

No. 44546-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,
In re the Parentage of A.M.C
Gregorio J. Merino Gonzalez
Appellant,
v.
Socorro Contreras Saldivar
Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
EMERSON ST
TACOMA, WA 98402

On Appeal from the Pierce County Superior Court
Cause No. 12-5-00863-5
The Honorable Frank E. Cuthbertson, Judge

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err in finding genetic testing was not in the best interests of the child and adjudicating appellant as the father of the child where he failed to meet his burden of showing fraud by clear and convincing evidence?
2. Is the proper standard of review in this case, abuse of discretion?
3. Was there any violation of the child's due process rights?
4. Did the trial court abuse its discretion in finding Appellant failed to prove fraud by clear and convincing evidence?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE HISTORY

Appellant Gregorio J. Merino Gonzalez (father) and Respondent Socorro Contraras Saldivar (mother) met at a dance on March 6, 2011. CP 38, 44. Father was 29 (twelve years older and the father of an eight-year-old son) and mother was 17 and had not graduated high school when they met. CP 38, 43, 44, 55. Prior to meeting father, mother had traveled to Mexico; she returned to Washington from Mexico sometime in January or February 2011. CP 38, 50.

Mother and father first had protected sex on March 7, 2011. CP 44, 45, 49. They continued to have protected sex 1-2 times per week until

March 25, 2011 when they had unprotected sex. CP 44, 45. Mother had two periods lasting two days and four days compared to her usual period of five days after returning from Mexico but before finding out that she was pregnant. CP 39, 50. Her pregnancy was confirmed by a positive pregnancy test at a routine clinic visit on March 28, 2011 where the mother was also informed that her irregular periods were normal. CP 39, 45, 50.

Mother told father she was pregnant later that day. CP 39, 45. Upon being informed by mother she was pregnant, father didn't think he was the father because the first time they had unprotected sex was three days earlier on March 25, but he never told anyone or made a written record of his doubts. CP 45, 55. The parties did not discuss mothers' sexual past or the parentage of the child before the birth. CP 39, 45. The Guardian Ad Litem (GAL), during his interview with the mother asked her: "Were you aware that you were pregnant when you first had sex with Mr. Marino (father)?" CP 50. Mother responded, "No, I wasn't aware. I had no clue I was." CP 50.

Father started living with mother sometime between March 2011 and May 2011 and father financially supported the mother and later the

child. CP 39, 45, 46. They lived together with father's family until October 2011 when they moved to their own apartment. CP 39, 45. A.M.C. (child) was born November 8, 2011. CP 46, 52. Father drove mother to the hospital on the day the child was born, stayed with mother and child for a few hours, left to go to work, then came back to the hospital and stayed with mother and child until they were discharged from the hospital. CP 40, 46. Father and mother signed a Paternity Acknowledgment on November 17, 2011, filed it with the Washington State Registrar of Vital Statistics and it became effective January 3, 2012. CP 19, 41, 50, 52.

Father took care of the child by himself a few times while the mother went to work or did other chores. CP 39, 47. Father bought diapers and formula for the child. CP 47. Father drove mother and child to shops and places to eat and they went to parties as a family. CP 47.

A few months after the child was born, the parties' relationship became strained. CP 40. Father started to question mother regarding the parentage of the child. CP 40. While mother initially had no doubt that he was the child's father, she began to accept father's assertion that he was not the child's father. CP 40. In February 2012 the parties had an argument. CP 48. Father asked mother whether he was the father of the

child and mother said yes. CP 48. Father told mother he would have a DNA test to check whether he was the child's father and mother then told him he was not the child's father. CP 48.

Later, father stated he thought he had not impregnated mother when she told him she was pregnant but did not bring up the issue to avoid upsetting her. CP 115. At some point in their discussions, mother informed father of the existence of Juan, a man with whom she had sexual relations in Mexico. CP 47, 56. Juan, who has not been further identified, does not live in the U.S., nor is he subject to this court's jurisdiction. CP 56.

Mother and father separated sometime between the end of February 2012 and March or April 2012 but the parties continued to see each other every week to two weeks and remained sexually intimate until Halloween 2012. CP 39, 40, 47, 48. During this time, father continued coming over to see the child and continued buying diapers and formula. CP 49, 58. Father desired to reconcile with mother and reestablish their romantic relationship even after she moved out. CP 47, 58. Mother had faith they were going to get back together. CP 91. The parties agreed that father would be disestablished as the child's father but that he would continue to financially support the child until the child's biological father was found.

CP 49.

