COURT OF APPEALS NO. 44546-8-II

PIERCE COUNTY SUPERIOR COURT NO. 12-5-00863-5

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

In Re the Parentage of A.MC.

GREGORIO J MERINO GONZALEZ,

Appellant,

V.

SOCORRO CONTERRAS SALDIVAR

Respondent.

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

The Honorable Frank Cuthbertson, Judge

APPELLANT'S REPLY BRIEF

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A ARGUMENT

1. IT WAS AN ABUSE OF DISCRETION TO FIND THAT GENETIC TESTING WAS NOT IN THE BEST INTERESTS OF THE CHILD

In Respondent's brief, the State focuses solely on the issue of financial support for the child, and completely ignores the child's fundamental right to a correct determination of his/her parentage and relationship interests that flow there from; financial interests are only one concern. Respondent/State completely ignores the lifelong and psychologically damaging impact the trial court's decision will have on A.M.C. given the fact that there is no bond or relationship between Appellant and the child. Even the mother of A.M.C does not support the State's position in this case.

Abuse of discretion has been defined as follows "Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." State ex. Rel. Campbell v. Cook, 86 Wn.App. 761, 766, 938 P.2d 345,___(1997),

citing, Lindgren v. Lindgren, 58 Wn.App. 588, 595, 794 P.2d 526 (1990).

In Campbell, the appellant, Cook, sought reversal of the trial court's denial of his request to reopen a 16-year-old judgment declaring appellant to be the father of D.J.C. Campbell at 761. In affirming the trial court's decision to deny appellant's motion to vacate the adjudication of paternity, the Court of Appeals, Div II, determined that nine years was not a reasonable time within to have brought a motion to vacate paternity with the child, D.J.C. who was then 15 years of age. Id. at 767 In further support of its decision to affirm the trial court's decision, the Court of Appeals noted that the appointed Guardian ad Litem (GAL) concluded that vacating the original paternity order would "eliminate what little identity D.J.C. already possesses, and that the risk to D.J.C. outweighed any potential benefits for Cook." Id.

There is no comparison between the facts in Campbell and the case at bar, and the court's denial of genetic testing for A.M.C. was a clear abuse of discretion. It is undisputed that Appellant separated from the mother when A.M.C. was only three months old. [CP 46-48] After their separation, Appellant would, according to the mother, visit with her approximately either every week or every two weeks until around the end of October 2012. There is no

indication that Appellant's purpose in those visits was to spend time with A.M.C., and the record does not indicate that he continued a relationship with A.M.C. Appellant did admit, though, that he helped mother buy diapers and formula. [CP 47,48]

The burden of proof for denying a motion seeking an order for genetic testing is not a mere preponderance of the evidence; instead, it must be based on clear and convincing evidence that genetic testing is not in the child's best interests. RCW 26.26.535(4) There are 9 factors that must be weighed when making that determination and they are as follows:

> (a) the length of time between the proceeding to adjudicate parentage and the time that the presumed father was placed on notice that he might not be the genetic father;
> (b) the length of time during which the presumed father has assumed the role of father of the child;
> (c) the facts surrounding the presumed father's discovery of his possible non-paternity;
> (d) the nature of the father-child relationship;
> (e) the age of the child;
> (f) the harm to the child that may result if presumed paternity is successfully disproved;
> (g) the relationship of the child to any alleged father;
> (h) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child support obligation in favor of the child; and
> (i) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child.
>
> RCW 26.26.535(2)(a)-(i).

Upon reviewing the interests of the parties, the Washington State Supreme Court has found that it is the child that has the most at stake in a paternity proceeding. State v. Santos, 104 Wn.2d. 143, 143, 702 P.2d 1179 (1985). When viewed in light of the factors that the court must consider under RCW 26.26.535(2), none of the facts in this case support the court's denial of having genetic testing performed. The child was only three months old when Appellant ceased having a parental relationship with A.M.C., and it was only a few months later when Appellant sought genetic testing. There is no Parent-Child bond between Appellant an A.M.C., which is what the trier of fact is to focus on when reviewing RCW 26.26.535(2)(a)-(i).

