

Supreme Court No. 89093-5
Court of Appeals No. 68424-8-I

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

In re the Marriage of:

NEHA VYAS CHANDOLA,

Respondent,

v.

MANJUL VARN CHANDOLA,

Appellant.

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STATE OF WASHINGTON
CRF

PETITION FOR REVIEW

By:

David B. Zuckerman

Attorney for Manjul Varn Chandola

1300 Hoge Building

705 Second Avenue

Seattle, WA 98104

(206) 623-1595

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A. IDENTITY OF PETITIONER

Varn Chandola, through his attorney David Zuckerman, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

On May 13, 2013, Division One of the Court of Appeals filed an unpublished opinion affirming the trial court decision. App. A.

C. ISSUES PRESENTED FOR REVIEW

1. RCW 26.09.191 sets out various factors – such as domestic violence and child sexual abuse – which either require or authorize the superior court to impose restrictions on a parent. The “catch-all” provision, sub-section .191(3)(g), permits restrictions based only on “[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child.” Here, the trial court greatly limited Varn’s time with his daughter and prohibited him from practices which are part of their Indian culture.

(a) What level and type of harm is required before a court may impose restrictions under this provision?

(b) Specifically, is it sufficient that a judge finds a parent to be “doting but ineffective?”

2. For nearly a year before trial, Mr. Chandola was subject to limited, supervised visitation because his wife made unfounded allegations that he sexually abused their daughter.

(a) Did the trial court improperly rely on the artificial conditions during the period of supervised visitation when ruling that Ms. Chandola should be the primary parent?

(b) Should this Court adopt a rule for cases involving unsupported abuse allegations, requiring the trial court to promote the immediate restoration of the child's relationship with the accused parent?

D. STATEMENT OF THE CASE

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. Varn and Neha Chandola, who is also of Indian descent, married on May 16, 1998. I RP 29. Their daughter, P.R.C., was born on November 2, 2008. For most of the remainder of the marriage, the paternal and/or maternal grandparents lived with the couple.

Neha returned to work in April, 2009, when P.R.C. was five months old. I RP 44, 47-48. Varn maintained that he handled the bulk of the parenting after that. Neha testified that Varn relied heavily on help from the grandmothers, and 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 rock P.R.C. while playing gentle music to get her back to sleep when she woke up during the night. VI RP 860. Varn

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

By all accounts, after P.R.C.'s second birthday on November 2, 2010, Varn cared for P.R.C. all day until Neha came home from work. *See, e.g.*, III RP 375, 378. This continued until the time of separation in February, 2011. *See* I RP 181-82.

Around December, 2010, as the couple's relationship deteriorated, Neha started to make threats about severing Varn's relationship with P.R.C. VI RP 894. She would say such things as "You don't know what I have planned for you." VI RP 895-96. Not long after that, she began to accuse Varn of sexually abusing P.R.C. VI RP 897-900. On February 14, Neha said to Varn: "Do you know that P.R.C. complains of vaginal pain? . . . What have you done to our daughter?" VI RP 898, 900. The next day, Neha suddenly disappeared from the house, taking P.R.C. with her. Trial Ex. 1 at p. 19. She promptly filed for dissolution on February 15, 2011. Supp. CP 129-133.

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. Trial 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. Dr.

Wheeler has substantial experience with psychosexual evaluations and with assessing allegations of child sexual abuse. II RP 249.

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. Varn also signed up P.R.C. for therapy recommended by the parenting evaluator after Neha failed to do so. VI RP 921-22.

The parties resolved most issues concerning the divorce by agreement. Trial 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 equal time with each parent was best for P.R.C. while Neha sought significant restrictions on Varn.

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 was insufficient evidence of inappropriate sexual contact. She claimed to be relieved that her fears were groundless. III RP 417.

During personality testing, Dr. Wheeler found Neha's anxiety-related disorders to be very elevated. II RP 257-58. This could lead her to overreact to benign childhood behaviors (II RP 269) and to give P.R.C. a false impression that she has problems. 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” Neha would view that through a “hypervigilant lens” and raise further allegations of sexual abuse. II RP 270-271.

Dr. Wheeler found no basis for a finding that Varn 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 . . .”) *See* Trial 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 issued.)

Dr. Marsha Hedrick reviewed Dr. Wheeler’s report and criticized her methodology and recommendations. Her primary disagreement was with the limited residential time Dr. Wheeler recommended for Varn. “[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.

Dr. Hedrick noted that Neha's extremely high scores for anxiety-related disorders 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.

There was no dispute that it is the cultural norm in India for an extended family to raise children together. *See, e.g.*, I RP 155; I RP 82-83; IV RP 599. Likewise, in Indian families it is common for children to sleep with their parents. *See, e.g.*, I RP 156-57.

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 544-45.¹ Dr. Fukura's partner, Dr. Ruth Kahn examined P.R.C.'s vagina shortly before the separation because Neha said that P.R.C.

¹Dr. Fukura is a board certified pediatrician with over 27 years of experience. He has been P.R.C.'s primary doctor since shortly after her birth. IV RP 533. He saw P.R.C. on at least 20 occasions. IV RP 523. He had no reason to slant his testimony.

complained of vaginal pain. Dr. Kahn concluded that P.R.C.'s discomfort was due to constipation. VI RP 897-98.

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.

Regarding Neha's sexual abuse allegations, "it appears to the court that Neha may have needed to precipitate a crisis in order to escape the marriage and extended family." CP 94.

