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No. 68668-2-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

HARJINDER S. GREWAL,

Appellant

v.

BALBIRPAL GREWAL,

Respondent

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable Jean Rietschel)

HARJINDER S. GREWAL'S OPENING BRIEF

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I. INTRODUCTION

Do our state constitution and statutes require a child's interests be represented in a timely proceeding to establish true parentage through genetic testing? The answer is yes, and this is the precise right that the child did not receive on two occasions at the trial level. Instead, the child was thrust into a relationship that the presumed father disavowed. This is unfair to the child and the results should be reversed until the child's best interests can be minimally represented by a guardian *ad litem*.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the motion for genetic testing without the child's interests having been represented by a guardian *ad litem* (GAL). Finding of Fact 2.21(G).

2. The trial court erred by entering an order of child support and two alternative parenting plans after denying a motion for genetic testing and then adjudicating parentage without the child's interests having been represented by a guardian *ad litem*.

3. The trial court erred by making an adjudication of paternity without the child's interests having been represented by a guardian *ad litem*.

III. ISSUES

1. Whether the trial court violated RCW 26.26.535¹ when it denied the motion for genetic testing without the child having been represented by a guardian *ad litem*. (Assignments of Error 1, 3)

2. Whether the trial court violated the child's constitutional rights by denying the motion for genetic testing without the child having been represented by a GAL. (Assignments of Error 1, 3)

3. Can a parent's noncompliance with a court order requiring that parent to pay for a GAL to represent the child's interests be a basis to deny the child his or her statutory and constitutional right to a GAL? (Assignments of Error 1, 3)

4. Whether parenting plans and an order of child support entered following an erroneous denial of a motion for genetic testing are themselves error. (Assignment of Error 2)

IV. STATEMENT OF THE CASE

The parties were married on April 19, 2000 at Kent, Washington.² The parties separated on January 1, 2011,³ and the trial court entered a

¹ The trial court cited RCW 26.26.335 in its Finding of Fact 2.21(G). CP 262. But the statutory language that the trial court quotes is actually from RCW 26.26.535. *Id.*

² CP 254 (FF 2.4).

Dissolution Decree on March 29, 2012.⁴ During the marriage, and before the parties separated, three children were born: K.G., N.G., and H.G.⁵

The wife, Balbirpal Grewal, filed a Petition for Dissolution on March 11, 2011.⁶ Five months later, on October 11, 2011 and under a separate case number, the husband, Harjinder Grewal, filed a Petition to Disestablish Parentage Based on Presumption in the King County Superior Court.⁷ At the same time, he filed a Motion and Declaration for Order to Require Genetic Tests.⁸ The husband sought to disprove the presumption of parentage regarding the youngest of the three children, H.G., born in 2009.⁹ H.G. was approximately 13-and-a-half months old when the parties separated and still under two years old when the husband timely filed to disprove parentage.¹⁰ The husband declared that his wife had told persons in their community that he was not H.G.'s father.¹¹ The husband asked the court to declare the nonexistence of the

³ CP 254 (FF 2.5).

⁴ CP 247-252.

⁵ CP 256 (FF 2.17).

⁶ CP 132-136.

⁷ CP 3-8.

⁸ CP 9-10.

⁹ CP 3.

¹⁰ *Id.*

¹¹ CP 84.

parent and child relationship between himself and H.G.¹² The court consolidated the two matters on January 9, 2012.¹³

Prior to consolidation, on November 17, 2011, after a hearing before Commissioner Pro Tem John Curry, the Commissioner entered orders denying the motion for genetic testing but also appointing a guardian *ad litem* (GAL) for the child.¹⁴ The court ordered the husband to pay 100% of the costs of the GAL and, if later ordered, DNA testing.¹⁵

The trial court stated in its oral ruling,

I will appoint a guardian ad litem. And the guardian ad litem will be 100 percent at the expense of the father if the guardian ad litem determines that there is a need for paternity testing. Her job is to look out for the best interests of the children [sic], and she can make that recommendation. And if she does recommend genetic testing, it will be at the father's expense. The father has a right to have the paternity testing done if he so wanted it, but I do find that the motion is in bad faith.¹⁶

The husband then re-filed his motion for genetic testing and/or a motion for an order reconsidering the November 17, 2011 decision denying his request for genetic testing and appointing a GAL for the minor child.¹⁷

¹² CP 7.

