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Supreme Court No. 89093-5

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IN THE WASHINGTON SUPREME COURT

In re the Marriage of:

NEHA VYAS,  
Respondent,

v.

MANJUL VARN CHANDOLA,  
Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER M. VARN CHANDOLA

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 ORIGINAL

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## I. INTRODUCTION

The two broad issues in this case are the trial court's imposition of restrictions on Varn Chandola<sup>1</sup> without a sufficient showing of harm, and the court's reliance on the artificial conditions during the year before trial, which were caused by Neha Vyas's unfounded allegations of child sexual abuse. The latter issue has been thoroughly briefed in the following pleadings: Appellant's Opening Brief (AOB) at 35-38; Reply Brief (RB) at 8-9; Amicus Brief of the National Parents Organization (NPO)<sup>2</sup>; and Amicus Memorandum of NPO in Support of Petition for Review.

This brief will focus on the standard of harm required before a judge may impose restrictions on parenting, and the extent to which a court is constrained by the federal due process clause. It will also discuss the need for a court to accommodate, whenever possible, the cultural and ethnic norms of the parent and child. Specifically, Varn asks the Court to apply the following standards:

1. The due process clause generally prohibits a court from interfering with a parent's autonomy in child rearing absent a sufficient showing of harm.

2. In a dissolution, it is often impossible to accommodate the rights of both parents because their preferences are irreconcilable. In that case, the court may properly apply the "best interests of the child" standard.

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<sup>1</sup> In order to avoid confusion, Petitioner will refer to the parties by their first names.

<sup>2</sup> Formerly "Fathers and Families."

3. To the extent the parents agree on some aspect of parenting, or their differing views can both be accommodated, the court may not restrict either parent's choices absent a sufficient showing of harm.

4. The proper standard of harm for imposing restrictions on parenting is the same as the standard for allowing third party custody against a parent's wishes.

5. When deciding whether a practice is harmful, and when crafting restrictions to ameliorate harm, judges must consider the cultural and ethnic norms of the parent and child.

## **II. STATEMENT OF THE CASE**

Varn relies on the statement of the case in the AOB at 4-23.

## **III. ARGUMENT**

### **A. THE DUE PROCESS CLAUSE LIMITS THE POWER OF A JUDGE TO ALTER PARENTING, EVEN IN DIVORCE PROCEEDINGS**

“The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel v. Granville*, 530 U.S. 57, 72-73, 120 S.Ct 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, the Court struck down a Washington statute permitting a judge to order third-party visitation based on the “best interest” of the child without a finding that the parent was unfit or that the child was harmed by the lack of visitation.

During a divorce, however, it is often impossible to accommodate the rights of both parents. “We have long recognized a parent’s right to raise his or her children may be limited in dissolution proceedings because the competing fundamental rights of both parents and the best interests of the child must also be considered.” *Katara v. Katara*, 175 Wn.2d 23, 42, 283 P.3d 546 (2012), *cert. denied*, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013). For example, it is not physically possible for a child to live with each parent most of the time. If both parents request more than half the residential time, a judge must necessarily step in. It is then appropriate to apply Washington’s “best interests of the child” standard.

The same analysis applies to education; generally, a child cannot switch schools every time he moves from one household to the other.

A trial court exercising the power of the state may not usurp the role of the parent and unilaterally compel any particular form of education; however, as the arbiter of custody disputes, the trial court may decide which of the competing plans proffered by the custodial parents is in the best interests of the child, considering the child’s educational needs, and the court may enter a valid, enforceable order in that regard.

*Morgan v. Morgan*, 964 So.2d 24, 31 (Ala.Civ.App. 2007). As a Virginia court put it, the parents’ constitutional rights “settle into oppositional equipoise” when their parenting preferences necessarily conflict. *Hart v.*

*Hart*, 2012 WL 1994978, \*4 (Va.App. 2012).<sup>3</sup> See also, *Yopp v. Hodges*, 43 Va. App. 427, 438-39, 598 S.E.2d 760 (Va. App. 2004).