2. THE COURT'S DECISION WAS CONTRARY TO THE BEST INTERESTS OF THE CHILD AND GENETIC TESTING SHOULD BE PERFORMED

A.M.C. was born on November 8, 2011, and both Appellant and mother signed the paternity affidavit on November 17, 2011. [CP 41, 46] The GAL report notes that the filing date of the birth certificate was November 16, 2011, which the GAL presumed noted the filing date of the paternity affidavit. [CP 41] Whatever errors may have occurred, the State's response to the Petition to rescind indicates that the Paternity Acknowledgement was filed

January , 3, 2012, but the birth certificate shows a filing date of 11/16/2011; both dates are inconsistent with each other. [CP 50, 63]

The dates Appellant and mother give for when they separated are not consistent either. Appellant reports that the mother moved out of his apartment at the end of February 2012, [CP 47], while the mother reports that they stopped living together in March or April of 2012. [CP 39] The GAL report, however, makes clear that Appellant had difficulty being accurate with dates, and the GAL's communication with Appellant had to be through an interpreter. [CP 43, 46] Whatever the situation was regarding the time of their separation, it does not appear that Appellant was within the 60 day time frame of RCW 26.26.330(a) to rescind the paternity affidavit. If there was in fact time, given his limited English skills, Appellant certainly was not aware of any time limitations to rescind.

If more than sixty days have passed since the effective date of a paternity acknowledgement, there are still provisions for rescinding, which are as follows:

> (1) After the period for rescission under RCW 26.26.330 has expired, a signatory of an acknowledgment or denial of paternity may commence a proceeding to challenge the acknowledgment or denial only:
>
> (a) On the basis of fraud, duress, or material mistake of fact; and

(b) Within four years after the acknowledgment or denial is filed with the state registrar of vital statistics. In actions commenced more than two years after the birth of the child, the child must be made a party to the action.

(2) A party challenging an acknowledgment or denial of paternity has the burden of proof.

RCW 26.26.335

The authority to deny genetic testing, though, is subject to the provisions provided in RCW 26.26.535, which provides, in part, as follows:

(1) In a proceeding to adjudicate parentage under circumstances described in RCW 26.26.530 or in RCW 26.26.540, a court may deny a motion seeking an order for genetic testing of the mother or father, the child, and the presumed or acknowledged father if the court determines that:

(a)(i) The conduct of the mother or father or the presumed or acknowledged parent estops that party from denying parentage; and
(ii) It would be inequitable to disprove the parent-child relationship between the child and the presumed or acknowledged parent; or
(b) The child was conceived through assisted reproduction. . . .

RCW 26.26.535(1)

In their reply brief, the State cites to In re K.R.P., 160 Wn.App. 215, 223, 247 P.3rd 491 (2011), to support their argument that the court exercised appropriate discretion in denying genetic testing in the case at bar.

The primary issue in K.R.P. was whether the trial court correctly denied the appellant's properly supported motion for genetic testing pursuant to RCW 26.26.405. In re K.R.P. 160 Wn.App. at 218 In K.R.P., the mother was engaged in extra marital relations with the appellant, Mark, but she told both her husband and Mark that the two children she gave birth to subsequent to her relationship with Mark were her husband's children; K.R.P. was born in September 1995 and K.H.R.P. was born in May 1998. Both men played significant roles in the children's lives from their birth, and the children referred to both men as "dad." K.R.P at 219. Later, in 2005, the presumed father, Tim, petitioned for dissolution of his marriage to the mother. A decree, support order and final parenting plan were entered in June 2006 with Tim being designated as the obligor parent. Id. at 220