¹³ CP 216.

¹⁴ CP 16-20.

¹⁵ CP 17.

¹⁶ RP, 7:11-19 (oral ruling, Nov. 17, 2011).

¹⁷ CP 128.

On December 29, 2011, after another hearing before Commissioner Pro Tem John Curry, the trial court entered an order denying the motion for genetic testing.¹⁸ The trial court found that “petitioner did not comply with the court’s prior order and is intentionally abusing the legal process and costing his wife money.”¹⁹ The trial court’s order additionally read: “Court assesses terms in the sum of \$5,000 against Petitioner. Petitioner shall not re-file his motion until he has complied with today’s order and the orders entered on Nov. 17, 2011 before Court Commissioner Pro Tem John Curry.” At the same time, the trial court entered a Judgment against the husband in the amount of \$5,000.²⁰

After holding a trial on the consolidated matters before Judge Jean Rietschel, the trial court entered on March 29, 2012, its Findings of Fact and Conclusions of Law,²¹ a Decree of Dissolution,²² an Order of Child Support,²³ and two alternative Parenting Plans.²⁴ In its Finding of Fact 2.21(G), the trial court again took up the husband’s petition to disestablish paternity.²⁵ The court found that the request for genetic

¹⁸ CP 128-129.

¹⁹ CP 128.

²⁰ CP 130.

²¹ CP 253-56.

²² CP 247-52.

²³ CP 283-95.

²⁴ CP 267-80.

²⁵ CP 262-64.

testing was a litigation tactic not made in good faith and that the husband “chose not to use the services of the court appointed guardian ad litem.”²⁶ The court additionally found “by clear and convincing evidence that the father is estopped from denying parentage and it would be inequitable to disprove the parent/child relationship, and therefore the motion for genetic testing is denied.”²⁷

The husband timely appealed the Orders entered November 17, 2011; the Order and Judgment entered December 29, 2011; and the Findings of Fact and Conclusions of Law; the Decree of Dissolution; the Order of Child Support; and both alternative Parenting Plans, entered on March 29, 2012.²⁸

V. ARGUMENT

A. Standard of Review

Issues pertaining to constitutional limitations and statutory authority are issues of law to be determined *de novo* by this court.²⁹ If a statute’s language is subject to only one interpretation, this Court’s inquiry ends because plain language does not require construction.³⁰

²⁶ CP 264.

²⁷ CP 264.

²⁸ CP 299-391.

²⁹ *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003).

³⁰ *In re Parentage of S.E.C.*, 154 Wn. App. 111, 114, 225 P.3d 327 (2010).

Issues affecting fundamental constitutional rights may be raised for the first time on appeal.³¹

B. Mr. Grewal May Raise the Issue of the Child’s Constitutional Rights.

A person has standing to raise constitutional questions when he or she has a personal stake in the outcome of the controversy.³² The person challenging the constitutionality of a governmental action must show that the particular action complained of has operated to his or her prejudice.³³

Ordinarily, a party would not have standing to assert the rights of another who is a party in litigation; the third party can decide himself how best to protect his interests.³⁴ However, children usually lack the capacity to make such decisions, and their interests in litigation are ordinarily represented by parents or guardians.³⁵

Here, the child clearly has a stake in the outcome of this controversy. A child has a constitutional right to an accurate parentage determination.³⁶ His familial bonds, financial support, and right to inherit are all dependent on his paternity. Additionally, denial of the Motion for

³¹ RAP 2.5(a)(3); *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

³² *Marchioro v. Chaney*, 90 Wn.2d 298, 303, 582 P.2d 487 (1978).

³³ *MacLean v. First N.W. Indus. of Am., Inc.*, 96 Wn.2d 338, 347, 635 P.2d 683 (1981).

³⁴ *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 841 n.44, 97 S.Ct. 2094 (1977).

³⁵ *Id.*

³⁶ *State v. Santos*, 104 Wn.2d 142, 150, 702 P.2d 1179 (1985) (“The due process accorded the interests of a child dictates that the procedures of a paternity determination ensure accuracy.”)

Genetic Testing has operated to his prejudice because the trial court denied the motion without the child's representation by a GAL. The action to determine his paternity proceeded without his having anyone to represent him or advocate on his behalf.

