn.2d 679, 708 n. 26, 122 P.3d 161 (2005) ("'The criteria for determining the best interests of the child are varied and highly dependent on the facts and circumstances of the case at hand. *Yet continuity of established relationships is a key consideration*," (quoting *McDaniels v. Carlson*, 108 Wn.2d 299, 312-13, 738 P.2d 254 (1987)); *see also In re Marriage of Combs*, 105 Wn. App. 168, 175-76, 19 P.3d 469 (2001), *review denied*, 144 Wn.2d 1013 (2001). Therefore, we address the continuity of placement in relation to factor (iii).

stated:

> So this factor also, performance of parenting functions, seems to me that both parties, when [the child] is in their care, take care of [the child], and both are certainly *capable* of performing parenting functions in the future.

III VRP at 311 (emphasis added). The record supports the trial court's conclusions that both parents demonstrated the past and future ability to care for the child.

In considering the second part of this factor, "whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child," the trial court found that Arviso had continuously "taken greater responsibility for performing parenting functions," RCW 26.09.187(3)(a)(iii), both before and after the couple separated. III VRP at 310-11. The record clearly shows that Arviso had taken responsibility for performing most of the parenting functions for the child's first three and a half years of life; thus, the record supports the trial court's finding that Arviso was the parent who met this part of factor RCW 26.09.187(3)(a)(iii).

Given that both parents demonstrated the past and present ability to parent, the fact Arviso had taken by far greater responsibility for the child's daily needs from the time of his birth until the date of trial undermines the trial court's conclusion that factor (iii) was "neutral." On the contrary, the record, and even the trial court's own findings, show that factor (iii) clearly weighed in favor of Arviso as the child's primary residential parent.

B. Factor (v) and the Child's Cultural Heritage

Arviso next argues that the trial court erred in giving disproportionate weight to one part of the child's multi-cultural heritage. The trial court considered the child's cultural heritage to be

relevant to RCW 26.09.187(3)(a)(v), which requires the trial court to evaluate the child's significant relationships with others, his physical surroundings, his school, and "other significant activities."

For several reasons, we agree that the trial court placed undue emphasis on a single portion of the child's multi-cultural heritage. First, although factor (v) required the trial court to consider the child's significant relationships with others, his physical surroundings, his school, and "other significant activities," *see* RCW 26.09.187(3)(a)(v), in promulgating this statutory factor, the legislature did not require the trial court to consider the child's cultural heritage. Instead, RCW 26.09.184(3) provides that the trial court "*may* consider the cultural heritage and religious beliefs of a child." (Emphasis added.) That the legislature "allows," rather than "requires" trial courts to consider cultural heritage suggests that the legislature did not intend for cultural heritage, though important, to be a determining factor in a child's residential placement.

Second, although Harker mentioned his Native American heritage and his desire to involve his son in that culture, it was the trial court, rather than Harker, that developed the vast majority of evidence related to this cultural heritage.[24] In addition to developing the cultural heritage component of pro se Harker's case for him, the trial court then ignored the non-determinative nature of this factor when it expressly found that Harker would promote the child's cultural awareness and that this fact "weigh[ed] very heavily" in favor of making Harker the primary

[24] We recognize that a trial court's focus in a child custody case should be the child's best interests and that it may be appropriate for the trial court to offer some direction to a pro se litigant. But the trial court's involvement here bordered on acting as Harker's advocate. *See, e.g., Edwards v. LeDuc*, 157 Wn. App. 455, 460-64, 238 P.3d 1187 (2010) (trial court can overstep bounds of impartiality by providing too much assistance to pro se party).

residential parent. III VRP at 315. Furthermore, in so ruling, the trial court ignored the lack of evidence that Arviso would interfere with Harker's involving their child with his Native American culture.[25] Nor did the trial court expressly consider the child's potential involvement with Arviso's Hispanic culture.

