

NO. 73897-6-I

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

PARENTING OF A.C.
MISTY RAE CURRY

Respondent,

v.

CHANDLER HAAKON CLOUGH

Appellant.

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

The Honorable Susan Amini, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Assignment of Error No. 1: The trial court erred when it ignored the petitioner's parenting plan and entered a Parenting Plan contrary to both petitioner and respondent's requests to the detriment of the child.

Assignment of Error No. 2: The trial court erred in making a domestic violence finding claiming the existence of a history of acts of domestic violence as defined in RCW 26.50.010 (1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm" when such a situation did not exist.

Assignment of Error No. 3: The court made an error when it made a restriction on respondent's residential visitation until he completed a mental health assessment, took domestic violence training and engages in supervised visitation, for a substantial period of time at great expense, which are justified and are not in the best interest of the minor child.

Assignment of Error No. 4: The court erred in making orders based on results of admitted unreasonable actions of Misty Curry, blaming Chandler Clough for the actions of Misty Curry and consequently penalizing the child by depriving it of the love, care and guidance of a father.

Assignment of Error No. 5: The court erred when it made rulings adverse to Chandler Clough, ignored all previous findings made by the

courts which had found Misty Curry lied to the court, was non-compliant with court orders and intentionally took action designed to cause the respondent inconvenience and expense.

Assignment of Error No. 6: It was error to find domestic violence without the right to a jury trial under circumstances where there exists no physical injury, no fear of physical injury and there was no independent domestic violence assessment by the court prior to making a finding of domestic violence and such a finding under these circumstances, absent clear and convincing evidence denies Chandler Clough equal rights and due process under the United States Constitution.

II. ISSUES RELATED TO THE ASSIGNMENT OF ERROR

1. The petitioner mother made a specific request for a parenting plan, did not take the position the respondent father should be prevented from residential visitation, made no claim in filings of domestic abuse and there is absolutely no evidence of abuse or danger to the minor child. The only reason given by the mother for a changed parenting plan on the record was to change Wednesday to Thursday. All the evidence, virtually without exception, was the primary verbal disputes between the parties involving: a) the Wednesday return followed by another pickup on Friday was difficult for the parents and the child and; b) the jealousy of the petitioner as to the petitioner's girlfriend at exchanges made the petitioner

angry. Should the court properly considered making the parenting plan requested by the petitioner and ordered the respondent's fiancé not to be present in any form at an exchange as the appropriate parenting plan as opposed to having made a serious limitation on the residential visitation of the respondent father?

2. The court did not make any specific findings of conduct prohibited by RCW 26.50.010 (1). The court did state on the record her concerns about isolated conduct occurring over the years, some going far back before the birth of the minor and none of which constitute Domestic Violence. None of the conduct mentioned by the court evidence assault or sexual assault or any fear of such conduct. Should the court have found domestic violence and put such a drastic parenting plan in place that denies the minor child the right of the love, care and companionship of her father at the age of three given the evidence does not support an ongoing pattern of conduct constituting domestic violence and petitioner acknowledges that she feels the parents are capable of co-parenting?

3. The court was presented with isolated instances covering years before and very few incidents at the beginning of the process of establishing a parenting plan where the petitioner and the respondent were having arguments about the Wednesday as opposed to a Thursday exchange, jealousy about the girlfriend of respondent and one about

visitation with the paternal grandmother. There was no violence, no fear of violence and no conduct even approaching domestic violence. Should these types of arguments common in any relationship be used to unduly stigmatize a parent with a domestic violence label and unduly restrict a child's right to see her parent and a parents right to see his daughter?

4. The petitioner acknowledged during her testimony that she was having difficulty accepting the idea the respondent was not with her and she acknowledged arguments at exchanges would frequently lead to her attacking respondent's girlfriend with verbal insults, on one admitted occasion calling the respondent's girlfriend a baby killer in front of the minor child. The court then made an extremely vague oral order prohibiting the girlfriend from coming out of the house when Misty Curry went to Chandler's home to pick up A.C. Should the Court punish or restrict the conduct of a person because another person is jealous?