In November 2007, Mark commenced an action to establish his parentage of K.R.P. and K.H.R.P. A GAL was appointed who later recommended against genetic testing stated that he/she was of the opinion that it would not be in the children's best interests. Id. Subsequent to the GAL's recommendation against genetic testing, both Mark and the mother, pursuant to RCW 26.26.405-630, moved for an order requiring genetic testing. Id. at 220-223 The court addressed the applicability of RCW 26.26.530-535 to K.R.P.

and determined that it did not apply to that case because, at the time, RCW 26.26.530 only applied to **presumed fathers**. K.R.P. at 225-26 The statute, however, has since been amended/modified to include situations where there is an **acknowledged father** like the facts at bar. See Laws of 2011, chapter 283, sec. 33. Given that RCW 26.26.235 did not apply to K.R.P., the court was barred from considering the factors used to determine the "best interest of the child". K.R.P. 160 Wn.App. at 226 RCW 26.26.405 made genetic testing mandatory without an express determination of the best interests of the child; the factors used to determine the best interest of the child under RCW 26.26.535(2) were, therefore, not addressed by the Court of Appeals in K.R.P. Id. at 229.

The statutory factors of RCW 26.26.535 were also not addressed directly in the analysis from In re Parentage of S.E.C, 154 Wn.App. 111, 225 P.3d 327 (2010). At trial, the presumed father in S.E.C. refused to comply with the court's order to participate in DNA testing because the trial court failed to first conduct a hearing to determine whether such a test would be in SEC's best interest. In re Parentage of S.E.C. at 114-115 The presumed father, TD, openly treated SEC as his own child and did not want his position of presumed father to be disturbed. On appeal, the court reversed and vacated the trial court's order

requiring father to participate in DNA testing before holding a hearing on SEC's best interests; No analysis of the child's best interest was addressed in S.E.C. Id. at 329-330.

When determining whether to deny genetic testing, the child's best interests are the court's paramount concern. RCW 26.26.535(2); In re Marriage of Their, 67 Wash.App. 940, 945, 841 P.2d 794 (1992), *review denied*, 121 Wash.2d 1021, 854 P.2d 41 (1993) Before a trial court may rule on a motion for genetic testing, it must consider the enumerated factors under RCW 26.26.535(2) and determine whether genetic testing is in the child's best interests. S.E.C. at 114-115 A guardian ad litem (GAL) is appointed and it is his or her role to investigate the relevant facts concerning the child's situation, analyze the options to the court, and make recommendations that he or she believes will serve the child's best interests. In re the Marriage of Swanson 88 Wn.App. 128, 137 944 P.2d 6, 11 (1997). The trial court received the guardian's report and recommendation, and considers the other parties' comments and criticisms. The court is, however, not bound by the guardian's report or recommendations. Swanson at 138

As noted previously, the factors pertaining to the best interests of the child are provided in 26.26.535(2)(a)-(i), which states as follows:

(2) In determining whether to deny a motion to seek an order for genetic testing under subsection (1)(a) of this section, the court shall consider the best interest of the child, including the following factors:

(a) the length of time between the proceeding to adjudicate parentage and the time that the presumed father was placed on notice that he might not be the genetic father;
(b) the length of time during which the presumed father has assumed the role of father of the child;
(c) the facts surrounding the presumed father's discovery of his possible non-paternity;
(d) the nature of the father-child relationship;
(e) the age of the child;
(f) the harm to the child that may result if presumed paternity is successfully disproved;
(g) the relationship of the child to any alleged father;
(h) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child support obligation in favor of the child; and
(i) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child.

RCW 26.26.535(2)(a)-(i).

Upon reviewing the GAL report in the case at bar, his analysis of RCW 26.26.535(2)(a)-(1) consisted of the following:

According to Mr. Merino, Ms. Contreras told him clearly that he was not the father of the child in February 2012. Yet, Mr. Merino continued having sexual relationship with Ms. Contreras. He continued coming over to see the child. He continued buying diapers and formula for the child. According to Mr. Merino, he was still hoping to reconcile with Ms. Contreras after she moved out.