Although the trial court properly considered the child's cultural heritage and Harker's desire and ability to engage his son in Native American cultural activities, we agree with Arviso that the trial court placed a disproportionate emphasis on this single attribute, contrary to the weight that the legislature prescribed in RCW 26.09.187(3)(a)(v) and RCW 26.09.184(3), especially in the absence of evidence that Arviso would not also support these activities. Accordingly, we hold that the trial court erred in using factor (v) to favor Harker as the child's primary residential parent.

C. Factor (vii)–Employment Schedule

Arviso next argues that the trial court erred in determining that Harker's work schedule allowed him to spend more time with their son. She contends that although Harker's work hours could potentially accommodate more time with the child, the trial court failed to recognize that because Harker intended to place their son in preschool during the day, Harker would not be spending additional time with the child. Again, we agree.

RCW 26.09.187(3)(a)(vii) required the trial court to consider "[e]ach parent's employment schedule." The trial court found that Harker's schedule "allows him the opportunity

[25] Although the record showed periodic disputes between the parents over their son's travel arrangements for visitation, there is no indication that such disputes were attempts by Arviso to prevent their son's exposure to his Native American culture.

to be more present in [the child's] life for a greater period of the time of the day when [the child] is awake," III VRP at 314, and then concluded that this factor "would weigh more heavily in favor of Mr. Harker being a primary residential parent because he will be more able to assist [the child] because he will be present with him *and not be placing him in daycare*." III VRP at 314-15 (emphasis added). The record supports the trial court's finding that Harker could potentially be more available to the child during the day because Harker's working day did not start until mid-afternoon. But the record does not support the trial court's finding that Harker's availability meant that he would "not be placing [the child] in daycare." III VRP at 315. On the contrary, the record establishes that Harker intended to enroll his son in a preschool program, specifically the FACE program, a fact that the trial court acknowledged when it emphasized that Harker would allow the child to "experience" his Native American Heritage. *See* III VRP at 316.

Although the FACE program allows parents to participate, they apparently do so by attending a group in a separate part of the facility; thus, Harker would not be with his son during the FACE preschool program, which is all-day, Monday through Thursday. Harker did not explain how he could begin work in mid-afternoon and still participate in the FACE program with his son.

If both parents intended to enroll the child in daytime daycare or daytime preschool, Arviso would be more available to the child during his waking hours because she would be home with the child in the evenings whereas Harker would not. The existing situation involved Arviso's being home with the child in the evenings and after work. But the trial court did not address Harker's plan to leave the child with Harker's parents in the evenings while Harker worked.

Thus, not only does the record fail to support the trial court's finding that Harker would be "present with [the child] and not be placing him in daycare," III VRP at 315, but also the record supports weighing this factor in favor of Arviso.

III. RCW 26.09.191(3)(c)–Harker's Alcohol Abuse

Arviso next argues that the trial court abused its discretion in "disregarding the evidence of [Harker's] alcohol abuse." Br. of Appellant at 26. We do not agree that the trial court erred in failing to place RCW 26.09.191(3)(c) limitations on Harker. We do agree, however, that the trial court failed to give appropriate weight when considering, and then minimizing, multiple indicators of Harker's apparent past alcohol abuse and his questionable reporting to his evaluators, the GAL, and the court.

RCW 26.09.191(3)(c) provides that the trial court "may preclude or limit any provisions of the parenting plan," if a parent's "long-term impairment resulting from . . . alcohol . . . abuse . . . interferes with the [parent's] performance of parenting functions" as defined in RCW 26.09.004(2). In its oral ruling, the trial court acknowledged that it must consider possible alcohol impairment when determining whether to limit Harker's residential time. The trial court then ruled:

> And even [the GAL], *although there are obviously history issues with Mr. Harker regarding his DUI*, testified—and my notes reflect anyway that she testified, as does her report, that neither parent should be subject to 191 factor. So there are—should be not (sic) any limitations on either parent's residential time.