The Court of Appeals in this case maintained that the due process limitations set out in *Troxel* can never apply in a divorce setting. Unpublished Opinion at 10, citing to Division One's own decision in *In re Marriage of Katare*, 125 Wn. App. 813, 105 P.3d 44 (2004), review denied, 155 Wn.2d 1005, 120 P.3d 577 (2005). It is an overstatement, however, to suggest that constitutional rights regarding child rearing are invariably waived upon the filing of a petition for dissolution. Divorcing parents do not necessarily disagree about every issue. When there is no dispute to resolve, the court has no basis to interfere with a parent's choice simply because the judge thinks there is a better one.<sup>4</sup>

Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child's best interests on a family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the "freedom to decide wrongly."

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<sup>3</sup> In Virginia, although an unpublished opinion has no precedential value, a court may adopt the rationale to the extent it is persuasive. *Fairfax Cnty. Sch. Bd. v. Rose*, 29 Va. App. 32, 39 n. 3, 509 S.E.2d 525, 528 n. 3 (1999) (en banc). Washington courts accept the citation rules of other jurisdictions. GR 14.1.

<sup>4</sup> In *Marriage of King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007), this Court stated that "fundamental constitutional rights are not implicated in a dissolution proceeding." The issue in that case, however, was whether divorcing parents should have a right to counsel at public expense. The due process right to autonomy in child rearing was not at issue.

*Fawzy v. Fawzy*, 199 N.J. 456, 477, 973 A.2d 347 (2009). The State may intervene only “where it is necessary to prevent harm to a child.” *Id.* at 474-75.

The same principle applies when the parents’ differing views on child rearing can both be accommodated without undue harm to the child. *See, e.g., Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996) (father lived with a same-sex partner while mother’s religion prohibited homosexuality; trial court abused its discretion in restricting the father from displaying affection towards his partner in front of the children). On the other hand, the conflict between lifestyles may sometimes be so harmful that a judge must step in. *See, e.g., Marriage of Jensen-Branch*, 78 Wn. App. 482, 899 P.2d 803 (1995) (father’s extreme and frightening religious beliefs, and denigration of the mother’s religious beliefs, justified awarding sole decision-making regarding religion to the mother).

**B. THE APPROPRIATE LEVEL OF HARM REQUIRED TO IMPOSE RESTRICTIONS SHOULD BE THE SAME AS THAT REQUIRED FOR THIRD-PARTY CUSTODY**

The *Troxel* Court found that a “fit” parent had a fundamental right to autonomy in parenting, but expressly declined to decide what level of harm the State must establish to overcome that right. *Troxel*, 530 U.S. at 73-74. In the context of dissolution proceedings, Washington has largely addressed the issue through legislation. RCW 26.09.191 sets out numerous factors that either require or authorize restrictions. Most of them are quite clear and, as discussed below, unquestionably meet

constitutional standards. For example, subsection (1) prohibits mutual decision-making when a parent has engaged in “willful abandonment . . . physical, sexual, or a pattern of emotional abuse of a child,” or serious assaults. Subsection (2) requires limitations on residential time for similar reasons. Subsection (3) authorizes restrictions for a variety of factors which a court *may* find harmful, including neglect of parenting functions, long-term impairment from substance abuse, and withholding the other parent’s access to a child for a protracted period without good cause.

The subsection at issue in this case, however, is open-ended: “Such other factors or conduct as the court expressly finds adverse to the best interests of the child.” RCW 26.09.191(3)(g). Because this provision is so broad there is a significant risk of a judge imposing restrictions based on personal preference rather than on a level of harm meeting constitutional standards.

This Court addressed subsection (3)(g) to some extent in *Katare v. Katare, supra*. It noted that imposing restrictions requires “more than the normal . . . hardships which predictably result from a dissolution of marriage.” *Id.* at 36, 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 which is now covered by the Child Relocation Act, RCW 26.09.405, *et seq.* The *Katare* Court also confirmed that a trial court need not wait for actual damage to a child but may act based on a

“danger” of damage. *Katare*, 175 Wn.2d at 36. The Court had no need in that case, however, to decide the level of harm required to impose restrictions. In *Katare* 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 this case, however, the issue is whether the father’s parenting faults, as perceived by the trial judge, rise to a constitutional level of harm. As noted above, the “best interests of the child” standard cannot apply unless it is impractical to accommodate both parents’ wishes. At the other extreme is the standard for complete termination of parental rights. *See, e.g., In re Welfare of C.B.*, 134 Wn. App. 336, 343-46, 139 P.3d 1119 (2006) (discussing the stringent statutory and constitutional requirements). Varn does not maintain that the restrictions imposed on him require the same level of protection. The most apt analogy is to third-party custody proceedings. In that setting, as here, the court may alter, but not extinguish, a parent’s relationship with his child.

