

No. 68668-2-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

HARJINDER S. GREWAL,

Appellant

v.

BALBIRPAL GREWAL,

Respondent

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COURT OF APPEALS
DIVISION ONE
SEATTLE
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ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable Jean Rietschel;
The Honorable John Curry)

HARJINDER S. GREWAL'S REPLY BRIEF

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I. REPLY ARGUMENT

A. **When The Trial Court Erred In Denying A Motion For Genetic Testing Without The Child Being Represented By A Guardian *Ad Litem*, It Violated The Child's Rights And Caused Harm Which Should Be Corrected By This Court.**

Contrary to the Mother's arguments, the child had rights and interests that deserved constitutional protection. The Washington Supreme Court has begun to define a child's rights in a trilogy of cases. First, in *State v. Santos*, the Washington Supreme Court recognized that children have procedural due process rights in paternity or parentage actions.¹ This extends to support, inheritance rights, and familial bonds. Children also have substantive due process rights in accurately establishing paternity.² Second, in *McDaniels*, the Court echoed *Santos* and recognized children have an interest in knowledge of their familial bonds. "The child has an interest not only in obtaining support, but also in inheritance rights, family bonds, and accurate identification of his or her parents."³ Finally, and most recently, the Court held children have a *fundamental liberty interest* under the United States Constitution's Fourteenth Amendment that includes the right to "maintain the integrity of the family relationships, including the child's parents, siblings, and

¹ *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985).

² *Santos*, 104 Wn.2d at 147-48.

³ *McDaniels v. Carlson*, 108 Wn.2d 299, 311, 738 P.2d 254, 261 (1987) (Internal citation omitted.)

other familiar relationships.⁴ “Child development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent.”⁵

Moreover, a child is not only constitutionally entitled to a guardian *ad litem* (GAL) being appointed, but to meaningful representation from a GAL. A child is not to be a party “in name only. It is fundamental that parties whose interests are at stake must have an opportunity to be heard ‘at a meaningful time and in a *meaningful manner*.’”⁶ To be sure, RCW 26.26.090 requires that a child be represented by a guardian or a guardian *ad litem*, who *in fact protects the child's interests*.⁷

In addition, the paternity determination in this case may very well be binding upon the child because a GAL was appointed. Here, a GAL was appointed, but did not do anything. “The child was a party ... represented in the proceeding determining parentage by a guardian *ad litem*.”⁸ As a result the prejudice to the child’s rights is compounded by this paternity determination while a GAL was appointed.

⁴ *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234, 244 (2012).

⁵ *McDaniels v. Carlson*, 108 Wn.2d 299, 310, 738 P.2d 254, 261 (1987).

⁶ *State v. Santos*, 104 Wn.2d 142 at 147 (Emphasis added.)

⁷ *State v. Santos*, 104 Wn.2d 142 at 147 (Emphasis added.) (Internal citation omitted.)

⁸ RCW 26.26.630.

These rights were actually affected in this case when the trial court twice denied genetic testing and when the trial court then adjudicated parentage all without a GAL representing the child's best interests. Despite Mother's attempts to frame this case differently, that is the sole issue on appeal.

1. The trial court erred when it denied genetic testing without a GAL meaningfully representing the child.

On three separate occasions the trial court denied the child's right to establish parentage. RCW 26.26.535(3) requires all children to be represented by a GAL in connection with any decision to deny genetic testing.⁹ First, On October 7, 2011, Father requested genetic testing.¹⁰ Despite the law, Commissioner John Curry denied genetic testing on November 17, 2011 and sanctioned Father \$2,000 for requesting the test.¹¹ No GAL had been appointed prior to this time. Also on November 17, 2011, Commissioner Curry appointed a GAL in a separate order.¹²

Second, on November 18, 2011, Father filed a motion under oath stating the Mother had told people that Father was not the child in question's (H.G.'s) father, and Father requested Commissioner Curry

⁹ *In re Parentage of QAL*, 146 Wn. App. 631, 637, 191 P.3d 934, 937 (2008) ("a GAL must be appointed before denying a request for genetic testing to accurately determine the child's paternity.")

¹⁰ CP 9-10.

¹¹ CP 16-17.

¹² CP 18-20

reconsider his order denying genetic testing.¹³ Commissioner Curry again denied Father's request and assessed \$5,000 in additional sanctions against Father for making the request.¹⁴ The record shows no GAL provided a report or other input to the trial court before Commissioner Curry made the decision.¹⁵

Finally, at trial, the trial judge denied Father's request for genetic testing in the Decree of Dissolution purportedly based on the trial court's written findings.¹⁶ The record again shows no GAL report or input prior to denying the genetic test and adjudicating Father to be H.G.'s father. To be sure, the Findings of Fact and Conclusions of Law show the findings were based on trial that only Mother, her lawyer, and Father attended.¹⁷ They also show the trial judge, without GAL input, purportedly analyzed the statutory factors under RCW 26.26.335(2) to deny genetic testing and for the third time denied genetic testing with no GAL representation or input.¹⁸

2. Mother's response unsuccessfully tries to argue the child was not affected by the trial court's decisions.

¹³ CP 47-48.

¹⁴ CP 128-29.

¹⁵ CP 128 (The order recites the Commissioner only considered Father's motion, Mother's respond (sic), and Father's reply).

¹⁶ CP 251, Decree of Dissolution, Section 3.15.

¹⁷ CP 253.

¹⁸ CP 262-63.