Mother and child received cash public assistance (Temporary Aid to Needy Families-TANF) beginning April 25, 2012. CP 16-17, 79-80. Subsequently, the Washington Division of Child Support (DCS) initiated proceedings to establish child support and served father with child support paperwork in June or July 2012. CP 47. After he received the proposed child support administrative orders, father wanted to take a DNA test. CP 48, 58. Father stated the parties attempted to disestablish his parentage by going to an office and requesting the child's family name be changed but were told no changes would be made to the child's birth certificate until DNA results were obtained. CP 48. Father believed changing the child's name would disestablish him as the child's father. CP 48. Genetic testing of the parties and child was done August 8, 2012, without a GAL or court order, and the results, absent chain of custody documentation, were filed August 28, 2012. CP 10-11. Father filed the petition to challenge his paternity acknowledgment on August 28, 2012. CP 3-9.

2. PROCEDURAL HISTORY

On July 31, 2012, DCS began enforcing child support against father pursuant to an administrative order. CP 65. On August 28, 2012,

father filed his Petition for Challenge to Paternity Acknowledgment alleging fraud. CP 3-9.

On October 2, 2012, mother filed a formal Response. CP 12-14. In her Response, mother checked the box that she did want genetic tests to be performed and under Section 3, "Other Possible Fathers," she checked the box "Does not apply." CP 13.

On October 10, 2012, the State of Washington filed its initial Response to father's Petition. CP 18-20. In its response, the State requested the court to determine if a GAL should be appointed for the child prior to allowing genetic tests and that if genetic tests were ordered, that any such testing should comply with RCW 26.26.410 and RCW 26.26.415. CP 19. On October 29, 2012, the court, on its own motion, appointed Thuong-Tri Nguyen, as a paternity GAL to represent the child. CP 23. The GAL completed his investigation and filed his report December 18, 2012. CP 35-63.

On December 13, 2012, father, through counsel, filed a Motion to rescind the acknowledgment of paternity, to dismiss father as alleged father, that the administrative child support order no longer be enforced and that father be removed from the child's birth certificate. CP 24-32.

On December 18, 2012, the GAL filed his response to father's motions asking that the court deny the motions, adopt the recommendations in his report and adjudicate father as the parent of the child. CP 33-34. On December 19, 2012, without benefit of the GAL report, the State filed its response to father's motions and asked the court to deny father's motions asserting no motion for genetic testing was ever filed with the court and that the court needed to allow the GAL to make his recommendation before allowing genetic testing to proceed. CP 64-77. Mother subsequently filed a Declaration on January 7, 2013, and although late, it was considered by the court. CP 91-93, 130.

Father's Motions were heard on January 8, 2013, before Pierce County Court Commissioner Diana Kiesel. CP 128-151. The mother was sworn and testified. She was questioned by the court as to the parentage of the child. CP 147-149. In her testimony, the mother stated Mr. Merino Gonzales was not the father of the child and the father was the man identified as Juan, the man she claimed to have relations with in Mexico and the only other person besides father with whom she had a sexual relationship. CP 38, 148.

After hearing argument of counsel, reviewing the pleadings, the

report of the GAL and the mother's testimony, the court ruled as follows:

. . . this of course is one of those cases where nobody really likes the statute, nobody really likes the results, but I have to follow the law. I find no fraud. The genetic testing should have been done a long time ago. The conduct of the parties is inconsistent with the rescission [sic] request and I am not finding that is in the best interest of the child to disestablish paternity.
CP 149.

The court ruled father failed to prove fraud by clear and convincing evidence and father was adjudicated to be the parent of the child. CP 149. Further, the court ruled that even if a proper motion for genetic testing was before the court, based on the lack of fraud and the recommendation of the GAL, genetic testing would not be in the best interests of the child. CP 95, 150. The court considered the factors per RCW 26.26.535 as argued by father's attorney (CP 142-147) and denied father's motions. CP 129-150. Two days later, on January 10, 2013, father filed the full genetic test results with the chain of custody without a court order authorizing genetic testing. RP 99-107.

On January 14, 2013, father filed a Motion for Revision (CP 108-112) seeking review of the following errors by Commissioner Keisel: 1) Failing to find fraud for mother's failure to inform father there was another

potential father of the child; 2) Failing to specifically state what clear and convincing evidence supported the failure to find fraud; 3) Failing to allow father to bring a motion for genetic testing if the court was going to reject the valid DNA testing that was done voluntarily by the parties prior to the beginning of the case; 4) Failing to accept a valid DNA test voluntarily submitted by the parties; 5) Failing to consider the absent father's rights to his child simply because he is not present in Washington State; 6) Error by the court adjudicating father to be the father of the child; and 7) Failing to consider mother's position as the primary parent of the child. CP 110-111.