This Court recently addressed the third-party custody standards in *In re the Custody of B.M.H.*, -- Wn.2d --, 315 P.3d 470 (2013).<sup>5</sup>

In parentage and child custody disputes we afford considerable deference to parents as we balance their fundamental right to make decisions concerning the care, custody, and control of their children with the interests of

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<sup>5</sup> In *B.M.H.*, the Court was sharply divided on the standards for de facto parentage, but it appeared to be in agreement regarding the standards for third-party custody.

other parties and the need to ensure stable and safe environments for children. *See In re Custody of Smith*, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion).

*B.M.H.*, 315 P.3d at 475.

Under chapter 26.10 RCW, a third party can petition for child custody, but the State cannot interfere with the liberty interest of parents in the custody of their children unless a parent is unfit or custody with a parent would result in “actual detriment to the child’s growth and development.”

*Id.* “A parent is unfit if he or she cannot meet a child’s basic needs.” *Id.* (citations and internal quotation marks omitted). “[T]he requisite showing required by the nonparent is substantial and a nonparent will be able to meet this substantial standard in only extraordinary circumstances.” *Id.* at 476 (citations and internal quotation marks omitted).

The actual detriment standard has been met, for example, when a deaf child needed a caregiver who could effectively communicate with the child and the father was unable to do so, *see Allen*, 28 Wn. App. at 640-41, 626 P.2d 16, when a suicidal child required extensive therapy and stability at a level the parents could not provide, *see In re Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001), and when a child who had been physically and sexually abused required extensive therapy and stability at a level the parent could not provide, *see In re Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989).

*Id.* “Facts that merely support a finding that nonparental custody is in the ‘best interests of the child’ are insufficient.” *Id.* (citations omitted). In *B.M.H.* itself, the Court found no adequate cause for a third party petition

where the mother allegedly “moved several different men in and out of her home,” causing confusion and disruption to the child. *Id.*, 315 P.3d at 476.

Even when interference with parenting is justified, the remedy must be “narrowly tailored to meet the compelling state interest involved.” *In re Custody of Shields*, 157 Wn.2d 126, 144, 136 P.3d 117 (2006).

Applying the third-party custody standards to parenting plan restrictions should not upset family law practice. In *Marriage of Wicklund*, 84 Wn. App. at 770, 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 standard is quite similar to the one set out in *B.M.H.*

Varn does not dispute that a “danger” of harm may be sufficient to impose restrictions. *Katara*, 175 Wn.2d at 36. This Court should clarify, however, that speculation is not sufficient; if the harm has not already occurred a court must find it probable that the harm will occur.

The bases for restrictions under RCW 26.09.191(1) and (2) will almost invariably meet constitutional standards. For example, when a parent has a history of assaulting his child there is clearly a substantial showing of actual detriment. The factors set out in subsections (3)(a) through (f) are likewise valid reasons on their face for restricting parenting, although there may be dispute in some cases whether the conduct is sufficiently serious. For example, a parent might neglect parenting functions to some extent while still satisfying the child’s basic needs. Under subsection (3)(g), however, courts must first assess whether

the parent's conduct is truly adverse to the child before considering whether it rises to the level of "unfitness" or "actual detriment" as defined in *B.M.H.*

C. WHEN CONTEMPLATING RESTRICTIONS, A COURT SHOULD BE SENSITIVE TO THE CULTURAL AND ETHNIC NORMS OF THE PARENT AND CHILD

As this case demonstrates, the overuse of restrictions may infringe upon the parent's and child's rights to maintain their cultural identity. Here, the trial court prohibited Varn from sleeping in the same room as P.R.C., and strictly limited the amount of time that the paternal grandparents could be present during Varn's already limited residential time with P.R.C. As the undisputed trial testimony showed, it is customary in Indian culture for extended families to raise children together and for children to sleep with adults. *See* AOB at 9. *See also*, Brief of Amicus Curiae Brandy DeOrnellas at 14-18 (discussing importance of extended families in Indian culture); Brief of Amicus Curiae James J. McKenna at 23-26 (discussing importance of co-sleeping in Indian culture).