Although neither party had requested such a restriction, the Court limited P.R.C.'s time with 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.

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 acceptable.

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 he

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.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE LEVEL AND TYPE OF HARM REQUIRED FOR IMPOSITION OF RESTRICTIONS UNDER RCW 26.09.191(3)(G) IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

Most of the subsections of RCW 26.09.191 provide clear standards for imposing restrictions on parenting. For example, restrictions are required for serious misconduct such as willful abandonment, child abuse, and a history of domestic violence. *See* RCW 26.09.191(2)(a).

Restrictions are authorized for lesser concerns such as emotional or physical impairment, substance abuse, and abusive use of conflict. RCW 26.09.191(3)(a) through (f). Subsection 3(g), however, is open-ended. It permits a judge to “preclude or limit any provisions of the parenting plan” if the court finds “[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child.”

This subsection appears to be widely employed by superior court judges throughout the state, yet it provides little guidance to the courts regarding the sufficient level or type of harm required for imposition of restrictions. This raises the concern that, as in this case, a judge will impose restrictions based only on his preferences regarding parenting style.

To date, this Court has provided only limited clarification. It has noted that imposing restrictions requires “more than the normal . . . hardships which predictably result from a dissolution of marriage.” *Katara v. Katara*, 175 Wn.2d 23, 36, 283 P.3d 546 (2012), *cert. denied*,

133 S.Ct. 889, 184 L.Ed.2d 661 (2013), quoting *Marriage of Littlefield*, 133 Wn.2d 39, 55, 940 P.2d 1362 (1997). While that statement is useful in some cases, it offers no guidance when the perceived problem is not directly related to the dissolution. *Littlefield* itself dealt with potential harm to a child from relocation, an issue that is now covered by the Child Relocation Act, RCW 26.09.405, *et seq.*

This Court has also confirmed that a trial court need not wait for actual damage to a child but may act based on a “danger” of damage. *Katara*, 175 Wn.2d at 36. In *Katara* the concern was that the father might abduct the child to India. There was no dispute that abduction is a sufficient harm to warrant restrictions; the issue was whether there was sufficient evidence that the father contemplated such action.

In *Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996), the Court of Appeals held that “[p]arental conduct may only be restricted if the conduct would endanger the child’s physical, mental, or emotional health.” *Id.* at 770. That phrase helps to clarify the *type* of harm which is required. This Court mentioned *Wicklund* in *Katara*, but only to distinguish its facts.² Westlaw lists *Katara* as “negative” treatment for *Wicklund*, although it seems fairer to say that *Katara* did not address the portion of *Wicklund* at issue here. The Court should now endorse the phrase quoted above. It should also explicitly state that a judge’s belief that certain parenting is not the *best* approach is insufficient to impose

² The *Katara* Court noted that harm from abduction went far beyond the “normal response to the breakup of a family” at issue in *Wicklund*.

restrictions. Rather, the court must find a credible danger of significant harm.

Such a rule does not, of course, prohibit a judge from considering more subjective factors when deciding how much time a child will spend with each parent. *See* RCW 26.09.187(3). But a finding of harm under section .191 permits the court to restrict parenting in many other ways. It also carries a stigma which prejudices the parent at any future hearings, such as motions to modify the parenting plan.

In imposing and upholding restrictions in this case, neither the trial court nor the Court of Appeals applied a meaningful standard of harm. 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 no evidence that this created any danger of harm. 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.³ 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

³ *See* http://en.wikipedia.org/wiki/Attachment_parenting;
<http://www.attachmentparenting.org/>

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.

The "ineffective" finding was based on Varn allegedly failing to impose sufficient structure and 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 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.

By the time of trial Varn had learned how to better impose routine and discipline in P.R.C.'s life by taking parenting classes. *See* section (D) above. 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.⁴ Absent a demonstrable risk of danger to a child's physical, mental, or emotional health, 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 a child if the parents were always on the same page. Or perhaps the child benefits in some way 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 true 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 harmed P.R.C. by depriving her of normal, unsupervised time with her father, thereby marginalizing his

⁴ http://en.wikipedia.org/wiki/Taking_Children_Seriously

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.

In short the result in this case illustrates the problem with the open-ended provision for restrictions set out in RCW 26.09.191(3)(g). While Judge Doerty imposed restrictions on Varn, another judge might have imposed restrictions on Neha. A clearer standard will help to ensure that restrictions are not based on the personal preferences of each judge.

This case also demonstrates how section 3(g), if not properly limited, can result in restrictions on a child's right to grow up in her own culture. Here, the trial court prohibited Varn from sleeping in the same room as P.R.C., and greatly limited the amount of time that the paternal grandparents could be present during Varn's already limited time with P.R.C. As discussed in Section D, it is customary in Indian culture for extended families to raise children together and for children to sleep with adults.

Varn is not suggesting that the trial judge was overtly prejudiced against Indians, but it does appear that he favored a "Seattle" approach to

raising children. As Justice Brennan noted in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), the “nuclear family” is 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.* Children of Indian background, such as P.R.C., “have a deep need to understand their Indian family, culture, and heritage during their childhood.” *Katara*, 175 Wn.2d at 50 (Madsen, C.J., dissenting).

2. THE TRIAL COURT IMPROPERLY RELIED ON THE UNNATURAL LIMITATIONS ON VARN’S PARENTING PRIOR TO TRIAL, CAUSED BY NEHA’S UNFOUNDED ALLEGATIONS OF SEXUAL ABUSE. THE COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT CONFLICTS WITH RULINGS FROM THIS COURT AND OTHER RULINGS FROM THE COURT OF APPEALS.