On January 18, 2013, the GAL filed his response¹ and asked the court to affirm the Commissioner's finding and decision of January 8, 2013. CP 113-117. Father's Strict Reply Memorandum of Law Regarding Paternity in response to the State's brief was filed on January 24, 2013. CP 118-127.

¹ The State's brief in Response to father's Motion for Revision of Commissioner Kiesel's January 8, 2013 ruling was inadvertently not filed on January 22, 2013. On that date, the attorney for father, Ms. Pamela Rodriguez, was emailed a copy of the brief at 3:09 pm by the State's paralegal Joy Brinkman and specifically noted that a hard copy would follow in the next day's mail. CP 171. Ms. Brinkman's actions were confirmed by her declaration of mailing dated January 22, 2013 on the original document. CP 172. In addition, on January 23, 2013, Ms. Brinkman placed a working copy of this document in Pierce County routing to the court. CP 171. Issues raised in this brief were discussed at the January 25, 2013 Revision Hearing as shown by an examination of the Verbatim Report of Proceedings filed herein. RP 2-42. The State's brief was later filed under cover and designated as clerks papers. CP 171-185

On January 25, 2013, father's Motion for Revision was heard before Judge Frank Cuthbertson in Pierce County Superior Court. RP 2-42. Father argued the standard of review was de novo on all of the Commissioner's rulings. RP 5-6. The State argued the standard of review on revision, where the mother provided sworn testimony, was substantial evidence of the Commissioner's findings of fact and de novo review of the Commissioner's conclusions of law. RP 6-8. Judge Cuthbertson agreed with the State and based his ruling on those standards. RP 8.

At the conclusion of the arguments and the questioning by the court, the court entered its oral rulings and denied the Motion for Revision stating:

. . . I don't believe there was an error as a matter of law. I believe Commissioner Kiesel closely followed the statute. I believe there is clear and convincing evidence to support her [the Commissioner's] decision not to grant an order for genetic testing, and it's my understanding that she reviewed the GAL report. And I believe the GAL report provides clear and convincing evidence in support of the Commissioner's decision. And also as a matter of law, it was not error to deny the petition to rescind, and I believe it was for those reasons that the motion for revision should be denied. RP 40.

The father has sought appellate review of Judge Cuthbertson's decision. CP 155-161.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING GENETIC TESTING WAS NOT IN THE BEST INTERESTS OF THE CHILD AND ADJUDICATING FATHER AS THE PARENT OF THE CHILD WHERE FATHER FAILED TO MEET HIS BURDEN OF PROVING FRAUD BY CLEAR AND CONVINCING EVIDENCE.

To understand the procedures involved in a challenge to a paternity acknowledgment in Washington State, it is necessary to examine the intent of both the Federal and State governments in the establishment of a comprehensive, nationwide child support system. Congress and the Washington State Legislature have long recognized that states have a legitimate and substantial interest in collecting delinquent child support and reducing public assistance expenditures. *Zablocki v. Redhail*, 434 U.S. 374, 387-88, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); *Johnson v. Johnson*, 96 Wn.2d 255, 634 P.2d 877 (1981) (state's collection of child support fosters a public purpose of protecting the welfare of children and a child's fundamental right to support); RCW 74.20.010.

The duty to collect support stems from a State's participation in the federal Title IV-D program of the Social Security Act under which a State may qualify for federal funds provided for various programs such as reimbursement of Temporary Aid to Needy Families (TANF) and medical assistance. 42 U.S.C. Section 651 et seq.; RCW 74.04.050; RCW

74.04.055. The State of Washington takes actions, authorized by law under Title IV-D, to require responsible parents to support their children and reduce the financial burden on taxpayers. RCW 74.20.010; RCW 74.20A.010.

States that receive federal funding for public assistance are required to operate a child support enforcement program that meets federal requirements. *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000) *cert. denied*, 531 U.S. 1035, 121 S. Ct. 623, 148 L. Ed. 2d 533 (2000).