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

In particular, there is a constitutional right to live as an extended family. In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), the U.S. Supreme Court struck down a law that so tightly defined single-family zoning that it prohibited a grandmother and her grandchildren from living together. The Court noted that it had “‘long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.’” *Id.* at 499, quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974). “It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.” *Id.* at 503-04.

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

*Id.* at 504 (emphasis added).

Decisions concerning child rearing, which *Yoder*<sup>6</sup>, *Meyer*<sup>7</sup>, *Pierce*<sup>8</sup> and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same

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<sup>6</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

<sup>7</sup> *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

<sup>8</sup> *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).

household indeed who may take on major responsibility for the rearing of the children.

*Id.* at 505. “[T]he choice of relatives in this degree of kinship to live together may not lightly be denied by the State.” *Id.* at 505-06.

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

Varn is not suggesting that the trial judge was overtly prejudiced against Indians, but it does appear that he favored a “Seattle”<sup>9</sup> approach to raising children. As our Chief Justice has noted, however, 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). In another recent case involving children of Indian background, the Oregon Court of Appeals noted the importance of preserving their ties to extended family, in part because it would further their “cultural and religious growth.” *Marriage of Maurer*, 245 Or. App. 614, 635, 262 P.3d 1175 (2011).

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<sup>9</sup> In 2010, the average number of people per household in Seattle was only 2.06. It has been declining for many years. *See* <https://www.seattle.gov/dpd/cityplanning/populationdemographics/aboutseattle/population/>.

Among U.S. cities, Seattle has the third-highest rate of people living alone. *See* [http://seattletimes.com/html/localnews/2015304744\\_census13m.html](http://seattletimes.com/html/localnews/2015304744_census13m.html).

In the context of the Indian [Native American] Child Welfare Act (ICWA), the Kansas Supreme Court has recognized the danger of judges imposing their own cultural views on the tribes.

One of the most serious failings of the present system is that Indian children are removed from natural parents by nontribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing.

*In re A.J.S.*, 288 Kan. 429, 436, 204 P.3d 543 (2009). The Court noted that the “ICWA was passed, in part, to curtail state authorities from making child custody determinations based on misconceptions of Indian family life.” *Id.* at 441. An Arizona Justice expressed similar sentiments, again in the context of the ICWA:

Although we are not social scientists, as judges we must be aware of the fact that acts which mean one thing in our culture may have a very different meaning in another culture. What I might see as circumstances implying abandonment may well be culturally-prescribed parental behavior in another social structure. A child left in a grandparent's care for an apparently lengthy period may, in fact, be in a normal period of training for adult tribal responsibility.

*Matter of Duryea*, 115 Ariz. 86, 89, 563 P.2d 885 (1977) (Gordon, J., concurring).

These concerns are heightened when a Washington judge relies on subsection 3(g) because the standard of harm is so vague that it could be based on mere cultural disagreements.

D. WHEN THE PROPER STANDARDS ARE APPLIED, THE RESTRICTIONS ON VARN MUST BE SET ASIDE

1. The Trial Court's Concerns Did Not Rise to a Sufficient Level of Harm to Justify Any Restrictions.

In addition to the grandparent and co-sleeping restrictions, the trial court significantly limited Varn's time with P.R.C. Varn can slowly and marginally increase his residential time only if he complies with several conditions, including abiding "by the mother's bedtime routine" and complying "with any and all recommendations by the child's therapist, the parent trainer, and the case manager." *See* AOB at 22-23. The overall effect is that Varn must parent in a style acceptable to the judge rather than in the manner he sees fit.

In imposing and upholding those restrictions, neither the trial court nor the Court of Appeals applied a meaningful standard of harm. The trial court found only that Varn was "doting but ineffective" as a parent because he did not "establish boundaries, routines, schedules, and structure" and "discouraged exploration and independence." CP 92.