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 member. 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 Varn’s normal parenting.

Varn had no chance to show that his parenting had improved after taking three 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 was faulty because, since separation, P.R.C. became a year older. It is hardly surprising that a child would become more sociable and throw tantrums less often when aging from two to three. *See, e.g.*, Centers for Disease Control and Prevention, Child Development Homepage⁵ (toddlers “will experience huge thinking, learning, social, and emotional changes” between the ages of two and three). Had Varn not been separated from P.R.C. during that year due to the unfounded sexual abuse allegations, he would have received credit for the changes.

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

⁵ <http://www.cdc.gov/ncbddd/childdevelopment/positiveparenting/toddlers2.html>

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 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.

As amicus The National Parent's Organization⁶ pointed out in the Court of Appeals, allegations of sexual abuse are all too frequent in divorce cases, in part because they are such an effective means to keep the accused parent out of the picture.⁷ When the allegations prove to be unfounded, the trial court should endeavor to restore the child's relationship with the accused parent as expeditiously as possible.

"The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and *each* parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002 (emphasis added). The National Parent's Organization's amicus brief discusses at length the social science research supporting the benefits to a child of two fully involved parents. Amicus suggests, and petitioner agrees, that in false allegation cases such as this, the appellate court should strictly scrutinize

⁶ Formerly "Fathers and Families."

⁷ See, e.g., Prof. N. M. Rutledge, "Turning A Blind Eye: Perjury In Domestic Violence Cases", 39 N.M.L. REV. 149 (2009); *Robert J. v. Catherine D.*, 171 Cal.App.4th 1500 (2009) (reversing a denial of sanctions sought by father for false child abuse allegations made by mother and her former attorney); Loewy, "Shadow and Fog: Is California Civil Code Section 4611 An Effective Deterrent Against False Accusations of Child Abuse During Custody Proceedings?", 26 LOY.L.A.L. REV. 881 (1993). See also "Denial or restriction of visitation rights to parent charged with sexually abusing child", 1 A.L.R.5TH 776 (1992, 2013 Supp.) and "Sexual abuse of child by parent as ground for termination of parent's right to child", 58 A.L.R.3D 1074 (1974, 2013 Supp.).

the parenting plan to ensure that it provides for expeditious restoration of the disrupted parent-child relationship.

Amicus also notes that – when one party’s parenting has been disrupted prior to trial – it is inappropriate to cast in stone a permanent parenting plan. That is particularly true in this case, where the trial judge purported to foresee far into the future how Varn’s parenting would evolve. The Court of Appeals approved a better approach in *Marriage of Possinger*, 105 Wn. App. 326, 19 P.3d 1109, *review denied*, 145 Wn.2d 1008, 37 P.3d 290 (2001). In that case, the trial court adopted a parenting plan limited to one year because the parents’ lives were in flux. The plan would be reviewed after that year without the need for either party to file a modification motion. *Id.* at 329-30. The Court of Appeals ratified this approach.

It would be strange indeed to construe an act designed to serve the best interests of the children of divorcing parents in such a manner as to require trial courts to rush to judgment on insufficient evidence with respect to the children’s best interests, or to ignore the fact that the lives of the parents are in such a state of transition that the children’s best interests would be served by deferring long-term parenting decisions for a reasonable period of time following entry of a decree of dissolution of marriage.

Id. at 336.

Here, because Varn had been deprived of the ability to parent P.R.C. normally during the year before trial, the court might legitimately have found it difficult to assess his parenting skills. An interim plan such as the one used in *Possinger* would have enabled the Court to postpone a

final decision until more data was available. Such an approach reduces the harm from an unfounded accusation, and ensures that the child will not needlessly be deprived of a full relationship with the accused parent.

F. CONCLUSION

The Court should accept review and reverse the Court of Appeals.

DATED this 12th day of June, 2013.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Manjul Varn Chandola
705 Second Avenue, Suite 1300
Seattle, WA 98104
(206) 623-1595

CERTIFICATE OF SERVICE

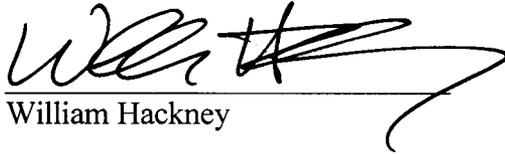
I hereby certify that on the date listed below, I served by email and United States Mail, postage prepaid, one copy of the foregoing Petition for Review on the following:

Ms. Patricia S. Novotny
Attorney at Law
3418 NE 65th Street, Suite A
Seattle, WA 9815-7397
novotnylaw@comcast.net

Ms. Janet Helson
Skellenger Bender, P.S.
1301 5th Ave Ste 3401
Seattle, WA 98101-2605
jhelson@skellengerbender.com

Mr. Varn Chandola
23628 – 58th Avenue S, Apt. X201
Kent, WA 98032

12 June 2013
Date


William Hackney

2013 JUN 12 AM 11:31
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:)	No. 68424-8-1
NEHA VYAS CHANDOLA,)	DIVISION ONE
Respondent,)	
and)	
MANJUL VARN CHANDOLA,)	UNPUBLISHED
Appellant.)	FILED: <u>May 13, 2013</u>

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAY 13 AM 8:46

Cox, J. — Primarily at issue in this appeal is the trial court’s discretionary authority to impose restrictions in the parenting plan between Manjul Varn Chandola (Varn) and Neha Vyas Chandola (Neha).¹ The trial court’s findings of fact are supported by substantial evidence and support the conclusions of law that restrictions are proper. Moreover, there is no evidence that the trial court based its decision on an improper basis. Finally, there is no showing of any denial of either due process or equal protection. We affirm.