Congress further augmented state child support enforcement programs by requiring participating states to have expedited paternity establishment procedures, both non-judicial and judicial, and all states must implement a procedure by which a man can voluntarily acknowledge his paternity. 42 U.S.C. Section 666(a)(5)C). In addition, participating states must pass legislation and procedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity. *Id.* Provisions are made for rescission within 60 days of the effective date, and creating a subsequent limited time period for challenging the acknowledgment, with the burden on the signatory to prove fraud, duress or material mistake of fact. 42 U.S.C Section 666(a)(5)(D). There is a

compelling public interest in the finality of paternity judgments.²

Washington's parentage provisions, including parentage acknowledgments, are codified in RCW Chapter 26.26, the Uniform Parentage Act. The statutory basis for challenging a paternity acknowledgment is set forth in RCW 26.26.300 et seq. These specific procedures were followed by the trial court in rendering its decision.

2. THE PROPER STANDARD OF REVIEW ON APPEAL IS THE ABUSE OF DISCRETION TEST.

The trial court was asked to assess and determine whether the best interests of the child required the court to order genetic testing and whether to allow father to disestablish his parentage by challenge to the paternity acknowledgment. The proper basis of review of the trial court's decision is the abuse of discretion standard. *State ex. Rel. Campbell v. Cook*, 866 Wn.App. 761, 938 P.2d 345 (1997); *Marriage of Swanson*, 88 Wn.App. 128, 944 P.2d 6 (1997).

In *Campbell*, the court cited *Lindgren v. Lindgren*, 58 Wn.App. 588, 595, 794 P.2d 526 (1990) and defined abuse of discretion as

² See Jayna Morse Cacioppo, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can be a Legal Father?*, 38 Ind. L. Rev. 479, 479- 481 (2005) (noting Under Title IV-D, a voluntary acknowledgment of paternity, even in the absence of a court order or genetic testing, is the equivalent to a legal finding of paternity. Finality of paternity judgments supports the best interests of the child by not disrupting the father-child bond or rendering the child fatherless, despite the biological realities) (citations omitted).

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.” *Campbell*, 866 Wn.App. at 766. Abuse of discretion will occur “. . . “namely, when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Kelley v. Centennial Contractors Enterprises, Inc.*, 147 Wn.App. 290, 295, 194 P.3d 292 (2008) (citations omitted).

Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact and instead, they must defer to the factual findings made by the trier-of-fact. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 717, 255 P.3d 266 (2009). The record below shows that the court considered the facts presented to it in the GAL’s report, balanced the interests of all parties involved while ensuring that the child’s interests were paramount, then made a reasonable and rational decision. There is no evidence that Judge Cuthbertson abused his discretion.

3. THE STATUTES AT ISSUE REQUIRE THE APPLICATION OF THE BEST INTERESTS OF THE CHILD STANDARD.

By statute, father is the acknowledged father of the child. CP 52. “Acknowledged father” means a man who has established a father-child

relationship under RCW 26.26.300 through RCW 26.26.375. RCW 26.26.011(1). Father and mother voluntarily signed an Acknowledgment of Paternity which became effective January 3, 2012. CP 19, 41, 50, 52.

Appellant's brief on appeal interchanges terms as to the father's status and his requested relief. In this case, an acknowledged father filed a petition for challenge to his paternity acknowledgment after the rescission period had expired. The case was presented and argued below and understood by both the commissioner and trial court as a challenge to the paternity acknowledgment based solely on fraud. There should be no change on review.

A signatory to an Acknowledgment of Paternity may rescind an acknowledgment for any reason if done before 60 days after the effective date of the acknowledgment. RCW 26.26.330(1)(a). Contrary to father's assertion he was not informed about the other possible father until the 60-day rescission period had passed (Br. of Appellant, p.12), mother informed him in February 2012 that he was not the father of the child. CP 48. Father had full opportunity from January 3, 2012 through March 3, 2012 to rescind his paternity acknowledgment but he took no legal action until August 28, 2012. CP 3-9.

RCW 26.26.335 limits the time for challenging the acknowledgment after the rescission period has expired. Such a challenge

may only be brought on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the party challenging the acknowledgment. RCW 26.26.335(1)(a) and (2). The only basis plead by the father is fraud due to mother's failure to inform him of another potential father. CP 4, 28, 54. This challenge action must be conducted in the same manner as a proceeding to adjudicate parentage under RCW 26.26.500 through 26.26.630 and is subject to the procedures set forth in RCW 26.26.535. See RCW 26.26.340(4) and RCW 26.26.540(3).

The only other known possible alleged parent resides in Mexico and has not been joined to this action; thus, his mere existence does not prevent the adjudication of father as a parent of this child. RCW 26.26.515(3).

