

COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14 th Avenue Denver, Colorado 80203 Telephone: (303) 837-3785	
Appellant: SEAN HARRINGTON and Appellee: CHRISTY RYAN	
Sean Harrington 197M Boston Post Road, West Suite #151 Marlborough, MA 01752	↑ COURT USE ONLY ↑ Case Number: 03CA1825
APPEAL FROM THE DISTRICT COURT, JEFFERSON COUNTY, STATE OF COLORADO Trial Court Case No.: 99DR3717, Division 3, Judge Jane A. Tidball presiding Party Initiating Appeal: Sean Harrington (Respondent)	
APPELLANT’S MOTION FOR INTERLOCUTORY LIMITED REMAND	

The Appellant, Sean Harrington, moves this honourable court, by way of the within interlocutory motion, for an Order granting a limited remand for the purpose of enforcing specific terms, relating to parenting time only, of the contract (Stipulated Agreement) that exists between Harrington and the opposing party, Christy Ryan. As grounds, the Appellant states:

1. The Petitioner, Sean Harrington, hereby certifies that the font and spacing of the within brief is 12-point Times New Roman and double, respectively, as required by C.R.C.P. 10 §(d)(2) (II) and §(d)(3)(III) and there are no more than 26 lines per page, as per C.A.R. §(a)(5).

2. All matters complained of, herein, are properly before the trial court and are now within the scope of jurisdiction of the appellate action initiated by Harrington in his Notice of Appeal. The court should take Judicial Notice of the Appellant's Designation of Record and Supplement to Designation of Record, which document that all exhibits and supporting documentation supplied with the within interlocutory motion are also part of the record on appeal that is presently being prepared by the trial court clerk. No new evidence or new issues are being presented to this Appeals Court as part of the instant motion.

3. This matter is an appeal in a domestic relations case, from an July 2nd, 2003 order entered by the District Court and post trial motions relating to the exercising of parenting time that had been established by means of a Stipulated Agreement that had been sanctioned by the same court on November 6th, 2001, *inter alia*.

4. At the heart of the July 2nd order, the parenting time provision of the Stipulated Agreement had been severed in its entirety, pending further order of the district court or agreement of the parties. That order is but one of the subjects of the appeal.

5. The trial court's subject matter jurisdiction over the terms of the parties' Stipulated Agreement is not unlimited: Unless otherwise granted jurisdiction by the parties that entered into the agreement, which was subsequently sanctioned by the trial court, the trial court lacks subject matter jurisdiction to nullify or modify their contract (See generally, *In re Marriage of Udis*, 780 P.2d 499 (Colo. 1989) (holding that a trial court may modify provisions of a maintenance agreement only if the agreement is silent on a subject or if the parties specifically reserve

such power to the court)). In the instant case, the trial court asserted jurisdiction by invoking the Endangerment Standard in its findings of fact at the request of the opposing party, Ryan. The trial court did not, however, support its findings with any conclusions of law.

6. The effect of the trial court in suspending parenting time was to essentially and permanently void the contract between Harrington and Ryan. Ryan, herself, has long attempted to nullify the contract, because she has already derived her maximum benefit from it (Harrington has already dropped his previous appeal and civil suit against her as part of that agreement) and there is no further incentive for Ryan to adhere to the ongoing terms of the agreement.
7. The trial court's reasoning in invoking Colorado's Endangerment Standard (C.R.S. 14-10-129.4) was based on the findings of fact (but no conclusions of law), which are found in the transcript on pp. 113[line 14] ~ 117 [line 19]. Only those findings that are applicable to the issues of the instant motion for limited remand, and arguments as to each, are individually enumerated and argued in the **Addendum I**, attached hereto and made part hereof by reference.
8. As a result of the order of the trial court, Harrington and his daughter have gone from regular parenting time (travel and overnights), three to five phone calls per week (sometimes nightly) and weekly mailings to absolutely no contact in the past four months. This abrupt end of vital parental relations is traumatic and emotionally devastating to this child. (See In re Lester, 791 P.2d 1244 (Colo. App. 1990) (holding that significantly restricting father's access to his children in relation to his existing relationship to them was an abuse of discretion)).