Varn and Neha were married in 1998. They lived with Varn’s parents in Arizona until they moved to the Seattle area in 2002. They are both attorneys.

¹ We adopt the naming conventions of the parties for clarity.

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They have one young daughter, P.R.C., who was born in November 2008. Both sets of her grandparents lived with the family at their house in Kent during different periods of time and helped care for her.

In February 2011, Neha commenced this dissolution proceeding. Neha told Varn that P.R.C. complained of vaginal pain and that Neha was concerned about the possibility of sexual abuse. Varn agreed to Neha's request for a temporary order requiring supervision during his visits.

A court-appointed parenting evaluator, Dr. Jennifer Wheeler, concluded that there was insufficient evidence to indicate that Varn engaged in behavior that would be consistent with sexual abuse. The supervised visitation was lifted in December 2011, after mediation.

A seven-day bench trial took place in 2012. The central issue at trial was the residential schedule and requested restrictions in the parenting plan. A number of witnesses testified, including the parties, family members, friends of the family, and P.R.C.'s doctor. Two parenting evaluators, one on behalf of each party, also testified.

Based on the evidence and controlling law, the trial court ordered restrictions and a residential schedule with three different stages to promote the best interests of the child. The first stage consists of two visits with Varn every week with one of those visits being an overnight visit every week. In the second and third stages, P.R.C.'s time with Varn will increase, if Varn meets certain conditions.

Varn appeals.

PARENTING PLAN

Varn argues that the trial court's restrictions in the parenting plan were not supported by the findings. We disagree.

An appellate court will not retry the facts on appeal and will accept the trial court's findings of fact as verities if they are supported by substantial evidence in the record.² "Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted."³ This court does not review the trial court's credibility determinations, nor does it weigh conflicting evidence.⁴

Decisions concerning the provisions of a parenting plan are reviewed for abuse of discretion.⁵ "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons."⁶ "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."⁷

² In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

³ In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), cert. denied, 133 S. Ct. 889, 184 L. Ed. 2d 661 (2013).

⁴ In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

⁵ In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

⁶ Id. at 46-47.

⁷ Id. at 47.

This court's review of whether the trial court's conclusions of law flow from its findings is de novo.⁸

Adverse Effect on the Child's Best Interest

Varn argues that there were insufficient findings and no substantial evidence to justify restrictions under RCW 26.09.191(3)(g). We disagree.

RCW 26.09.191(3)(g) is a discretionary provision that permits a trial court to limit the terms of a parenting plan.⁹ This discretionary authority of the court is conditioned on the existence of specific factors or conduct that the court expressly finds adverse to the best interests of the child.¹⁰ "Imposing such restrictions 'require[s] more than the normal . . . hardships which predictably result from a dissolution of marriage.'"¹¹

Here, the trial court found that Neha had established by a preponderance of the evidence that restrictions under RCW 26.09.191(3)(g) should be included in the parenting plan. More specifically, the court made the following finding, which is supported by substantial evidence:

The court finds that the father's parenting history has had an adverse effect on the child's best interests pursuant to RCW 26.09.191(3)(g). See Memorandum [F]indings on Trial entered this date and incorporated by reference.^{12]}

⁸ Watson v. Dep't of Labor & Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006).

⁹ Katare, 175 Wn.2d at 36.

¹⁰ Id.

¹¹ Id. (alteration in original) (quoting Littlefield, 133 Wn.2d at 55).

¹² Clerk's Papers at 80.

The Memorandum Findings on Trial, which the trial court expressly incorporated into the above, identified the factors and conduct of Varn that the court found adverse to the best interests of the child:

Prior to separation the father consistently engaged in a pattern of interaction with [P.R.C.] which while loving, caring, affectionate, enriching in an entertainment sense, and nurturing in some respects, nonetheless ***lacked, in concerning degree, objectivity with respect to her healthy development. The father was unwilling or unable to establish boundaries, routines, schedules, and structure. He discouraged exploration and independence.*** Varn may best be described prior to separation as a doting father but ineffective parent. This is not an entirely unusual situation but ***he also 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.*** The court is unable to conclude that it was the father's design to undermine the mother but the consequences for the child are the same. It is telling that subsequent to separation the child's behavior repertoire increased dramatically As more than one lay witness observed since separation "[P.R.C.] is a changed child, more outgoing, interactive"¹³

On appeal, Varn assigns error to five of the trial court's findings regarding his parenting history. But, he only discusses two of these findings when he challenges the trial court's determination that he was an "ineffective parent." Thus, we need only address whether these two findings are supported by substantial evidence.

First, the trial court found that Varn "discouraged [P.R.C.'s] exploration and independence." A family friend, Rahul Gupta, testified that it appeared that Varn did not want P.R.C. to explore and engage with other children and adults.

¹³ Id. at 92-93 (emphasis added).

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A neighbor, Carol Johnston, testified that Varn would hold P.R.C. a lot and would not let her get down and play. Another family friend, Anjulie Ganti, described Varn as a “hovering” parent who was “always” holding P.R.C. and not letting her explore. Gupta also testified that Varn wanted somebody to be in the room with P.R.C. while she slept, and he refused to use a baby monitor.