The trial court exercised caution and considered the non-authorized genetic tests in its analysis of the best interests of the child. RP 8-12. RCW 26.26.405 lists several provisions containing mandatory testing and exceptions thereto relating to genetic testing. "The plain words of the statute state the legislature's intent is that genetic testing is mandatory *where there is a properly supported motion of a party* to a parentage proceeding, *subject to limited exceptions.*" *In re K.R.P.*, 160 Wn.App. 215, 223, 247 P.3rd 491 (2011). (emphasis added).

Here, RCW 26.26.535 is the only applicable exception to the

mandate for genetic testing and it provides:

(1) In a proceeding to adjudicate parentage under circumstances described in RCW 26.26.540 [child having acknowledged father], a court may deny a motion seeking an order for genetic testing of the mother, child, and acknowledged father if the court determines that: (a) (i) The conduct of the mother or the 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 acknowledged parent. In determining whether to deny a motion to seek genetic testing, the court shall consider the best interests of the child and includes a list of several factors. RCW 26.26.535(2).

The child must be represented by a GAL who shall investigate and report to the court. RCW 26.26.535(3). A denial of a motion seeking an order for genetic testing must be based on clear and convincing evidence. RCW 26.26.535(4). If the court denies a motion seeking an order for genetic testing under RCW 26.26.535(1)(a), it shall adjudicate the acknowledged parent to be the parent of the child. RCW 26.26.535(5).

Whether genetic testing is permitted in a case involving an acknowledged father is subject to the court's exercise of discretion, as guided by the statutory factors set forth in RCW 26.26.535. See also, *In re K.R.P.*, 160 Wn.App. 215, 227, 247 P.3d 491 (2011) and *In re Parentage of S.E.C.*, 154 Wn.App. 111, 225 P.3d 327, 329 (2010). Although *K.R.P.* and *S.E.C.* discussed RCW 26.26.535 in light of a presumed father, their analysis of the exercise of the court's discretion is also applicable to the

court's determination of the best interests of the child where there is an acknowledged father.³

The statutory factors that the court shall consider include:

- a) Length of time between the proceeding to challenge and the time the father was placed on notice that he might not be the genetic parent;
- b) Length of time during which father has assumed the role of parent of the child;
- c) Facts surrounding father's discovery of his possible non-parentage;
- d) Nature of the relationship between the child and father;
- e) Age of the child;
- f) Harm that may result to the child if parentage is successfully disproved;
- g) Nature of the relationship between the child and any alleged parent;
- h) Extent to which the passage of time reduces the chances of establishing the parentage of another person 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 parent-child relationship between the child and the acknowledged parent or the chance of other harm to the child. RCW 26.26.535(2).

RCW 26.26.535's plain language requires an evidentiary hearing before ordering a DNA test. *In re Parentage of S.E.C.*, *supra* at 114. Before a trial court can rule on a motion for genetic testing, it must consider several enumerated factors [RCW 26.26.535] and determine whether proceeding is in the child's best interests. *Id.* "By the statute's plain

³ Effective July 22, 2011, RCW 26.26.535 became applicable to a challenge action brought by an acknowledged father. See Laws of 2011, chapter 283, sec. 33. Prior to the effective date, RCW 26.26.535 only applied to a case involving a presumed father. See Laws of 2002, chapter 302, sec. 508.

language, a trial court cannot order genetic testing until it holds a hearing on the child's best interests." *Id.* at 114-115. The GAL must conduct an investigation and make a recommendation on the best interests of the child before the trial court proceeds with a DNA test. *In re Parentage of Q.A.L.*, 146 Wn.App. 631, 637, 191 P.3d 934 (2008).

The GAL's role is to investigate the relevant facts concerning the child's situation. *Marriage of Swanson*, 88 Wn.App. 128, 137-139, 944 P.2d 6 (1997). The GAL analyzes the courses of action available to the court concerning the best interests of the child through an independent investigation and prepares a report containing recommendations for the court's consideration. *Id.* The other parties, including the child's parents and the State, offer criticism and comment on the GAL's report and recommendation, including any deficiencies in the GAL's performance. *Id.* The trial court is not bound by the GAL's recommendation and exercises its discretion and makes its own determination whether proceeding is in the best interests of the child based on the record and controlling statutes. *Id.* The record clearly shows the court made a considered, reasoned decision.

Here, even without a proper genetic test motion before the court, the trial court carefully applied and considered RCW 26.26.535 to the facts before it and considered the GAL's report and recommendation in

determining whether genetic testing would be in the best interests of the child. It is clear from the record that the court was required to consider the best interests of the child, pursuant to statute and case law. It is further clear from the record that the court did exactly that, consider and apply the best interests of the children standard. The court did not commit any error and did not abuse its discretion.