Mr. Merino filed the petition for challenge to paternity acknowledgment in August 2012 only after the State

> pursued an administrative order of child support.
> Applying the factors listed in RCW 26.26.535(2) to the facts of this case, I recommend that the court deny Mr. Merino's motion for genetic testing.
>
> [CP 58-59]

The guardian further stated in the end of his report that "When I saw [A.M.C], he had not yet started to talk. He cannot express any meaningful opinion." [CP 60] The only real focus of the guardian was the financial concerns, not the father-child relationship. This is not a record that shows a considered, reasoned decision by the court to deny genetic testing.

In The Marriage of Their, the mother left her child in the custody of the presumed father, Gene, for a period of 18 months. After that period, the parties had an agreement that the child would live with the mother; the child was born June 1, 1987. Their 67 Wn.App. 941- 942. In February 1990, Gene petitioned for dissolution of the marriage proposing that he be designated primary parent. Id. In response, the mother, in an amended response, asserted that Gene was not the child's father. In fact, subsequent blood tests determined that another man, Brett Annear, was the child's biological father. By the time trial occurred in August 1991, the child was 4 years old, and had been living with the presumed father for most of his life. Id. at 942-943. In affirming the trial court's

decision to deny mother's request to proceed with a paternity action, the Court of Appeals agreed that DNA testing was not in the child's best interests and noted as follows:

> In making its determination, the trial court did not abuse its discretion. Gene emotionally bonded with Andrew and provided as stable home for Andrew during the first 41/2 years of his life, and Tracy recognized the benefits of maintaining their father-son relationship by publicly identifying Gene as Andrew's father up until the Superior Court Commissioner designated Gene as the primary caretaker. During trial, Tracy's testimony demonstrated that identifying Gene as Andrew's father was to Andrew's benefit. Noting that "Brett didn't want anything to do with it", Tracy explained that she hadn't told the truth about Andrew's parentage because she wanted to protect Andrew. Tracy stated, "Gene has been there since Andrew's birth and that is the only daddy he knows. I'm protecting that."
>
> Their at 946

The facts at bar do not support a finding that denial of genetic testing is in A.M.C.'s best interests. In this case, there is no family unit or bonded relationship to protect, which has been the fundamental reason for denying genetic testing. There is no stability to be destroyed and the child is too young to even communicate; he was only three months old when Appellant and mother separated. Even the mother does not support the State's position in this matter, and the State cannot abuse the authority of RCW 74.20.310 to find someone to pay child support while

neglecting the fundamental need of the child for an accurate determination of parentage. State v. Santos 104 Wn.2d 142, 149, 702 P.2d 1179, 1183 (1985)

In their rebuttal, the respondent/State asserts that the trial court's decision in this case is supported by the facts found from In re Marriage of Wendy M. 92 Wn.App. 430, 962 P.2d 1012 (1993) and McDaniels v. Carlson 108 Wn.2d 299, 738 P.2d 254 (1987), but those cases are distinguishable as well.

In Marriage of Wendy, the child at issue was three years old when a temporary parenting plan was entered through the mother's Petition for Dissolution; J.M. was born September 26, 1989, and a temporary parenting plan was approved in June 1992. Wendy at 432-433. Concluding that it was not in J.M.'s best interests to disestablish parentage of the presumed father, it was noted that J.M.'s actual father was a convicted felon incarcerated in a federal prison in Colorado. Id. at 433 What was more important, however, was the fact that the presumed father was the only father the child knew, and that J.M. referred to him as "Daddy."