Dr. Jennifer Wheeler was the court-appointed parenting evaluator. She interviewed both parents, the child, and others in preparing her written evaluation and recommendations to the court. At trial, she testified that Varn’s constant holding of P.R.C. was behavior that appeared to be “more about father’s anxiety about what might happen if he put her down and regulating his own anxiety versus recognizing what’s really best for her in that particular situation.” Dr. Marsha Hedrick, a parenting evaluator that Varn called on his behalf, agreed that this behavior was problematic in terms of the child’s best interests.

This evidence is sufficient to persuade a fair-minded person that Varn “discouraged [P.R.C.’s] exploration and independence.”

Second, the trial court found that Varn was “unwilling or unable to establish boundaries, routines, schedules, and structure.” Dr. Hedrick, who reviewed Dr. Wheeler’s report, testified at trial that Varn appeared to be “overly permissive in his parenting” regarding P.R.C.’s eating and sleeping.

Neha’s mother, Kuldeep , Johnston, and Ganti agreed that Varn did not set routines or create structure around these activities. For example, they explained that Varn and his mother would chase P.R.C. around the house instead of feeding her at a table or in a high chair. Varn testified that he knew

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that P.R.C.'s doctor recommended against giving P.R.C. a bottle of milk at night as she got older, but he would almost never decline P.R.C.'s request for a bottle. Neha testified that she was not able to implement a bedtime routine for P.R.C. until September 2010 when Varn and his parents started to leave the house after dinner.

Dr. Wheeler also testified that Varn was "very controlling" with "certain things" like car seats and baby monitors, but "[w]hen it came to the schedule, there was sort of this odd lack of structure and lack of control."

In sum, there is substantial evidence in this record to support the findings that Varn "discouraged [P.R.C.'s] exploration and independence" and that Varn was "unwilling or unable to establish boundaries, routines, schedules, and structure."

Varn argues that his discouragement of P.R.C.'s "exploration and independence" was not a problem at the time of trial. He points to Dr. Wheeler's testimony that P.R.C. was playing with the visitation supervisor's son. Nevertheless, the trial court was not convinced by his testimony that the "risks and hazards of his parenting choices going forward" would continue to improve. Thus, the trial court made a credibility determination, which this court does not review.¹⁴

Varn contends that the professionals who testified at trial thought P.R.C. had "always been a perfectly happy, healthy child, with normal development." A fair reading of the entire record, however, shows that Dr. Wheeler,

¹⁴ In re Marriage of Rich, 80 Wn. App. at 259.

notwithstanding this observation, believed that parental behavior merited restrictions. Thus, this argument fails.

Varn argues that Drs. Wheeler and Hedrick did not have “any concerns about Varn’s parenting [that] rose to a level requiring restrictions.” This is inaccurate.

The record reflects that Dr. Hedrick criticized Dr. Wheeler’s report for failing to tie her concerns about Varn to a basis for restrictions. But at trial Dr. Wheeler testified that while restrictions were not justified based on domestic violence, sexual abuse, or emotional impairment, she believed that Varn’s “abusive use of conflict” was a different basis for restrictions. Dr. Wheeler admitted in her testimony that her written report did not “do an adequate job of connecting the dots between what [her] concerns were and the limitations to the schedule that [she was] recommending.” But her testimony at trial was clear:

My authority for my opinion is that the personality traits that I’ve been describing all morning in my opinion, the risk to [P.R.C.] of those traits is ongoing conflict that is essentially emotionally abusive to her. And I do think that until those traits are better regulated and [Varn is] able to interact with [P.R.C.] in a way that does not perpetuate this conflict and parent in a way that does not continue to inflame this conflict, I do think that father is vulnerable to engaging in abusive use of conflict. That supports generally why I am limiting his residential schedule relative to what you just referred to as the normal, typical kind of recommendation.^[15]

In any event, it is the ultimate responsibility of the court, not the experts, to determine whether restrictions are required. The court did so here on the basis

¹⁵ Report of Proceedings (Jan. 31, 2012) at 305-06.

of all the evidence, including the testimony of both parenting evaluators. There was no error in this respect.

Varn argues that it is common for parents to have different styles of parenting, and courts must tolerate these different styles. He contends that the trial court was “imposing [its] own preference regarding parenting style” because his parenting style did not result in any “demonstrable harm” to P.R.C. This argument ignores the record.

As discussed previously in this opinion, the findings of fact regarding Varn’s parenting history are supported by substantial evidence. Moreover, the findings support the conclusion that his parenting had an adverse effect on P.R.C.’s best interests. Thus, the trial court was properly acting under the provisions of governing law, not imposing its own parenting style preference.

Varn argues that “[t]o 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.” The premise of this argument is incorrect.

We have already identified the adverse effect that Varn’s actions had on the child. In contrast, there is no showing that restrictions against Neha should have been imposed. As Drs. Wheeler and Hedrick testified, they did not have any serious concerns about Neha’s parenting that would rise to the level of requiring restrictions.

Finally, Varn argues that “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.” He cites Troxel v. Granville¹⁶ to support this assertion.

But as Varn acknowledges, this court has already rejected a similar argument in In re Marriage of Katare.¹⁷ There, this court explained that Troxel does “not support [the father’s] argument that a parenting plan that complies with the statutory requirements to promote the best interests of the children raises an issue of constitutional magnitude or violates a parent’s constitutional rights.”¹⁸ Thus, this argument is not persuasive.