Although the child at issue here has a personal stake in the outcome of the controversy, and although the trial court's action operated to the child's prejudice, he is still toddler age. He cannot advocate for himself. He must rely on a GAL, parent, or other party to raise the issue of his rights for him.

Here, although the trial court appointed a GAL, no GAL ever accepted the appointment or took any action on the child's behalf. As was the case in the trial court, the child has no GAL to advocate for him on appeal. The child's mother has not raised the issue of the child's rights. If not for Mr. Grewal, nobody would be advocating on behalf of the child to raise the issue of his constitutional rights. The child is, therefore, reliant on Mr. Grewal to raise the issue of his rights.

Moreover, the putative father in *Santos* had standing to raise on appeal a constitutional issue on behalf of the child in that case: whether the section of a child support statute eliminating the need for an independent guardian for a child in paternity proceedings improperly and unconstitutionally eliminated the requirement that a child be made a party

to paternity proceedings.³⁷ If the putative father in *Santos* had standing to raise constitutional issues on appeal on behalf of the child, then the presumed father in this case also has standing to raise on appeal constitutional issues on behalf of the child at issue here.

C. The Trial Court Violated RCW 26.26.535 and the Child's Constitutional Rights by Denying a Motion for Genetic Testing Without the Child Having Been Represented by a Guardian Ad Litem.

1. Statute Requires the Child's Representation by a GAL.

The Uniform Parentage Act states that in a proceeding to adjudicate parentage under circumstances described in RCW 26.26.530³⁸ or in RCW 26.26.540, a court may deny a motion seeking an order for genetic testing if the court determines that the conduct of a parent or presumed or acknowledged parent estops that party from denying parentage, and it would be inequitable to disprove the parent-child relationship.³⁹ In determining whether to deny a motion to seek an order for genetic testing under subsection (1)(a) of RCW 26.26.535, the court must consider the best interest of the child, including certain factors enumerated in the statute.⁴⁰ Thus, before a trial court can rule on a motion

³⁷ 104 Wn.2d at 146.

³⁸ RCW 26.26.530(1) requires that a proceeding to adjudicate parentage brought by a presumed parent must be commenced not later than four years after the birth of the child. Here, it is undisputed that the husband is a presumed parent. His motion to disestablish parentage was brought pursuant to RCW 26.26.530(1).

³⁹ RCW 26.26.535(1)(a).

⁴⁰ RCW 26.26.535(2).

for genetic testing, it must consider several enumerated factors and determine whether proceeding is in the child's best interests.⁴¹ However, the statute's plain language also requires, "In a proceeding involving the application of this section, a minor or incapacitated child *must be represented* by a guardian ad litem."⁴²

The Uniform Parentage Act differs in this respect from the GAL provision in RCW 13.34.100, which covers dependency and termination of parental rights. RCW 13.34.100 states, "The court shall appoint a guardian ad litem for a child who is the subject of an action under this chapter, *unless a court for good cause finds the appointment unnecessary.*"⁴³ The Uniform Parentage however does not allow the court this same discretion to find "good cause" making appointment of a GAL unnecessary. Instead, it flatly requires that a minor child be represented by a GAL.

In *In re Parentage of S.E.C.*, the trial court ordered genetic testing without first having held a hearing to determine whether DNA testing and proceeding with a paternity petition were in the child's best interests.⁴⁴

The appellate court stated:

⁴¹ *Id.*

⁴² RCW 26.26.535(3).

⁴³ RCW 13.34.100(1) (emphasis added).

⁴⁴ *S.E.C.*, 154 Wn. App. at 115.

[W]e hold that the trial court should have first held a hearing to determine if DNA testing and proceeding with VH's paternity petition are in SEC's best interests before it ordered TD and SEC to undergo DNA testing. *See also In re Parentage of Q.A.L.*, 146 Wash.App. 631, 637, 191 P.3d 934 (2008) (Guardian ad litem **must** make a recommendation on child's best interests before the trial court proceeds with a DNA test or paternity petition).⁴⁵

In *S.E.C.*, the appellate court held that the trial court erred when it ordered genetic testing before holding a hearing on the child's best interests.⁴⁶

Here, in denying the motion for genetic testing, the trial court applied the factors in RCW 26.26.535(1)(a) and RCW 26.26.535(2) one by one when it made its Finding of Fact 2.21(G), and even made findings as to the child's best interests, but it did so without any recommendation by a GAL and without a GAL ever having represented the child's interests. This is in violation of the statute and reversible error.