III VRP at 308 (emphasis added).

Thus, the record shows that the trial court considered RCW 26.09.191(3)(c). The record

also shows that substantial evidence supports the trial court's conclusion that, although Harker had some history of alcohol abuse, there was no evidence that he currently had any alcohol issues that would require the trial court to limit his contact with his son.[26] *See, e.g.*, the "All For You Counseling" assessment report, which concluded that Harker did not need alcohol treatment, Ex. 21, and the GAL's testimony that she was satisfied with this report. Accordingly, we find no reversible error in the trial court's decision not to condition Harker's time with his son on a limiting factor based on Harker's prior alcohol use.

Nevertheless, when balancing other factors present in this case and assessing the relative suitability of both parents, the trial court should have considered facts of concern about Harker's alcohol abuse, such as his misrepresentations to Statewright, to the GAL, and to the Arizona court, and his drinking history, especially to the extent that it involved crimes, such as DUI and a "domestic dispute." Ex 22 at 5. In particular, Harker misrepresented his treatment history and

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[26] Arviso also argues that the trial court should have considered that Harker did not (1) rebut his former girlfriend Luke's statements to the GAL about his alcohol abuse, (2) call Luke to impeach her testimony about Harker's alcohol problems at trial, or (3) present any other witness to bolster his assertion that he did not have a drinking problem. Arviso fails to note, however, that Harker had told the second alcohol evaluator that he (Harker) had no alcohol problems and that his current girlfriend, Bacchus, had told the GAL that she (Bacchus), would not characterize Harker's drinking "as excessive." Ex. 8 at 10. Because there was contradictory evidence on the issue of whether Harker had an alcohol problem at the time of trial, Arviso's argument relates to credibility of witnesses and weight of evidence for the trial court's determination, which we do not review on appeal. *Rich*, 80 Wn. App. at 259.

Arviso further suggests that the trial court failed to consider the GAL's final report recommendation to condition Harker's residential time on his submitting to an alcohol reassessment, with which Harker did not comply until the eve of trial. Despite delaying his second alcohol evaluation until the last minute, Harker did produce a reassessment, which satisfied the GAL's concerns. We further note that Arviso did not object to admission of this second alcohol assessment at trial. Other than noting that Harker's reassessment was untimely when presented it on the second day of trial, Arviso does not argue on appeal that the trial court erred by considering the reassessment.

DUI history, namely his apparent use of his Alternative Counseling assessment to satisfy the assessment/treatment conditions the Arizona court imposed, while simultaneously telling the Alternative Counseling counselor that he had already satisfied the Arizona court's conditions; furthermore, he never revealed any California arrests or convictions to the GAL. Harker's misrepresentations strongly suggest that he was less than forthcoming during the trial court proceedings, undermining the trial court's ultimate conclusion that Harker is the parent who will better facilitate or foster the child's relationship with his other parent.

IV. Primary Residential Placement Determination

Arviso next argues that the trial court erred in failing to adopt the GAL's recommendations about who should be the primary residential parent. Arviso argues that the GAL's "recommendations were supported by significant evidence that indicated a different result should have been obtained" and that the only evidence contradicting the GAL's investigation and testimony was Harker's "self-serving testimony."[27] Br. of Appellant at 33-34. This argument fails.

As Arviso acknowledges, "the trial court remains free to ignore the [GAL's] recommendations if they are not supported by other evidence or it finds other testimony more persuasive." Br. of Appellant at 33 (emphasis omitted) (citing *In re Guardianship of Stamm*, 121 Wn. App. 830, 836, 91 P.3d 126 (2004); *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380, *review denied*, 133 Wn.2d 1014 (1997)). Arviso fails to identify the specific GAL

[27] We note that Arviso also argues that the trial court erred in giving too much weight to Harker's "self-serving testimony" and that he failed to meet his "burden of production." Br. of Appellant at 34-35. Because we reverse on other grounds, we do not further address these arguments.

recommendations that the trial court allegedly "ignored." Br. of Appellant at 33. In light of Arviso's other arguments, however, it appears that she directs her challenge at the trial court's decision to make Harker the primary residential parent, contrary to the GAL's recommendation that Arviso remain the primary residential parent.