5. The court made a finding of domestic violence. The court cited RCW 26.50.010 (1) using language found in subsection (3). There was no domestic violence assessment made prior to the court trial, although there was prior mediation ordered. Following mediation, a case closure notice was filed by Desiree L. Canter. Petitioner made the decision to then proceed to trial. There was no jury allowed to hear the claims. The findings of the court were findings of violence, or fear of violence. This stigmatizes

Chandler Clough with a label of a person who had engaged in domestic abuse. If someone is going to be found to have committed an act that carries such consequences in our society, they should have the right to have those charges or claims heard before a jury and the standard of proof should, at a minimum be clear and convincing evidence. A person charged with a criminal act of domestic violence involving injury or fear of injury is entitled to a jury trial. A person involved in a custody dispute is similarly situated, yet does not have the same protections. The issue presented is whether a finding of domestic violence without evidence of violence, without evidence of injury or without evidence of fear of violence may be made by a judge without the finding being one made by a jury and whether the finding must comply with the United State Constitutional rights to equal protection and due process.

III. STATEMENT OF THE CASE

The trial involving a parenting plan commenced on June 2, 2015.

The court stated at the commencement of trial, you really have to focus on the issues at hand, “the parenting plan” and “child support.”

Verbatim Report of Proceedings (hereafter referred to as “RP”) 92, lines 21-25. The court restated during the trial, the “parenting plan is the issue.” RP 164.

Misty Curry's request, as to the parenting plan, was stated on the record as well as in the filed pleadings. The statement on the record was:

I would like a parenting plan established because me and Chandler have not been able to get along and come to an agreement on what is best for our daughter. The parenting plan that is in place right now, the temporary parenting plan is, he has her every Wednesday. It's from the morning, but he works, so he usually just comes and gets her when he's off work and it's never been an issue. And then he has her until Thursday morning and then every other weekend. A lot of our conflict happens on that Thursday when it is his weekend because it is an extra pickup an extra drop-off. We've had conflict on that day multiple times from him asking to keep her and me just not wanting to because it is my scheduled day.

The parenting plan that I submitted would be that it would change from Wednesday and then to every other Wednesday... So he doesn't lose any time; I don't gain any time. There is no extra pickup and drop-off, and it's just a better schedule for our daughter so she doesn't bounce around as much.

RP 16-17.

Misty Curry advised the Court that she and Chandler Clough are capable of co-parenting.:

I think we are very capable of co-parenting. I just think we need structure.

RP 22, lines 14-15.

The court did not accept the request of petitioner to simply change the Wednesday custody exchange to Thursday, and the Court did not

consider petitioner's testimony that the parents were "very capable of co-parenting." RP 22.

When discussing the comparison between Chandler Clough's plan and her parenting plan, Misty Curry testified:

Okay. With the parenting plan I submitted Mr. Clough and I did agree on a lot of things. With the holidays, the schedule for the holiday and vacation time ... So this schedule is also beneficial for me for when I do get out of school and begin my career. The schedule would continue to be, I would have her Monday, Tuesday, Wednesday. He would have time with her on Thursday. So it takes off the extra pickup and drop-off day, and every other weekend."

RP 9-24.

The first two years of A.C.'s life, Chandler Clough was employed in California, going to school and he traveled to Washington to see his daughter. RP 231. Ms. Curry likewise traveled to California with A.C. RP 33. Mr. Clough usually called every day more than once. RP 83.

While Chandler Clough was in California and Misty Curry was in Washington State, Clough called every day. RP 83. A few weeks after A.C. was two years old in 2014, Clough left everything he had in California and moved to help raise his child. RP 316.

At trial, Clough testified:

I left my school, my job, my family, my friends, and moved from California to Washington to be here for my daughter in every way and not miss out on any opportunities to spend time with her. I've overcome great hardship to be the best

father – to be the best father possible. I am currently a department manager with Safeway.

RP 316.

There were arguments on occasions after Clough moved from California to Washington, however, nothing physical or violent toward Misty Curry or A.C. Early attempts to institute a parenting plan beneficial to A.C. and to the parents resulted in improper conduct by petitioner. From an order of the court filed on 10-1-2014, the court found Chandler Clough to be an engaged and supportive father despite distance with a residential schedule, and proposed in good faith to further bonding and care for A.C. CP 25-26. The court also found Misty Curry had refused to allow residential time in Chandler Clough's home area and that Misty Curry had not complied with court orders. CP 25-26. The court also found that A.C. was not where the mother reported she was to the Court on September 22, 2014. CP 25-26. Based on this fabrication to the Court, the judge found the mother intransigent and awarded \$1,500 in attorney's fees to Chandler Clough. CP 25-26.