4. THERE WAS NO VIOLATION OF THE CHILD'S DUE PROCESS.

Father, in his Brief of Appellant, claims there was a violation of the child's due process rights associated with the determination of parentage based on the parties' voluntarily performing DNA tests and the court refusing to accept the results without a court appointed GAL. Father also asserted the trial court erred in refusing to consider "Juan's" rights to the child and failing to consider the mother's position, as primary parent, that she is in agreement to disestablish paternity of her child to father.

Father cannot now claim to be "protecting" the rights of the child he is trying to disown and is prohibited from asserting any claim on behalf of the child by Washington case law. *State ex. rel. Campbell v. Cook*, 86 Wn.App. 761, 770, 938 P.2d 345 (1997); *McDaniels v. Carlson*, 108 Wn.2d 299, 310, 738 P.2d 254 (1987). Here, the child had a guardian ad litem who has never claimed the child's constitutional rights to due

process were violated.

The claimed alleged father (Juan) was never joined as a party to this action and it would have been improper for the court to consider any rights of another possible alleged father. RCW 26.26.510. The lack of jurisdiction over another alleged father did not preclude the court from adjudicating father to be the parent of the child. RCW 26.26.515(3).

Where a paternity determination is clearly not in the child's best interest, a parent may not sacrifice the child's best interest to protect their own. *In re Marriage of Thier*, 67 Wn.App. 940, 946, 841 P.2d 794 (1992), *review denied*, 121 Wn.2d 1021, 854 P.2d 41 (1993),

Father cites two cases to support his position: *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985) and *State ex rel. McMichael v. Fox*, 132 Wn.2d 346, 937 P.2d 1075 (1997). Both cases were State initiated paternity actions unlike the instant case. In *Santos*, the Court found no fraud and denied a motion to vacate a stipulated judgment of paternity but reversed on other grounds because the trial court did not appoint a GAL to protect the interests of the child. In *Fox*, the Court reversed and reinstated paternity, finding the State satisfied its duty as GAL for the child where DNA evidence identified one man (Fox) as the natural father and another

possible father was neither located nor joined in the action.⁴

Here, the facts are dissimilar in that there is no State action for due process purposes as there was in *Santos* and *Fox*. *Santos* is inapplicable as the court appointed a guardian ad litem for the child upon reversal. This is not a parentage action involving the state as GAL for the child. Father voluntarily established paternity through an expedited procedure by signing a paternity acknowledgment. This appeal is from a private action to challenge the acknowledgment of paternity. The court appointed a GAL for the child. CP 21. The guardian investigated the best interests of the child and reported to the court. CP 35-63. The GAL recommended no genetic testing or disestablishment, the commissioner agreed and the judge upheld the decision upon revision. Father's argument that the court committed error when it did not blindly accept the proffered genetic test results without court approval or a court appointed GAL for the child is without merit.

5. THE BEST INTERESTS OF THE CHILD IS THE CONTROLLING FACTOR IN ALL PARENTAGE ACTIONS.

In determining whether to deny genetic testing, the child's best interests are the court's paramount concern. *In re Marriage of Thier*, 67

⁴ The Court noted the mother had no menstrual period after her relations with Fox as part of the evidence of the paternity of the child. *Fox*, 132 Wn.2d at 357.

Wn.App. 940, 945, 841 P.2d 794 (1992), *review denied*, 121 Wn.2d 1021, 854 P.2d 41 (1993). Case law indicates that the “best interests of the child standard” governs the determinations of all petitions to disestablish paternity, regardless of which section of the Uniform Parentage Act applies. *In re Marriage of Wendy M.*, 92 Wn.App. 430, 435, 962 P.2d 130 (1998). The best interests of the child must prevail in the action whenever there is a conflict, whatever the outcome. *Id.* at 430-431. The criteria for determining the best interest of the child are varied and highly dependent on the facts and circumstances of each case. *McDaniels v. Carlson*, 108 Wn.2d 299, 312-14, 738 P.2d 254 (1987). In *McDaniels*, the Court reversed and followed the GAL’s recommendation that it was in the best interests of the child for the paternity action to proceed in order to preserve the child’s relationship with two men who were competing to be the child’s father. *Id.*

Here, unlike *McDaniels*, there were not two men competing to be the child’s father. In fact, father is seeking to leave the child fatherless. The other purported possible father (Juan) is unknown, lives in Mexico and has never been to the U.S. CP 56. This State has no jurisdiction over him, and it is unlikely paternity can or will ever be established for this child if father is disestablished. CP 56. The only father this child has ever known is Mr. Merino Gonzalez. His success in disestablishing parentage

would not produce an accurate determination of paternity for the child. It would merely remove father from the child's life. The equities fall in favor of the child.