Mother ignores the child's constitutional rights and argues the child's rights were not affected by the trial court's actions. She bases her argument on the statutes that hold that a child is not a necessary party and that a child is not bound by a judgment unless the child is a party to the action citing RCW 26.26.630(2). A substantially equivalent argument has already been considered, and rejected, by an appellate court in this state. In *QAL*,¹⁹ Division II considered the seeming contradiction between the Legislature's pronouncement in the Uniform Parentage Act (UPA), enacted in 2002, and the Washington Supreme Court's pronouncement in *Santos* regarding a child's constitutional rights.²⁰ *QAL* harmonized this seeming anomaly: "Although the legislature does not make the child a statutory necessary party to a parentage determination, it lacks the authority to infringe on the child's constitutional right to participate in accurately determining his paternity that our Supreme Court declared in *Santos*."²¹

B. Father Has Standing To Raise The Child's Constitutional Rights By Appeal To This Court.

Father, as the child's presumed or putative parent, has standing to raise the constitutional rights of the child by appeal to this court. If he did not raise this issue, who would? Certainly not the GAL, who never did

¹⁹ *In re Parentage of QAL*, 146 Wn. App. 631 at 637.

²⁰ *In re Parentage of QAL*, 146 Wn. App. at 635-36.

²¹ *In re Parentage of QAL*, 146 Wn. App. at 636-37.

anything, and certainly not the Mother, who wants Father to be the adjudicated father. The state is not involved. Someone with similar interests to the child has to be the one to raise the child's constitutional rights when then the child is not meaningfully represented. In this case, Father is the only one whose interests are aligned with the child's. He, therefore, has standing to raise the issue. The Supreme Court of Washington recognized a parent or putative parent has standing to raise and comment upon a child not being meaningfully represented by a GAL in a parentage action:

[The] role of other parties, [including] the child's parents and the State, is to highlight and comment on deficiencies in the guardian's performance. The purpose of such comment is not to benefit the commenting party, although that may be a side effect; rather, the purpose is to benefit the child and assist the trial court. Because the child usually cannot perceive deficiencies in the guardian's performance, and the court cannot conduct its own investigation without going beyond its proper judicial function, such comment and criticism is an important way—and sometimes the only practical way—of unearthing deficiencies in the guardian's performance.²²

In a case such as this, where the GAL is wholly absent from the proceedings, even though appointed by the court, parents with aligned

²² *Marriage of Swanson*, 88 Wn. App. 128, 137-38, 944 P.2d 6, 11 (1997).

interests with the child are the only persons who are likely to bring the GAL's deficiencies to this Court's attention.

C. Father Did Not Invite Any Error On The Child's Behalf And Never Suggested The Trial Court Could Deny Genetic Testing Without A GAL.

Mother's argument based upon the invited error doctrine that this Court should not consider Father's appeal, which is really brought on behalf of the child, ignores the party whose rights have been abridged. "The doctrine of invited error prevents a party from complaining on appeal about an issue it created at trial."²³ Here, the child is the person whose constitutional rights were abridged. The father, because his interests are aligned with the child's interests, is the one who is commenting on the GAL's lack of performance and the trial court's constitutional error regarding the child. The child did nothing to invite this error that affected his rights. The invited error doctrine does not apply.

Additionally, if this Court examines the invited error doctrine, the Court will find that it does not apply in this case. Father never argued the trial court could deny genetic testing without a GAL representing the child. The trial court did this on its own accord or at Mother's invitation, not Father's.

²³ *City of Bellevue v. Kravik*, 69 Wn. App. 735, 739, 850 P.2d 559, 562 (1993).

Father may not have complied with the trial court's order requiring payment to the GAL, but other remedies were available that did not abridge the child's rights. For instance, the trial court could have held Father in contempt for refusing to pay the GAL and stayed his disestablishment proceeding until he purged his contempt. It could have required Mother to pay the GAL fees before it proceeded and entered a judgment against Father. What the trial court could not do is deny the child's constitutional rights by denying genetic testing without a GAL's meaningful representation and input. The trial court's error relating to the rights of the child is not absolved simply because the blame can be loosely placed on Father's shoulders.

D. Mother Tries To Lead This Court Astray By Arguing Issues Not Raised In The Assignments of Error.

Mother devotes substantial time, energy, and resources arguing that the trial court did not abuse its discretion in requiring Father to pay the GAL. That is simply not an issue in this appeal. The sole issue is whether the trial court may deny genetic testing before a GAL is appointed and whether a trial court may deny genetic testing without meaningful participation by the appointed GAL. The answer to the questions raised in this appeal are "no." Mother tries to divert this Court's

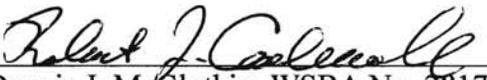
attention to an issue she may be able to win, but which was not raised in the Opening Brief.

E. Father's Appeal On The Child's Behalf Is Not Intransigent.

Father is not intransigent in this appeal. To award appellate fees to Mother on appeal, Father must be intransigent in the appeal process. This means the appeal must be devoid of merit or totally frivolous.²⁴ Father's appeal has merit. While it presented some novel or interesting issues of first impression regarding standing and a child's constitutional rights, it is supported by authority and is by no means frivolous.²⁵ Mother's attorney fee request should be denied.

DATED this 21st day of December, 2012.

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²⁴ *In re Matter of Greenlee*, 65 Wn.App. 703, 710-11, 829 P.2d 1120 (1992).

²⁵ *Mackenzie v. Barthol*, 142 Wn. App. 236, 242, 173 P.3d 980 (2007).

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

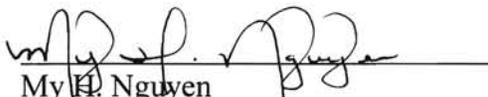
On the below written date, I caused delivery of a true copy of Harjinder S. Grewal's Reply Brief to the following via U.S. Mail:

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