The first argument of significance involved Ms. Curry's boyfriend Mr. Clough learned that a man named Koraphol Alam was living in the house with Ms. Curry and his toddler daughter. RP 33. He wanted to know whom his daughter was living with. RP 98. Clough looked up the name

using a Washington State Patrol website and learned he was a felon with multiple felony convictions, including domestic abuse. RP 98.

There has not been a single incident of domestic violence that has been testified to or otherwise established in the state of Washington as that term is defined.

There are disputed events that Ms. Curry recited at trial, involving claims of events of years past that she testified took place in the state of California. None were confirmed because none existed. No police reports, no medical treatment or care and no witnesses to any claimed improper conduct. Ms. Curry claims she and Clough tussled in early 2012 before A.C. was born. RP 142. Clough testified that he never touched Ms. Curry physically, other than to put his hands up when she tried to slap him. RP 355. Further, there was a claim after A.C. was born that Chandler Clough threw a pizza at Curry and A.C. while they were laying on the bed. RP 21-22. Clough vehemently denied this.

In fact, Ms. Curry's testimony about when they started having problems was as follows:

I found out that you were dating Stacy after your Alaskan trip and that's when we started having problems. I couldn't figure out why you didn't want to be with me, and that was the reason.

RP 82-83.

That issue of problems continued with every girlfriend Chandler Clough has ever had. Initially when in California Curry acted bizarrely with the girlfriend Clough had at the time, Kayla Payton. While she was visiting in California she located Clough's girlfriends clothing and wrote "slut" on her jacket. RP 125. This all occurred when she had A.C. in her custody. RP 125.

Curry testified:

Whenever Chandler does pick up Aria from my house or my grandparent's house, it's usually quick. There's never any confrontation. Every time that I pick up Aria, he always wants to talk. There's always confrontation.

It's never an easy transition. When it's just bringing her out, we usually don't have any issues. When – and Aria is excited. When him and his girlfriend bring Aria out, Aria is usually crying, saying that she doesn't want to come with me.

RP 40.

Incident number 1

According to Misty Curry:

There's been a few incidents where Chandler has refused, regardless of the parenting plan, to give Aria back to me. One incident, I came to his house to *pick her up after my scheduled time*. I got out of school orientation. I hadn't started yet, but I told him I was going to be later because I had orientation. He said that was fine.

I went to pick her up. He refused to give her to me. I called the police to get a report about it. The police told me to go down to the courthouse and file Mr. Clough for contempt.

As I was walking into the courthouse, Mr. Clough, his girlfriend Alex, and our daughter Aria were walking out. Aria saw me and ran to me. I picked her up. And it's in one of the videos that the provided. And he threw a fit in front of the security officers downstairs.

He claimed that I wasn't the mother that Aria came to the courthouse with him.

RP 39.

A contempt hearing took place and the court did not find contempt. RP 38-39.

Chandler Clough filed a motion for contempt and it was ordered the scheduled pickup time be changed from Thursday at 9:00 a.m. to 12:00 p.m. RP 39-40. The 12:00 p.m. pick up time was recommended by Clough following inquiry from the court. RP 39-40. The scheduled time was changed due to Misty Curry consistently being late for her 9:00 AM exchange. RP 39-40. Contempt was not found. RP 40.

Incident number 2

Misty Curry testified:

Another incident that Chandler had provided, it was one of my scheduled pickup days. I was at his house waiting and he had told me that they were at the park right down the street from his house. So I said, okay. I'll be there. And I got there early. And he said, okay, we'll be out there at 12:00. And I said, okay, that's fine.

His girlfriend served me some papers and then a few minutes later, he came down to my car and said, 'Aria is feeding the ducks. Why don't you come and get her?'

And I said 'No. Just bring her to my car. I have an appointment. I need to leave.' And he said, 'No. She's feeding the ducks. You can come and get her,' and walked away or skateboarded away

Me and his girlfriend got into an argument. ...
It's just – it's never an easy pickup with him. I don't know why. There is always confrontation.

RP 41.

Incident number 3

Misty Curry received a text from Clough's mother who was to be in town on Misty Curry's weekend. RP 69. She wanted to visit her granddaughter. Clough and Curry were talking about changing days that would work for both of them. RP 1-10.

Misty Curry testified:

I did verbally tell you [Chandler] that you guys can have those days. I then later texted you guys saying, I am willing to switch weekends, but I'm not willing to lose time with my daughter."

RP 71.