9. The trial court recognized that its findings, irrespective of whether they were biased or erroneous, related to grey area –the trial court referred to the matter as being, “a close question.”¹ The trial court also regarded these alleged matters as being reversible or correctable, for it held out to Harrington the opportunity to, “over the next few weeks, locate a therapist, obtain a place to live with another bedroom ... [and to] provide information in an acceptable and admissible form to the Court regarding your treatment by a psychiatrist and the fact that you are taking medication prescribed on a regular basis. If all those things were done, I would like to have Shelby go back and spend another couple weeks with her father” and, “...what I would like to see happen is, Mr. Harrington, if you can get those items put in place, I would like to see Shelby be able to come back and spend another period of time with you.”²

10. Because the matters complained of by Ryan were found by the trial court to be correctable and temporary, they do not indefinitely invoke the Endangerment Standard, even if those complaints were credible or established with the clear and convincing evidence of Santosky,³ and were not a

¹ Transcript of proceedings, p. 115 [line 2 ~ 3]

² See the transcript of the proceedings at pp. 117 [line 20] through 118 [line 20]

³ Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that the clear and convincing evidence standard, articulated by the Due Process test of Mathews v. Elridge must be used when determining severance of parental rights). Santosky applies to the instant case because, because “[t]he children’s code does not, by its language, clearly recognize the substantial difference between deprivation of parental custody and termination of parental rights in dependency and neglect actions.” People in Interest of K.S., 33 Colo. App. 72, 515 P.2d 130 (1973). In contrast, in People in Interest of R.W. and T.W., 989 P.2d 240 (Colo. 1999) the court found that a preponderance of the evidence was sufficient for dependency and neglect proceedings to sever a majority of parental rights, including “visitation,” if but one parental right (such as the right to motion the court to reconsider its order and allow future visitation) remains undisturbed. The marked difference between R.W. and T.W. and the instant case is that the child[ren] was found to have been abused and neglected, as evidenced by testimony from D.H.S. Further, the mother had been convicted of drug possession and other charges and had served considerable (cont.)

subject of an appeal. These complaints, therefore, do not give Ryan or the trial court the grounds to permanently vacate, void or nullify the contract between Harrington and Ryan. The contract is enforceable and Harrington is entitled as a matter of law to require enforcement of the terms of the contract as provided by the Equal Protection Clause of the Fourteenth Amendment: *A law that is administered so as to unjustly discriminate between persons similarly situated may deny equal protection.* Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984) (citing, Yick Wo v. Hopkins, *supra*; Kuzinick v. County of Santa Clara, 684 F.2d 1345 (9th Cir. 1983)) [*a*] *pro se litigant in a civil court must be given an equity of arms or he will be denied any effective opportunity to vindicate his rights in court.*” Degan v. United States, 517 U.S. 820 (1996). Citing Julie M. Bradlow, Procedural Due Process Rights of Pro Se Litigants, 55 U. Chi. L. Rev. 659 (1988) (internal quotes omitted).

11. The trial court clearly did not consider Ryan’s complaints to have long-term invocation of the endangerment standard because the trial court stated on p. 120 of the transcript at line 18, “I’m going to put in, ‘further order of the court or agreement of the parties.’ I’m going to write that

(cont. from prev. page’s footnote) time in jail. In the instant case, Harrington is not a criminal and his alleged mental illness is not a crime (See, generally, Robinson v. California, 370 U.S. 660 (1962) and 353 F.2d at 11 n.1). Further, mental illness is not a basis for termination of parental rights (See, e.g., People in Interest of C.B., 740 P.2d 11 (Colo. 1987), Custody of a Minor, 378 Mass. 712, 722 (1979) (holding that trial judge erroneously relied upon mental disorder as basis for adjudicating a parent as unfit)) and mental health proceedings and determinations, themselves, are special statutory proceedings and do require the clear and convincing standard (see the arguments in Paragraph 1 of Addendum I, incorporated by reference herein). Therefore, the trial court appears to have found that not taking the child to a weekly therapist during a nine-week stay in Minnesota qualifies for the Endangerment Standard (beyond the Best Interests standard), a finding, which is not well supported by any case law.

in.” Consequently, the last sentence of the order now reads, “The father shall have no parenting time until further order of this court, *or agreement of the parties.*” If the trial court felt that the child was subject to a continuing and imminent physical or emotional danger as a result of parental contact, it would not have surrendered authority to the parents to jointly decide the matter *sua sponte*. Harrington, states, however, that, because the mother has historically been opposed to any form of parental contact in contravention of well settled law (see, e.g., Lester, supra, “...discretion must ... be exercised consistently with the express public policy of encouraging contact between each parent and the children”), Harrington’s parenting time should not be dependent on Ryan’s approval, which he states will never happen and Harrington’s parenting time should not be indefinitely delayed until the particulars of a fair trial, due process and other matters are reviewed and adjudicated by the appellate process, which will take many more months. Harrington therefore seeks an interlocutory, injunctive order by this Court of Appeals (if necessary, in the nature of prohibition or mandamus, within original jurisdiction), to forthwith restore parental contact, including phone calls, mail and normal, unsupervised parenting time during the holiday season and spring break, pursuant to the Stipulated Agreement and recommendation of the Special Advocate.