There are other aspects than biology that the court considers in determining whether genetic testing is in the best interests of the child. *In re Marriage of Wendy M.*, 92 Wn.App. 430, 439, 962 P.2d 130 (1998); *McDaniels v. Carlson*, 108 Wn.2d 299, 311, 738 P.2d 254 (1987). The child has an interest in inheritance rights and family bonds. *McDaniels, supra* at 311. In addition, the court considers: 1) continuity of established relations will be maintained; 2) stability of the present home; and 3) the uncertainty of parentage existing in the child's mind. *In re Marriage of Wendy M., supra* at 438.

In *Wendy M.*,⁵ the court rejected presumed father's assertion that some standard other than the best interests of the child should apply to his disestablishment action. *Id.* at 435. There, the presumed father had a private genetic test which excluded him as the biological father of the child. He argued that his interest in not paying child support was superior to the child's interests.

⁵ Court refused to disestablish legal [presumed] father's paternity despite genetic evidence indicating that he was not the child's biological father because he was "the only father the child has ever known" and disestablishing paternity would have destroyed the stability of the child's world with respect to the identity of his father.

The court rejected this argument by the presumed father, stating:

“ . . . although Michael [presumed father] has an interest in not being erroneously required to pay child support, where his interest conflicts with the interests of the child, the child’s interests prevail. Where a paternity determination is clearly not in J.M.’s best interests, Michael may not sacrifice J.M.’s best interests to protect his own.”
In re Marriage of Wendy M., 92 Wn.App. at 439. See also *McDaniels v. Carlson*, 108 Wn.2d at 311.

In this case, father’s reliance on genetics and the young age of the child in support of his challenge action is misplaced. Here, father is the only father the child has ever known, is listed on the birth certificate and consistently treated the child as his son. In fact, father’s actions as detailed in the GAL’s report show that he readily took on the parental role prior, during, and after the birth of the child and for an extended period of time after mother and child moved out. Father continued to visit and buy things for the child, had an agreement with the mother he would continue to financially support the child until the mother could locate Juan and notably, maintained a regular, intimate relationship with the mother for an extended period of time all the while hoping the parties would reconcile.

Only when the DCS enforced his child support obligation, did father take action to challenge his parentage. Even after learning his private genetic test results, he continued to have intimate relations with the mother for another three months, thereby attempting to maintain the family

unit with continued hope of reconciling. In light of the GAL's investigation and recommendation and the court's determination of the best interests of the child, the trial court did not abuse its discretion.

6. THERE WAS NO FRAUD BY CLEAR AND CONVINCING EVIDENCE.

Father alleged fraud based upon mother's failure to inform him there might be another potential father of the child. CP 4, 28, 54. The existence of fraud is normally a question of fact. *Parentage of C.S.*, 134 Wn.App. 141, 151, 139 P.3d 366 (2006), citing *Duke v. Boyd*, 133 Wn.2d 80, 83, 942 P.2d 351 (1997). Father uses a dictionary definition of fraud but never discussed the elements of fraud as set out in Washington caselaw. (Br. of Appellant, p.13). To establish fraud, a claimant must demonstrate: 1) representation of an existing fact; 2) materiality; 3) falsity; 4) speaker's knowledge of its falsity; 5) speaker's intention that it shall be acted upon by the plaintiff; 6) plaintiff's ignorance of 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). See also, *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Father has not proved or even addressed the requirements necessary to establish fraud.

In *Parentage of C.S.*, *supra* at 144, the presumed father and mother

were married and belonged to a “swingers” group where the mother met a married man, engaged in sexual relations with him and became pregnant. The presumed father sought to disestablish his parentage and adjudicate the other man as the father. *Id.* at 145. The mother later joined in and asserted a common law action for determination of parentage and a claim of fraud and fraudulent concealment by the other man. *Id.* Mother’s claim of fraud was based on the premise that the alleged father, who has a law degree, falsely told her that Washington law foreclosed any action to adjudicate him as the child’s father, and she delayed filing the petition in justifiable reliance on these statements. *Id.* at 151. The court found the record did not support mother’s argument and did not allow an inference that the alleged father intended mother to rely on his statements about Washington law, or that mother had a right to rely on these statements. *Id.*, citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).⁶

Here, father failed to prove fraud by clear and convincing evidence. As a result, the trial court, after stating that the GAL report was both very thorough and objective, correctly denied father’s motion to revise the commissioner’s ruling to not disestablish parentage nor allow father to

⁶ See also, *Paternity of Cheryl*, 434 Mass. 23, 746 N.E.2d 488 (2001) (mother’s failure to disclose father was not the father of the child did not establish fraud on the court; even if mother knew at the time the paternity acknowledgment was signed that the father was not the child’s biological father [a proposition not established by that court record], mother’s failure to disclose the information would not amount to fraud on the court).

relinquish his parental responsibilities. RP 41-42.