Likewise, with McDaniel, the focus was, again, the nature and quality of relationship the child had with the two competing fathers. The child, Wendy, was born September 5, 1981, and a final parenting plan/decree was entered in February 17, 1984 when

Wendy was 21/2 years old. McDanial 108 Wn.2d 301. The relationship Wendy had with the presumed father and appellate was described as follows:

> The guardian ad litem's report, filed September 9, 1986, states that both appellant and respondent have adequate parenting ability, genuinely love Wendy, and maintain an excellent relationship with her. Wendy speaks of both men as her father and has at various times addressed them as "daddy Gary" and "daddy Shawn". Other relatives of her family are well-acquainted with the circumstances of this case. The guardian recommends that paternity be determined to resolve the invariable confusion and tension in Wendy's life and, regardless of the paternity determination, that both appellant and respondent be awarded rights of visitation "because it is clearly in Wendy's best interest to preserve her relationship with each [of them." Report of Guardian ad Litem, at 708
>
> Wendy at 302-303

The facts at bar do not support a finding that there is a bonded parent/child relationship between Appellant and A.M.C. that needs protecting. When the state's interest in accepting stipulations of paternity as a means to solving the support problems conflict with the child's interest in an accurate determination of parentage, the child's interests prevail. Santos, 104 Wn.2d at 148-49. All of the noted cases in respondent's brief discuss situations where there are significant relationship issues that need protecting. The guardian at litem's report in this case is bereft of any relationship of note between A.M.C. and Appellant after mother separated from

Appellant when A.M.C. was three months of age. The only note is that Appellant helped mother with buying diapers and formula after they separated. [CP 48] Nothing describes the nature of Appellant's relationship with the child other than the mother mentioning that Appellant took care of A.M.C. "by himself the few times Ms. Contreras had to leave the apartment to go to work or do other chores." [CP 39] There was no observation of Appellant with A.M.C. by the guardian.

This is not the sort of relationship that the courts seek to protect in parentage actions, and denial of Appellant's request for genetic testing under these facts was an abuse of discretion under these facts.

3. THERE WAS CLEAR AND CONVINCING EVIDENCE OF FRAUD AND THE CHILD'S DUE PROCESS RIGHTS REQUIRE GENETIC TESTING

When Appellant signed the paternity affidavit, it was with the understanding that there were no other potential fathers. It is not disputed that that the mother did not disclose the existence of her prior relationship with Juan to Appellant. [CP 37-50] The mother also discussed having two unusual menstrual periods with the maternal grandmother, of A.M.C. The mother also disclosed to the guardian that the maternal grandmother informed mother that

Appellant may not be A.M.C.'s father, but, as per her own report, the mother also failed to mention that to Appellant. [CP 49] Without further evidence, the guardian somehow concluded that the maternal grandmother could not have advised the mother to conceal the child's parentage from Appellant. [CP 49]

When an acknowledge father is signatory to a parentage affidavit, he is contractually obligating himself to be responsible for the care comfort and support of a child; this obligation continues at least until the child reaches the age of majority. Before the affidavit is signed, the acknowledged father should have full and open disclosure of the facts, which is why there are exceptions for fraud, misrepresentation or duress within the four year statutory limits.

In respondent's brief, the State relies on Parentage of C.S., 134 Wn.App. 141, 139 P.3d 366 (2006), to assert that were was no fraud, but the facts of that case are clearly not applicable here.

In Parentage of C.S., the mother, Sherry, and presumed father, Dean, were married in 1995. The marriage, by agreement, was not monogamous and they were both involved in an Internet "swingers" group. 134 Wn.App. at 144. In October of 2001, Sherry met a man named Frederick, and they later met at a hotel several times, which later resulted in Sherry becoming pregnant. Id. Sherry informed Dean of the pregnancy, and, unlike the facts here with A.M.C.,

Sherry also told Dean that he might not be the father. Id. The child was born on July 17, 2002, Dean was present for the birth, and he was named the father on the birth certificate. Id. at 145 On August 11, 2002, a DNA test excluded Dean as the biological father. One month later, Dean and Sherry decided to end their marriage, but they continued to reside together until other living arrangements could be made. Id. at 145

On August 4, 2004, Dean filed a petition seeking to disestablish himself as the father of C.S., and to have Frederick adjudicated as the father. Id. at 146 Sherry later joined in the petition, sought a common law action for determination of parentage and she made a claim of fraud and fraudulent concealment. Id. On Fredrick's motion, the trial court dismissed Dean and Sherry's actions as barred by the two year statute of limitations. Id. It should be noted that, since Parentage of C.S., the statute of limitations was changed from 2 years to 4 years from the birth of the child. See Laws of 2011, chapter 283, sec. 32.