As noted above, Varn also assigned error to two other findings of fact. The first is that Varn “lacked, in concerning degree, objectivity with respect to [P.R.C.’s] healthy development.” The second is that 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.”

Varn fails to support these assignments of error with any argument or persuasive authority. Thus, we need not address them.¹⁹

Restrictions

Varn argues that the restrictions in the parenting plan were not supported by the findings. Specifically, he challenges three restrictions in the parenting

¹⁶ 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

¹⁷ 125 Wn. App. 813, 105 P.3d 44 (2004).

¹⁸ Id. at 823.

¹⁹ See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

plan. None of his challenges are meritorious. All of the restrictions are reasonably calculated to address identified harm to the child.

“A trial court wields broad discretion when fashioning a permanent parenting plan.”²⁰ But this discretion is guided by several provisions of the Parenting Act of 1987, including RCW 26.09.191, which sets “forth factors which require or permit limitations upon a parent’s involvement with the child.”²¹ A primary concern in establishing parenting plans is that parenting arrangements serve the best interests of the child.²² This court has held that “[a]ny limitations or restrictions imposed must be reasonably calculated to address the identified harm.”²³

The first challenged restriction is the limit on Varn’s time with P.R.C., which is approximately 30 hours a week. Under the court’s plan, this visitation was scheduled to increase in length over three stages if Varn continued to comply with certain requirements. This time restriction was supported by the trial court’s Memorandum Findings on Trial:

While it is cause for optimism that Varn has agreed to parenting plan provisions that recognize the importance of “[P.R.C.’s] set schedule for meal times, bed times, wake up times *etc.*”, his testimony failed to persuade this court that he appreciated the down side of his approach before separation or the risks and hazards of his parenting choices going forward. This assessment of his testimony is consistent with Dr. Wheeler’s concerns about his

²⁰ Katare, 175 Wn.2d at 35.

²¹ Id. at 36.

²² See RCW 26.09.002.

²³ Katare, 125 Wn. App. at 826.

difficulties with integrating data inconsistent with his view of reality. It is therefore necessary to impose such restrictions as may best be anticipated [to] assure the mother's parenting is not diluted by the father. Certainly a "fifty/fifty" parenting plan would not accomplish this.^[24]

The time restriction in the residential schedule was a reasonable way to address Varn's unwillingness or inability to establish boundaries, routines, schedules, and structure; and help him develop objectivity with respect to P.R.C.'s development.

Varn argues that the evidence shows that he was "the primary parent during much of P.R.C.'s life," and this fact does not support the time restriction. But at trial, there was conflicting evidence whether Varn was the primary parent, and the trial court did not make a finding as to this fact. In any event, such a finding would not obviate the need for this restriction, given this record.

The second challenged restriction was that P.R.C. sleep in her own room at Varn's house unless the case manager recommends otherwise. This restriction was also supported by the trial court's findings which were, in turn, supported by testimony at trial.

In the Memorandum Findings on Trial, the trial court found that Varn was "unwilling or unable to establish boundaries, routines, schedules, and structure," which included P.R.C.'s sleeping routine. At trial, several witnesses' testimony supported this finding. They testified that Varn interfered with P.R.C.'s sleeping schedule by being in the same room as P.R.C. Neha testified that she felt like P.R.C. was not getting enough sleep because Varn would hold her in the middle of the night. Neha went on to explain:

²⁴ Clerk's Papers at 93.

sometimes children have to be soothed to go back to bed, but he would just randomly pick her up. At 2 in the morning, he's holding her. . . . And I felt that the co-sleeping was more disruptive and it wasn't healthy for her because she's not sleeping through the night.^[25]

She also testified that Varn would show P.R.C. videos on the Internet until 1 a.m., which kept her from sleeping. Ganti's testimony corroborated this statement.

Several witnesses also testified to other interruptions of P.R.C.'s sleep. Ganti observed Varn's mom staying in the room while P.R.C. was sleeping. And, though Ganti offered the family a baby monitor to use while P.R.C. slept, she did not see the Chandolas use it. Johnston testified that P.R.C. often seemed "cranky and tired." Dr. Wheeler testified that she would support a restriction that would require that P.R.C. sleep in her own room if the parent trainer supported this restriction.

In contrast, Varn testified that P.R.C. had a difficult time sleeping. He asserts that she would go to sleep around 9 p.m. and then wake up again at 11 p.m., midnight, or 1 a.m. He testified it was his responsibility to help her get back to sleep, and he would use different noises including music from Internet videos to help her sleep.

Given the conflicting testimony of the parties regarding P.R.C.'s sleeping schedule and the testimony of Dr. Wheeler that supported this restriction, the trial court was well within its discretion to require P.R.C. sleep in her own room. This restriction is reasonably related to the identified harm to the child.

²⁵ Report of Proceedings (Feb. 1, 2012) at 411-12.

Varn argues that precluding P.R.C. from sleeping in his room would actually cause more harm to P.R.C. because she has never slept in her own room. But as noted above, this requirement is based on Dr. Wheeler's trial testimony and conditioned on the case manager's recommendation. Moreover, it could be altered depending on the case manager's observations of P.R.C.'s progress. Thus, Varn's argument is not persuasive.