Varn has already addressed why these findings do not rise to a sufficient level of harm. *See* AOB at 27-31; RB at 5-8. In short, even if Varn's approach was not always perfect, he certainly met P.R.C.'s "basic needs," and there was no "actual detriment to the child's growth and development." Notably, the child's long-time pediatrician, Dr. Fukura, testified that P.R.C.'s development was normal in terms of gross motor,

fine motor, social and adaptive behavior. IV RP 542<sup>10</sup>. Thus, there was no “substantial showing” of harm under the *B.M.H.* standards.

The Massachusetts Supreme Court has expressed concern with a judge restricting a parent’s residential time merely because the judge subjectively prefers the other parent’s style.

[T]his case illustrates how subjective value judgments affect a judge’s assessment of the child’s best interests. . . . Beyond the comparison of the day care providers and schedules, the judge was critical of the father because he “does not appear to be overly concerned about [Kali’s] physical needs beyond the basics,” whereas the mother “preoccupies herself with [Kali’s] care regarding clothing, hygiene, doctor’s appointments and childcare providers.” To some, it would be preferable that a parent stay focused on “the basics” and not become “overly concerned” about things beyond those “basics,” and some might think it a disadvantage to have a parent “preoccupie[d]” with the child’s clothes and cleanliness. Even on the issue of medical care, where the judge viewed the mother as “more attuned,” the differences between the two parents reflected justifiably different attitudes.

*In re Custody of Kali*, 439 Mass. 834, 847 n. 13, 792 N.E.2d 635, 644 (2003). In *Kali*, the trial court preferred the “overly concerned” and “preoccupied” approach of the mother, while in this case the judge apparently preferred the opposite. Varn was criticized at trial for being over-protective of P.R.C. and for obsessing over her safety. *See* Brief of Respondent (BOR) at 5-6, 29.

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<sup>10</sup> Dr. 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. RP 533. He saw P.R.C. on at least 20 occasions. RP 523.

Neha argued below that the finding under RCW 26.09.191(3)(g) was for the most part superfluous because the trial court must in any event decide what is best for the child. As discussed above, that exaggerates the trial court's power. The court must *presume* that a parent is acting in the child's best interest unless there is some need to referee a conflict in the divorcing parents' choices.

It is true that decisions concerning residential time generally do not implicate the due process clause because the parents' rights are in "equipoise." Here, however, the trial court expressly stated that Varn's very limited residential time was due to the finding under subsection (3)(g). CP 84. In addition, the Court expressly tied further increases in residential time to Varn's compliance with various measures intended to improve his parenting. CP 81-82.

Further, it can make a big difference to a parent whether he received a minority of the residential time because of .191 restrictions rather than because the judge simply found the schedule to be in the best interests of the child. A finding under .191 can prejudice a parent throughout all future family court hearings in his case, just as a criminal record can forever prejudice a job seeker.

2. Even if a Court Could Properly Apply Some Restrictions Under RCW 26.09.191(3)(g), the Restrictions Imposed by the Trial Court were Improper Because They Ignored Varn's and P.R.C.'s Cultural Norms and Were Not Narrowly Tailored to Address the Perceived Problems

In this case, consistent with Indian culture, both parents believe significant grandparent involvement is beneficial to the child. Neha herself sought the assistance of her mother during the marriage and after separation. III RP 403, 405. Neha never argued at trial that Varn's parents should be restricted from time with their grandchildren. The trial judge decided on his own to restrict P.R.C.'s time with her paternal grandparents solely because he felt that would improve Varn's parenting. Clearly, in this setting, Varn's constitutional right to autonomy in child rearing was not negated by a conflicting right of Neha's.

The Illinois Supreme Court has addressed a similar issue:

[T]he very constitutional principles that required us to strike down the grandparent visitation statute in *Wickham*<sup>11</sup> require that a parent's voluntary visitation decision be honored. If fit parents have a fundamental right to make decisions regarding the care custody and control of their children, as *Wickham* and the cases on which it was based held, they must likewise have the fundamental right to agree to visitation by the children's grandparents if they wish to do so.

*In re M.M.D.*, 213 Ill.2d 105, 115-16, 820 N.E.2d 392, 289 Ill. Dec. 616 (Ill. 2004).