Father had the obligation to raise any questions or issues he had of the child's parentage and to use his best judgment before engaging in voluntary acts that led to his current situation. Father cannot eliminate his responsibility to the child through the excuse of poor decision making. Father already had another eight-year-old child from a different relationship living with him. CP 55, 116. Father should have ascertained the parentage of the child when mother first informed him of her pregnancy in March 2011 based on his doubts he had up to and within 60 days of his voluntary paternity acknowledgment as provided in RCW 26.26.330. At all times, father knew, or should have known, the facts needed to determine if he had fathered the child.

The GAL found mother credible as to whether she knew she was pregnant before she received the results from the medical clinic. CP 55. Taking in the age of the mother and her lack of experience as an adult, she could easily have been both uninformed and confused about her pregnancy.

Father has cited no authority imposing an affirmative duty on mother to disclose her sexual history to father. Father knew when he and mother had sex. Father later stated he thought he wasn't the one who impregnated mother when she told him she was pregnant (CP 45, 55), but

it was father's choice not to discuss the issue with mother. As the GAL's report noted: 1) Father could have asked mother to confirm whether he was the one who impregnated her, yet he didn't ask; 2) Father could have refused to sign the paternity acknowledgment, yet he signed the acknowledgment; 3) Father could have filed a rescission of the paternity acknowledgment within 60 days after signing, yet he did not file to rescind his acknowledgment of paternity; and 4) Father could have demanded a genetic test prior to signing the paternity acknowledgment, yet he remained silent. CP 115-116. Father's own inaction cannot relieve him of his parental responsibilities.

During the revision hearing, father was not able to offer a credible explanation for why he didn't say or do anything to question his parentage. RP 14. Judge Cuthbertson stated, "Well, it's important because it goes to the issue of fraud. Where is the clear and convincing evidence of fraud?" RP 14. Father argued mother's mere silence constituted fraud but this argument was correctly rejected by the court. RP 14. The court noted that even when father learned in February 2012 that this may not be his child, he and mother continued to have an intimate relationship and he continued to act like a father knowing for a long time that maybe he's not the biological parent. RP 16. He bought diapers, he did things for the child and took them out to eat. RP 16. The court also noted that the mother had a

number of menstrual cycles after she had returned from Mexico and after they had engaged in sex together and only later, during a routine medical checkup, did she find out that she was pregnant. RP 17-18. In addition, father waited until August 2012 to do DNA testing and only after he is ordered to pay child support. RP 15-16.

The court stated:

“. . . the statute requires a showing of fraud or duress by clear and convincing evidence, and right now, we're talking about maybe, well, it could have been, and she might have thought and if she thought, that's not clear and convincing evidence of fraud. And that was my question: Where is that?" RP 18.

The court's ruling was clear and concise. The court did not rely on the genetic tests. Although the genetic tests were in the record without a GAL investigation, were not conducted pursuant to court order and the court considered them even in the absence of a proper motion, the court based its ruling on the statutory factors pursuant to RCW 26.26.535 considering the best interests of the child and the GAL's recommendation. It ruled the actions of the parties estopped them from denying parentage and the equities clearly fell in favor of the child. Once the court found there was no evidence of fraud by clear and convincing evidence pursuant to RCW 26.26.335(1)(a) and RCW 26.26.535(4), the court focused on the factors of the conduct of the parties to find disestablishment was not in the

best interests of the child. The court examined the GAL report and focused on what the parties knew, when they knew it and what actions they took once father had knowledge he possibly might not be the biological father of the child. There was no error. There was no abuse of discretion.

D. CONCLUSION

The Court of Appeals should affirm the decision of the trial court. Given the statutory scheme and caselaw, the trial court considered and acted to protect the best interests of the child. Father's request to be disestablished should be denied and the trial court should be affirmed.

DATED: 10-16-13

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CERTIFICATE OF SERVICE

I certify that on the 17th day of October, 2013, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

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