The third challenged restriction limited Varn from having his parents present for more than 20 percent of his time with P.R.C. during stages one and two of the residential schedule. Again, this restriction was supported by the trial court's findings:

Varn's opportunities to parent and to learn from the opportunities must in large part be without the presence of his parents. The court recognizes that there are several cultural aspects to the history of the marriage and these may or may not include the paternal grandparents approach and influence. Or it may be due to Varn being an only child, or likely a combination of both. Whatever the antecedents of the extended family dynamic the so called "team" approach at this time needs to stop. Therefore Varn's residential time must exclude his parents with occasional exceptions which may include [P.R.C.] visiting her grandparents in Tucson consistent with the other provisions of the plan.^[26]

The trial court's findings appear to provide two reasons for the restriction on the involvement of Varn's parents: (1) provide Varn with opportunities to parent, and (2) improve the "family dynamic."

As discussed above, the trial court found that Varn was "unwilling or unable to establish boundaries, routines, schedules, and structure," but he was willing to work on following P.R.C.'s "set schedule for meal times, bed times,

²⁶ Clerk's Papers at 93-94.

wake up times, *etc.*” Ensuring that Varn mostly spends time with P.R.C. alone was a reasonable way to ensure that Varn establishes “boundaries, routines, schedules, and structure” for P.R.C. while still allowing the grandparents to be involved in P.R.C.’s life.

Moreover, Drs. Wheeler and Hedrick both testified that they were concerned about the family dynamic. As noted above, Dr. Wheeler reported that “[P.R.C.] became increasingly aligned with the father and paternal grandparents and relatively less aligned with the mother and maternal grandparents,” which she described as harmful to P.R.C. Dr. Hedrick testified that the data in Dr. Wheeler’s report made her “suspicious that these in-laws and this father had made it very difficult for this mother to have a reasonable relationship with the child.”

Johnston, a neighbor, and , Neha’s mother, testified that Varn and his parents seemed to encourage P.R.C. to choose Varn over Neha.

Again, restricting the amount of time Varn’s parents can spend with Varn and P.R.C. was a reasonable way for the court to change and improve the family dynamic that had developed.

Varn argues that Dr. Wheeler did not identify any problem with P.R.C.’s relationship with Varn’s parents and recommended that Varn and Neha support this relationship. While Dr. Wheeler noted in her report that P.R.C.’s relationship with her grandparents should be supported by her parents, as discussed above, she also explained that the family dynamic that had developed with Varn and his parents was harmful to P.R.C. Thus, this argument is not persuasive.

Varn argues that any effort to undermine Neha and P.R.C.'s relationship is no longer a problem because Neha and Varn live separately. Again, this view is contrary to Dr. Wheeler's recommendation. Thus, this argument fails.

Varn points out that Neha did not request the grandparent restriction. That is irrelevant. The trial court's duty is to determine whether the child's best interests require the imposition of restrictions irrespective of whether a party asks for such restrictions.²⁷ The trial court did so in this case.

In sum, these challenged restrictions were supported by the trial court's findings and were reasonably calculated to address Varn's parenting history, which had an adverse effect on P.R.C.'s best interests. The trial court did not abuse its discretion in imposing these restrictions on Varn in the parenting plan.

UNPROVEN SEXUAL ABUSE ACCUSATIONS

Varn argues that the trial court failed to consider the distorting effects of the unproven sexual abuse accusations. There is no support in the record for this argument.

If sexual abuse accusations are proven, the trial court is "**required** to restrict [a parent's] residential time and to eliminate the mandatory alternative dispute resolution and mutual decision-making provisions of the parenting plan."²⁸ But if the sexual abuse accusations are unproven, the trial court still has **discretion** under RCW 26.09.191(3)(d) to place restrictions or limitations on a

²⁷ See Katare, 175 Wn.2d at 35-36.

²⁸ Watson, 132 Wn. App. at 232 (citing RCW 26.09.191(1)(b), (2)(a)(ii)).

parent if the evidence supports a finding that the parent's "involvement or conduct" has an adverse effect on the child's best interests.²⁹

There is nothing in this record to show that the restrictions here were imposed based on sexual abuse. Rather, they were imposed based on other documented harm to the child's best interests.

Varn primarily relies on In re the Marriage of Watson³⁰ to support his argument. There, Division Two concluded that "the trial court exceeded its authority and abused its discretion in limiting [a father's] visitation after finding that the sexual abuse allegations were unprove[n]."³¹ In that case, the mother obtained a protection order against the father alleging that the father had sexually abused their daughter after a final parenting plan was in place.³² At first the father had no contact with his daughter and then he had two hours of professionally supervised visits for over two years.³³ After finding that the allegations were unproven, the court did not reinstate the parent's original parenting plan but added more restrictions on the father's visitation under RCW 26.09.191(3)(d).³⁴

²⁹ Id.

³⁰ 132 Wn. App. 222, 130 P.3d 915 (2006).

³¹ Watson, 132 Wn. App. at 225.

³² Id. at 226.

³³ Id.

³⁴ Id. at 228.

Division Two acknowledged that the mother did not ask for restrictions under RCW 26.09.191, and thus, the issue was not properly before the court.³⁵ But, Division Two concluded that substantial evidence did not support the trial court's decision to restrict visitation under RCW 26.09.191(3)(d):

The court found that conflict between the parents escalated following the entry of the parenting plan, but there are no findings indicating that [the father] caused the conflict. The court also found that [the daughter] had a subjective perception of sexual abuse and visitation anxiety but not that [the father] caused it.