The GAL did not address promoting the child's cultural heritage, which the trial court developed during its examination of pro se Harker and then found to be an important factor weighing in favor of making Harker the primary residential parent. The trial court also found that Harker had satisfied the GAL's concerns about his alcohol assessments. And it concluded that several of the statutory factors were either neutral or weighed in Harker's favor. Finding this other evidence more persuasive, the trial court chose to disregard the GAL's recommendation about who should be the primary residential parent, which, as we note above, is the trial court's prerogative. That said, however, we wish to make clear that we disagree with the trial court's ultimate disposition in this case because, as discuss above, the trial court erred when it found that factor (iii) was neutral, placed too much emphasis on the child's Native American heritage when evaluating factor (v), found that factor (vii) weighed in Harker's favor, and failed to consider Harker's past alcohol abuse and questionable reporting.

V. Harker's Affidavit of Paternity

Finally, Arviso argues that the trial court erred in entering the final residential schedule order before Harker filed the "requisite affidavit of paternity." Br. of Appellant at 38. Although the record does not show that Harker filed a copy of the affidavit of paternity that he was supposed to have filed with the State, neither Arviso nor Harker have contested the child's

paternity at trial[28] or on appeal.

Moreover, Harker alleged in paragraph 1.2 of his superior court petition that he was the child's acknowledged father. And, in her response to Harker's petition, Arviso "admitted" that this assertion was correct. CP at 22. We hold, therefore, that Harker's failure to file an affidavit of paternity with the trial court did not preclude the trial court's filing its final order.[29]

[28] Nor does Arviso assert that she raised this issue at the presentment hearing before the trial court signed its final order. The record before us on appeal does not include the verbatim report of the presentment hearing.

[29] Nevertheless, because we are reversing and remanding this case to the trial court, Harker should file this document with the trial court as soon as possible to ensure that the court records are complete.

VI. Attorney Fees

Arviso requests attorney fees and costs under RAP 18.1 and RCW 26.09.140. RCW 26.09.140 provides in part:

> The court from time to time *after considering the financial resources of both parties* may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

(emphasis added).

Because RCW 26.09.140 requires us to consider both parties' financial resources before awarding attorney fees, RAP 18.1(c) requires the parties to file financial affidavits not later than 10 days before the date the case is set for consideration. Arviso filed a copy of a February 9, 2010 "Financial Declaration" showing that her monthly income is the same as her monthly expenses. *Spindle*. But neither she nor Harker filed a financial affidavit or declaration establishing Harker's ability to pay. Because we cannot fully evaluate Arviso's financial need relative to Harker's ability to pay, we deny Arviso's request for attorney fees and costs on appeal.

VII. Conclusion

As we discuss above, we disagree with the trial court's findings that RCW 26.09.187(3)(a) factor (iii) as neutral and factors (v), and (vii) weigh in favor of Harker's designation as the child's primary residential parent. Instead, we hold that factors (iii) and (vii)

weigh in favor of Arviso and that factor (v) was neutral. In addition, the record does not support the trial court's finding that Harker would be better at fostering the child's relationship with the other parent. Thus, the record before us does not support the trial court's conclusion that Harker should be the child's primary residential parent; instead, the record supports the conclusion that Arviso should be the child's primary residential parent.

Accordingly, we reverse the trial court's decision designating Harker as the child's primary residential parent. And we remand to the trial court to designate Arviso as the child's primary residential parent, to implement this change of primary placement forthwith, and to establish a revised residential schedule and a child support schedule with Arviso as the primary residential parent and Harker having scheduled residential time.

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

Hunt, J.

We concur:

Armstrong, PJ.

Van Deren, J.