Chandler Clough testified he was late paying his telephone bill and never got the text. RP 312. Paula Peterson, [Paternal Grandmother] testified: "...she agreed to let us have Aria for two extra hours. We had to have her back by 12:00. And then she agreed that she would swap Friday and Saturday with Chandler." RP 273. On the day A.C.'s paternal

grandmother was to visit with her, Misty took A.C. to her grandparents earlier. RP 311. A verbal dispute happened after that at the grandfather's house.

After a three-day trial, Judge Susan Amini imposed a restricted residential visitation plan. CP 94-105. The Parenting Plan states:

The father's residential time with the child shall be limited or restrained completely...because this parent has engaged in the conduct which follows: A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

CP 95.

The judge justified this decision by saying, "the abusive use of conflict by the parent, which creates the danger of serious damage to the child's psychological development." CP 95.

IV. ARGUMENT

1. STANDARD OF REVIEW

A trial court's parenting plan is reviewed for an abuse of discretion, which "occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (citing In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). The trial court's findings of fact are treated as verities on appeal, so long as they are supported by substantial

evidence. Id. “Substantial evidence” is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. Id.

While a parenting plan is reviewed for abuse of discretion, the trial court's discretion is cabined by several provisions in chapter 26.09 RCW, including the catchall provision at issue in this case: RCW 26.09.191(3)(g). RCW 26.09.191(3) bars the trial court from "preclud[ing] or limit[ing] any provisions of the parenting plan" (i.e., restricting parental conduct) unless the evidence shows that “[a] parent's ... conduct may have an adverse effect on the child's best interests.” In re Marriage of Chandola, 327 P.3d 644, 180 Wn.2d 632 (2014).

Here, there was an abuse of discretion when the trial court imposed an overly restrictive parenting plan sua sponte and without the request of either party. Further, there was an abuse of direction because the Court could not find, based on the record, that Mr. Clough’s conduct would have an adverse effect on the child. Finally, the Court erred in finding that Mr. Clough engaged in a history of acts of domestic violence which caused Ms. Curry grievous bodily or fear or such harm.

2. THE PARENTAL PLAN REQUESTED BY THE PARTIES SHOULD HAVE BEEN IMPOSED

Neither parent in this case were not looking for the court to intervene by imposing domestic violence conditions on Mr. Clough or for that matter

Ms. Curry. Rather than apply the request of Misty Curry to change the exchange date from Wednesday to Thursday and allow co-parenting as requested, the court imposed domestic violence conditions on Mr. Clough based on isolated, disputed claims that were not supported by any witnesses, medical records, or police reports and were not even mentioned until court hearings on a petition that had been filed almost a year earlier. *See* RP 22. They were not established by substantial evidence. It is also noteworthy these claims were not made until after Ms. Curry had been sanctioned for improper manipulative conduct by the court.

The court imposed a Domestic violence condition on Chandler Clough under RCW 26.50.010 (1) and recited physical violence or sexual assault as the basis. There was no situation which fit the definition of physical violence set forth in section (3) introduced into evidence.

Domestic Violence is defined under RCW 26.50.010 (3) as follows:

Domestic Violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

There was never even a hint of sexual assault and the only support of a physical assault without injury or claims of fear of injury came from

Curry, with no corroboration. Ms. Curry could not provide any medical, police or witness evidence supporting the claims. None existed.

In 1999, the Ninth Circuit Court of Appeal put it most succinctly:

The government interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents. Calabretta V. Floyd, 189 F.3d 808 (1999).

There were disputes over child exchanges, child sleep patterns, medical care, family visitations, persons living in the home with A.C. who had felony convictions including domestic abuse and disputes arising from jealousy by ex-significant others. There was nothing presented that rose to the level of activity beyond exercising the privacy and dignity of a father and mother raising a child in separate households.

This case is not a situation where one parent is pitted against the other and seeks to restrict, deny or limit the other party from visitation. Yet, the court made its ruling as though such were the case. This is a case where both parties agree that co-parenting is something that both parties are very capable of doing. RP 22. Both parties simply want structure in residential visitation and exchanges. Clough wanted to reduce the number of exchanges that were a result of Curry schedule.

Despite this agreement of principle between the parties the court imposed strict conditions of a domestic violence offender on Clough based

on the barest of evidence that appears to have been made based upon gender, instead of facts and ignored the conduct of Ms. Curry.

The reality here is Ms. Curry admitted jealousy. RP 82, 83. She did not deny acting with an explosive temper. Id.