On the contrary, the evidence shows only that [the father] did the "most parenting he could" under the restrictive conditions available to him. In the absence of substantial evidence establishing a nexus between [the father's] "involvement or conduct" and the impairment of his emotional ties with [the daughter], the trial court erred in imposing visitation restrictions under RCW 26.09.191(3)(d).^[36]

Division Two explained that the sole basis for the requested restriction was the sexual abuse allegations, and most of the litigation focused on whether the sexual abuse actually occurred.³⁷ The record in that case did not support the finding that emotional ties between the father and daughter were absent or impaired, which was required for a restriction under RCW 26.09.191(3)(d).³⁸

In contrast to Watson, here, the trial did not base any part of its decision on whether Neha's accusations or concerns about sexual abuse were proven. Instead, the trial court imposed restrictions on the basis that Varn's "parenting

³⁵ Id. at 233.

³⁶ Id. at 234.

³⁷ Id. at 232-33.

³⁸ Id. at 233-34.

history has had an adverse effect on the child's best interest," which fell under the catch-all provision of RCW 26.09.191(3)(g). Unlike Watson, the trial court expressly found that Varn was an "ineffective parent" for a variety of reasons unrelated to sexual abuse. As discussed above, the trial court's findings are supported by substantial evidence, which in turn support the restrictions and limitations.

Varn argues that the effect of the accusations was that he had nearly one year of supervised visitation with P.R.C. leading up to the trial. He contends that the supervised visitations impacted Dr. Wheeler's observation of Varn, and they did not allow him the opportunity to show the improvements he was making. He argues that the trial court should have "disregarded Varn's marginalized status during the temporary orders . . . [and] looked instead to the situation that existed prior to Neha's accusations." But the trial court's findings demonstrate that it did just that. The trial court looked at the family situation before the temporary order and supervised visitation were in place, and it still found that restrictions were necessary.

Varn also contends that the trial court improperly credited all of P.R.C.'s improvement to Neha's parenting and did not consider that her improvements could be developmental. There simply is no support in the record for this assertion. There is no need to further address this argument.

Finally, Varn argues that RCW 26.09.002 provides that "the 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. This is a correct statement of the

law. But that statute does not overcome the requirements of RCW 26.09.191(3)(g), which control here.

CULTURAL CONSIDERATIONS

Varn argues that the trial court's restrictions regarding co-sleeping and his parents' involvement denied his right to substantive due process and equal protection because the court failed to consider the family's Asian Indian culture. These arguments have no merit.

The Fourteenth Amendment of the United States Constitution protects the freedom of "intimate association," which is derived from substantive due process concepts.³⁹ The United States Supreme Court has recognized that the right to "intimate association" protects "the choices to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State."⁴⁰ These "intimate human relationships" include "the raising and educating of one's children"⁴¹ and "cohabitation with one's relatives."⁴²

Additionally, RCW 26.09.184(3) provides that a "court may consider the cultural heritage and religious beliefs of a child" when establishing a permanent parenting plan. "Moreover, parenting plans are individualized decisions that

³⁹ City of Bremerton v. Widell, 146 Wn.2d 561, 575, 51 P.3d 733 (2002) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)).

⁴⁰ Id. at 576 (quoting Roberts, 468 U.S. at 617-18).

⁴¹ Id. (citing Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)).

⁴² Id. (citing Moore v. City of E. Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)).

depend upon a wide variety of factors, including '**culture**, family history, the emotional stability of the parents and children, finances, and any of the other factors that could bear upon the best interests of the child.'"⁴³

As discussed above, the trial court restricted P.R.C. from sleeping in the same room as Varn and limited the involvement of Varn's parents. Before imposing these restrictions, the trial court appeared to take the family's culture into consideration in establishing the parenting plan. In the Memorandum Findings on Trial, the trial court recognized that "there are several cultural aspects to the history of the marriage and these may or may not include the paternal grandparents approach and influence." The trial court also heard testimony from Varn and Neha that it was customary in Indian culture for parents to sleep with their children and to have grandparents live with them and help provide care.

The trial court did not completely prohibit the paternal grandparents' involvement or co-sleeping with Neha and thus appears to have considered these cultural norms. Instead, the trial court put restrictions on Varn because it found that his approach to these two practices were adverse to P.R.C.'s best interests. As discussed earlier, a parenting plan that complies with the statutory requirements to promote the best interests of the child does not raise an issue of constitutional magnitude or violate a parent's constitutional rights.⁴⁴

⁴³ In re the Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) (emphasis added) (quoting In re the Parentage of Jannot, 110 Wn. App. 16, 19-20, 37 P.3d 1265 (2002)).

⁴⁴ See Katara, 125 Wn. App. at 823.

Varn also argues that the “trial court’s rulings on these issues amounted to national origin discrimination,” which violated Varn’s right to equal protection. But Varn fails to cite any authority to support this assertion or provide any other argument beyond this statement. Thus, we need not address this argument.⁴⁵

ATTORNEY FEES

Varn requests an award of attorney fees and costs. Neha did not request fees. We conclude Varn is not entitled to an award of fees or costs.

RCW 26.09.140 provides for fees on appeal in a dissolution matter. “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 attorneys’ fees in addition to statutory costs.”⁴⁶

We have considered the respective financial declarations that both parties filed and conclude an award of fees is not warranted.

We affirm the parenting plan.

Cox, J.

WE CONCUR:

Speerman, A.J.

Schelding

⁴⁵ See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

⁴⁶ RCW 26.09.140.