12. Harrington states that, for the benefit of his daughter, parenting time, including restoration of unlimited phone contact and the holiday visitation schedule set forth in the Agreement should be immediately restored and only those “suggestions,”⁴ set forth by the trial court as quoted in Paragraph 7, *supra*, that are not outside of the court’s discretion, subject matter jurisdiction or

⁴ Transcript of proceedings p. 118 at line 20: “So, I’m going to suggest that you try to put those measures in place.”

otherwise in clear contravention of statutory or case law, should be satisfied. The only items that the trial court asked for that may have been within its discretion are:

- a. A place to live with more than one bedroom during times when the child is out of state with the father.
- b. A weekly therapist for any extended periods of parenting time while the child is in the State of Massachusetts (or out of the State of Colorado). *This provision would not apply for the upcoming holidays or spring break, which are not extended periods, as defined by the Stipulated Agreement.*

The third item, relating to medication and psychiatric treatment, however, was not within the authority of the trial court to require this of Harrington as a condition of exercising parenting time. Tidball's "suggestion" (which was substantively an *order* or provision requiring compliance for any future possibility of parenting time) with regard to medication and treatment is not only based on no case or statutory laws and unsubstantiated by her own findings of fact or expert witness testimony, but is an impermissible attempt to compel Harrington to barter one fundamental right (parenting time) with another (the right to refuse anti-psychotic medication). The Colorado Supreme Court has described such a choice as creating "*an intolerable tension between two constitutional rights.*" People v. Chavez, 621 P.2d 1362, 1365 (Colo. 1981). These two are both fundamental rights [of constitutional dimensions] because, as is well settled, The Ninth Amendment acknowledged the prior existence of fundamental rights with it: "*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,*" and it has also been held that protected liberty and property interests may be created and defined not only by the Constitution itself, but also by Federal and State statutes and rules, or by contract, Board of Regents V. Roth, 406 U. S. 564, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972), Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42L. Ed. 2d 725 (1975); People v. Chavez, 629 P.2d 1040 (Colo. 1981); Anderson v. State Department of

Personnel, 756 P.2d 969 (Colo. 1988). As an example, the father's right to make decisions regarding the care, custody, and management of his children's lives is a fundamental liberty interest of *constitutional dimensions*. See Santosky v. Kramer, 455 U.S. 745, 753 (1982).

This dilemma of choosing between two fundamental or constitutional rights is not new to the courts: See *e.g.*, Simmons v. United States, 390 U.S. 377, 394 (1968) (holding that defendant cannot be required to choose between the right to remain silent and the right to be free from unlawful searches and seizures, arising from damaging admissions that may be made in support of a motion to suppress); Harris v. New York, 401 U.S. 222, 225 (1971) (holding that an attorney's threat forced his client to choose between two constitutional rights - "*the right to testify in one's own behalf and the right to effective assistance of counsel, and infringed both*" 744 F.2d at 1330); State ex rel. Wright v. Yawn, 320 So. 2d 880, 882 (Fla. 1s DCA 1975) (holding that it has long been a rule of law that the State, "*Cannot force a defendant to choose between two coequal rights.*" See also Shapiro v. Thompson (1969) 394 U.S. 618 [89 S.Ct. 1322, 22 L.Ed.2d 600]; United States v. Jackson (1968) 390 U.S. 570 [88 S.Ct. 1209, 20 L.Ed.2d 138]; Aptheker v. Secretary of State (1964) 378 U.S. 500 [84 S.Ct. 1659, 12 L.Ed.2d 992]). In McGautha v. California, 402 U.S. 183, 213 (1971), the U.S. Supreme Court recognized that:

“...[T]he legal system is replete with situations requiring ‘the making of difficult judgments’ as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. * * * /21/

By this standard, if Harrington is required to make a choice between (a) his right to refuse anti-psychotic medication or psychiatric treatment (and to retain state intervention-free control over his own personal mental health care); and (b) the right to enjoy meaningful (or any) parenting time and the right to raise his child, then a choice of one or the other does substantial damage to the policies behind the right that he must forfeit as a result of the choice.

WHEREFORE, the Appellant prays that the Appeals Court will grant the within interlocutory motion for limited remand and, by its own order, restore parenting time as set forth in the Stipulated Agreement and as recommended in the Report of the Special Advocate, requiring of Harrington only that he obtain a two bedroom home for any extended parenting time that the child may have with him while out of the State of Colorado, as more fully set forth above.

Respectfully submitted this 30th day of October, 2003,

Appellant

CERTIFICATE OF MAILING

I hereby certify that I did place, in the United States Mail, postage prepaid this _____ day of _____, 2003, a true and correct copy of the foregoing instrument addressed hereto:

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