Unlike the Appellant in A.M.C., both Sherry and Dean knew during Sherry's pregnancy that C.S. was possibly not Dean's child. Parentage of C.S. 134 Wn.App. at 145 Nevertheless, both tried to assert that the doctrine of estoppel prevented Fredrick from asserting the 2 year limitations defense. Id. at 149 As noted by

the court of appeals, the doctrine of estoppel may apply to prevent a fraudulent to a statute of limitations where a defendant conceals facts or otherwise induces a plaintiff not to bring suit within a limitations period. Id. at 149. Applying that analysis to Dean, though, the facts were clear that there was no concealment as he clearly knew he was not the father from the DNA tests performed one month after the birth of C.S. Id. 149-150 The mother, Sherry, even told him he was possibly not the father, and he acquiesced to having his name placed on the birth certificate regardless. As for Sherry, (1) nothing barred her from disestablishing Dean as father and (2) Frederick repeatedly advised Sherry to seek the advice of an attorney even though he insisted on secrecy. Id. at 150, 151-152.

Under the facts in Parentage of C.S. the court rightly concluded that there was no misrepresentation/fraud or false information conveyed by Frederick to Dean or Sherry, or any false or misleading information conveyed from Sherry to Dean. Sherry never told Dean that he was the father, and she openly told him that someone else may be; both parties were fully informed about the other relationship.

The nine elements of fraud are as follows: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's

knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. Chen v. State 86 Wn.App. 183, 188, 937 P.2d 612, 615 (1997), *citing*, Hoffer v. State, 110 Wash.2d 415, 425, 755 P.2d 781 (1988).

In Chen, the appellant asserted that his supervisor made a false statement by telling him that a "probationary period was not difficult , and that only one psychiatrist in the past 10 years had failed the probationary period because that person committed gross misconduct." Chen 86 Wn.App. at 188. In affirming the trial court's dismissal of Chen's fraud claim, the court of appeals determined that the given statement was not a representation that one can only fail probation by committing gross misconduct, but merely an explanation as to why one psychiatrist failed to pass probation. Id. at 188-189.

As noted in Appellant's opening brief, fraud is a simple act of deception where one makes a representation that is known to be untruthful or misrepresents the truth, which causes another to perform some act on reliance of the misrepresentation. Blacks Law Dictionary, 594 (5th Edition 1979), *citing*, Citizens Standard Life Ins.

Co. v. Gilley, Tex.Civ.App., 521 S.W.2d 354, 356 (1975). The misrepresentation is usually done to obtain a perceived benefit from the person who was given the false or misleading information. In this case, part of the benefit to the mother was to maintain the stability, financial and otherwise, of her relationship with Appellant.

When a paternity acknowledgement is signed in Washington State, the acknowledged father is asserting under penalty of perjury that he is the "biological" father. See Department of Health form DOH/CHS 021 (Rev. 7/2011) By signing the acknowledgement, both parents are accepting responsibility to provide support for the child.

Respondent/State erroneously argues that the mother was under no obligation to disclose her sexual past. That may be true if Appellant and mother had simply remained in a dating relationship where they signed no agreement binding them to be legally responsible for a child, but that is not the case here. It has been long held that concealment of or failure to disclose a material fact is an act of fraud. See generally Hand v. Errington, Tex.Com.App., 242 S.W. 722, 725 (Tex.Com.App. 1922) (the Court declined to recognize as binding an agreement between a daughter and her father relating to her share in community property, holding that the father's failure to reveal the true status of