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<sup>11</sup> *Wickham v. Byrne*, 199 Ill.2d 309, 320-22, 263 Ill. Dec. 799, 769 N.E.2d 1 (2002).

Judge Doerty's ruling in this regard was not based on any finding that the paternal grandparents themselves were harmful to P.R.C. By all accounts, they have been a positive influence. For example, parenting evaluator Dr. Wheeler stated that "P.R.C.'s relationships with her maternal and paternal grandparents should be supported by both parents." Trial Ex. 1 at 28. *See also* Amicus Brief of Brandy DeOrnellas at 7-14 (discussing the value to children of grandparent relationships); *In re M.M.D.*, 213 Ill.2d at 115 ("Grandparents often play a uniquely positive role in a child's upbringing. For a parent to permit visitation between the child and the child's grandparents is a time-honored, often cherished aspect of family life.").

Judge Doerty identified only one "harm" from including the grandparents in visitation: Varn might not learn to parent on this own if his parents were always available to help. But that was mere speculation. Neither parenting expert supported the judge's position. Certainly, less restrictive alternatives were available. For example, Varn does not dispute the requirement that he successfully engage in parent training. It would be reasonable for the trial court to require that he attend those sessions without his parents (which was Varn's expectation in any event). In addition, the court's ruling was based on the cultural assumption that there is something wrong with relying on an extended family for help in raising children. As noted above, few Indians feel that way.

The North Dakota Supreme Court has rejected reasoning similar to Judge Doerty's. *Schmidt v. Schmidt*, 660 N.W.2d 196, 2003 ND 55 (N.D.

2003). In that case, the trial court awarded custody to the father despite evidence that he relied heavily on other family members. The Supreme Court affirmed.

We conclude a trial court determining the best interest and welfare of a child in making a custody decision may appropriately consider such things as the child's interaction and interrelationships with a party's extended family and other people, such as childcare providers and others who may significantly affect the child's best interests.

*Id.* at 202-03.

The Iowa Court of Appeals made a similar ruling in a case in which the father was accused of essentially the same faults that Neha attributes to Varn.

Todd harshly criticizes Brian for seeking help from his parents to become an adequate parent to Kole. Todd argues Brian has been propped up by his parents to appear mature and financially stable to the court. Even if true, this fact does not defeat the preference for parental custody. Iowa cases have emphasized parents should remedy their shortcomings to meet their children's best interests, even if they need to have help in doing so.

*Northland v. Starr*, 581 N.W.2d 210, 212-13 (Iowa App. 1998). As the Amicus Brief of NPO points out at 3-5, children do best when *two* parents play a significant role in their lives. Even if Varn has been "propped up" by his parents, the Court should recognize his value to P.R.C.

As with the grandparent restriction, the court's restriction on P.R.C. sleeping in the same room as Varn was not required to resolve an irreconcilable dispute between the parents. Both Varn and Neha approve

of “co-sleeping,” another practice quite common in Indian culture. There is much evidence that the practice is beneficial, although it has been stigmatized in Western culture. *See* McKenna Amicus Brief at 12-23. Neha did object to *Varn* sleeping in the same room as P.R.C., but her only stated reason was that she felt *Varn* picked up P.R.C. too often during the night. There was no showing, however, that *Varn*’s practice was harmful in itself or that there was a need for uniformity. Parents can reasonably disagree on “sleep training.”

In any event, the restriction was not “narrowly tailored” to the perceived problem. Whether or not *Varn* should be prohibited from picking up P.R.C., he could still sleep with her. The trial court’s solution forced *Varn* and P.R.C. to violate the standards of their culture. “Most Indians. . . consider it mistreatment of a child to put her in a separate room or sleeping compartment.” McKenna Amicus Brief at 26 (citation and internal quotation marks omitted).

#### **IV. CONCLUSION**

This Court should adopt the standards set out above for imposing restrictions under RCW 26.09.191(3)(g). It should find that those standards were not met in this case and remand for reconsideration of the parenting plan without any restrictions.

DATED this 29th day of January, 2014.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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Dear Clerk:

Attached for filing in *In Re Marriage of Neba Vyas v. Manjul Varn Chandola*, No. 89093-5, is the Supplemental Brief of Petitioner M. Varn Chandola. Please contact me with any questions. Thank you.

Sincerely,  
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