The judge focused on the selfish acts by both parties, but only restricted Mr. Clough's residential time with his daughter. Judge Amini commented from the bench, "You both have put a lot of stress on this child, and all I can tell you is that it's been for selfish reasons; selfish reasons. All right." RP 446. There is no evidence to demonstrate Mr. Clough did anything for selfish reasons, quite the contrary, nothing of significance was done to monitor or regulate the conduct of Ms. Curry by the court. This is not to say anything should have been done other than change Wednesday exchange to Thursday and perhaps restrict conduct upon exchange, however, given the facts introduced into evidence and the observations of the judge from the bench it appears the order denying Mr. Clough residential visitation is not only unnecessary, but nothing more than gender based.

3. UNDER THE CIRCUMSTANCES INVOLVED IN THIS CASE, IT IS A VIOLATION OF EQUAL PROTECTION AND DUE PROCESS NOT TO ALLOW A TRIAL BY JURY ON THE ISSUE OF DOMESTIC VIOLENCE

The fundamental liberty interest of natural parents in the care, custody and management of their child is protected by the Fourteenth

Amendment and termination of parental rights is governed by the clear and convincing standard of evidence. Santosky v. Kramer, 455 U.S. 745 (1982).

Obviously, the Santosky case, is a permanent termination of parental rights case, however, no difference should be applied. Importantly, a three-year-old is in the middle of the time period when her morals and personality are formed. To take away that period from a parent requires a consideration that involves clear and convincing evidence to justify tearing the child away from a parent even temporarily.

In this case the order prohibits residential visitation altogether until substantial time passes and funds are spent to complete classes and hire independent supervisors.

The supervised visitation with A.C. by Chandler Clough requirements are totally unwarranted. They are punitive and serve no purpose. Virtually every witness, even adverse witnesses opined Chandler was a good father. For example, even Korophal Alam testified when asked whether or not Chandler Clough was a good father to A.C. “yeah, you are a great father to Aria. I give you that.” RP 141. The record is clear that petitioner has no fear whatsoever of danger to A.C. from her father.

The basis of the court restriction was highly disputed testimonial evidence which contradicted the testimony of multiple witnesses in the case.

This is not a situation where the court will find clear and convincing evidence to justify the restrictions imposed.

A criminal faced with exactly the same charge of domestic violence as decided in this case would be entitled to a jury determination. Here there was no independent determination based on any credible evidence.

The Court could have required a domestic violence assessment to determine the accuracy of the disputed claims made belatedly by Curry prior to the court hearing. Here, the non-criminally charged individual is vested with less due process rights than a criminally charged individual.

The loser in all of this is the child, A.C., who lost her right to the care, comfort and guidance of her father. To date, the child has lost over 180 days of her father's love, care, and guidance.

The only hearings undertaken prior to trial found petitioner intentionally manipulating the court to delay and deny residential visitation. The court awarded Chandler attorney fees because of this. The court also found that the proposed parenting plan presented by Chandler was in good faith, and that he was an active and involved father despite distance. Yet, all evidence supporting Chandler Clough presented by both sides to the dispute was disregarded by the trial court.

In light of the evidence in this case it is requested the court strike the allegation of domestic abuse against Chandler Clough, allow Chandler

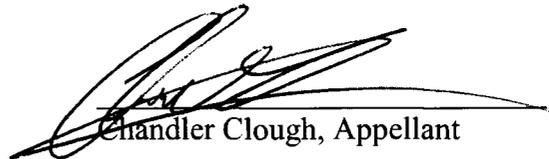
Clough to begin residential visitation with his daughter forthwith or alternatively remand the matter for an independent domestic violence evaluation. It is further requested the trial court be required to consider the parenting plan petition of Misty Curry changing the exchange day from Wednesday to Thursday.

V. CONCLUSION

Appellant respectfully submits that the parenting plan order be reversed and remanded for insufficient evidence of domestic violence or that Mr. Clough's contact with his daughter would have an adverse effect on the child's best interests.

DATED this 25th day of January, 2016.

Respectfully Submitted,


Chandler Clough, Appellant

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DIVISION I

CHANDLER CLOUGH,

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PARENTING OF A.C.
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Respondent.

No. 73897-6-I

CERTIFICATE OF SERVICE

CERTIFICATE

I certify that I mailed a copy of APPELLANT'S OPENING BRIEF to MISTY CURRY, 15817 130th Pl. S.E., Renton WA 98058 on February 1, 2016 by United States Postal Service Mail, certified mailing.

DATED this 1 day of February, 2016.

Respectfully submitted,


Appellant Chandler Clough

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