the community property amounted in law to concealment, and under these circumstances concealment is fraud); Donahue v. The Mutual Life Ins. Co. of New York, 164 N.W. 50, 37 N.D. 203 (N.D. 1917)(If there is any change in the condition of health of the applicant pending negotiations for insurance, such fact should be made known, and its concealment is fraud); Casso v. Pennsylvania Railroad Co., 219 F.2d 303 (3rd Cir. 1955), *citing*, Restatement, Contracts, § 471, Illus. 8 (There it is said that where the owner of a one-eyed horse turns the beast in such fashion that the prospective purchase cannot see the blind eye and is deceived into buying the animal thinking him sound the concealment is fraud. We have no doubt that in that case the purchaser ought to be able to void the contract for fraud) In the case at bar, the court can clearly infer from the facts that fraud did occur. [CP 37-63]

At no time did mother disclose to Appellant that there was another possible father until sometime between February and March of 2012, 3-4 months after the birth of A.M.C. [CP 37-50] This was a material fact that Appellant should have been made aware of prior to signing the paternity acknowledgement. In her own statement to the guardian, the mother acknowledged that she was having unprotected sex with another man, and that her last sexual encounter with this man was just two days before she left

for Washington State. [CP 38] The mother also reported having two unusual periods after her return from Mexico. [CP 39] Appellant reported meeting the mother on March 6, 2011, and having started sexual relations with the mother on March 7, 2011. [CP 44] Nowhere in the record does the guardian show any effort made to determine the date or time of conception for A.M.C., nor does it show whether he reviewed any medical records or consulted with mother's physician. The guardian also failed to inquire of the mother whether she discussed the likely time of conception with her physician.

As reported by the mother, Ms. Contreras, she was told that Appellant may not be the father, but she did not disclose that to Appellant. Instead, the mother concealed this information from appellant, and she did not disclose the existence of the other potential father when she signed the paternity acknowledgment with Appellant. Knowing that the time of their first sexual encounter with Appellant was March 7, 2011 and that the birth of the child was on November 8, 2011, mother certainly had reason to know that Appellant was not the father under a normal gestation period of 280 days; Appellant was not informed of the prior sexual relationship mother had with Juan, and mother certainly did not want to reveal anything that she knew would make Appellant think

twice about signing the acknowledgment. It is also reasonable in infer that mother did not want to disclose this information to Appellant as it would have clearly impacted her relationship with him.

Under the facts in Parentage of C.S. the Court of Appeals denied the presumed father's fraud claim because the alleged father made no representations to him and, more importantly, the mother openly disclosed to her husband the existence of the affair and the possibility that he was not the father. Parentage of C.S.34 Wn.App. at 150-152.

Appellant signed the Paternity Acknowledgement with the understanding that he was the only possible father and the mother concealed from him material information about the child's parentage. This was not the same situation as found in Parentage of C.S., and the trial court erred by not making a finding of fraud and ordering DNA testing.

Given the lack of relationship between Appellant and A.M.C., maintaining Appellant as the legal father of A.M.C. is a fraud on the child. Under the circumstances, it is a violation of the child's due process rights to deny paternity testing. A.M.C. has a fundamental right to an accurate determination of paternity under these circumstances, and the natural father has parental rights as well

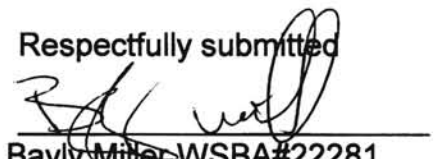
even though he is outside of this jurisdiction. It is inequitable, against public policy and contrary to the child's best interests to adjudicate Appellant as the father under the present set of facts.

B. CONCLUSION

Appellant respectfully requests this Court reverse the trial court's order adjudicating Appellant as father and permit Appellant to rescind the paternity affidavit.

DATED this 3rd day of January 2014

Respectfully submitted



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CERTIFICATE OF SERVICE

I certify that on the 3rd day of January 2014, I served a true an correct copy of this Reply Brief of Appellant to the following, in the manner indicated below:

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