Although the trial court did appoint a GAL, simply appointing a GAL is not sufficient. The statute requires that the child be *represented* by a GAL.⁴⁷ Here, no GAL actually undertook the child's representation. No GAL ever made any investigation, issued any report, or represented the child at any hearing. Without the child's interests having been represented, the trial court still denied the motion for genetic testing. This

⁴⁵ *Id.* (emphasis in original).

⁴⁶ *Id.*

⁴⁷ RCW 26.26.535(3).

was clearly error when the statute expressly requires that a child must be represented by a GAL in such a proceeding.

2. The Child's Constitutional Rights were Violated.

In addition to the Uniform Parentage Act, constitutional considerations also require that children be parties to actions determining their paternity.⁴⁸ The importance of familial bonds accords constitutional protection to the parties involved in judicial determinations of the parent-child relationship.⁴⁹ These protections are found when the State seeks to terminate a parent-child relationship.⁵⁰ They are also present when the State seeks to establish a parent-child relationship.⁵¹ The role of a child, in a paternity action, is to seek to maintain or establish a familial bond and protect himself from an erroneous determination of parentage.⁵²

It is the child who has the most at stake in a paternity proceeding.⁵³ A child has a constitutional right to participate in accurately determining his paternity.⁵⁴ The Washington Supreme Court has stated:

Procedural due process already requires that a child must be a party to a paternity action in recognition of the principle that no individual should be bound by a judgment

⁴⁸ *State v. Santos*, 104 Wn.2d 142, 146, 702 P.2d 1179 (1985).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 148.

⁵³ *State v. Santos*, 104 Wn.2d 142, 143, 702 P.2d 1179 (1985).

⁵⁴ *In re Parentage of Q.A.L.*, 146 Wn. App. 631, 636-37, 191 P.3d 934 (2008), citing *State v. Santos*, 104 Wn.2d 142, 147, 702 P.2d 1179 (1985).

affecting his or her interests where he has not been made a party to the action.

A child must not 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. Because a child cannot represent his or her own interests, [statute] requires that a child be represented by a guardian or a guardian ad litem, who in fact protects the child's interests.⁵⁵

A child's interest in a paternity proceeding extends beyond the immediacy of support which a potential father might provide.⁵⁶ Also at stake are inheritance rights and familial bonds.⁵⁷ Substantive due process *requires* accuracy in establishing paternity.⁵⁸

In *Santos*, the Pierce County Prosecuting Attorney brought a paternity action on behalf of the mother.⁵⁹ The child was named, but not served, as a party.⁶⁰ The child was not represented by independent counsel or a GAL.⁶¹ On appeal, the husband claimed constitutional error because an independent guardian was not appointed for the child in the paternity action.⁶² The court vacated the judgment, saying that the state failed to protect the interests of the child.⁶³

⁵⁵ *Santos*, 104 Wn.2d at 147 (internal quotation marks and citations omitted).

⁵⁶ *Q.A.L.*, 146 Wn. App. at 637, citing *Santos*, 104 Wn.2d at 147-48.

⁵⁷ *Id.*

⁵⁸ *Id.* (emphasis added).

⁵⁹ 104 Wn.2d at 146.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 151 (Dolliver, C.J., dissenting).

⁶³ *Id.* at 150-51.

Here, although the court appointed a GAL, no GAL ever represented the child during the proceeding. Because nobody represented the child's interests during the proceeding, the child's constitutional rights were violated.

D. The Parenting Plans and Order of Child Support Were Entered in Error.

Because it was an error to adjudicate paternity without the child having been represented by a GAL, it was also error for the trial court to enter Parenting Plans and an Order of Child Support based on that adjudication of paternity.

E. Invoking the Doctrine of Invited Error is Inappropriate.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal.⁶⁴ It applies when a party takes affirmative and voluntary action that induces the trial court to take an action that the party later challenges on appeal.⁶⁵

Here, the trial court found that the husband "chose not to use the services of the court appointed guardian ad litem,"⁶⁶ and the husband now challenges the trial court's actions on the basis that the child had no representation by a GAL. However, it would be inappropriate to rely on

⁶⁴ *Kenneth W. Brooks Trust A. v. Pac. Media, LLC*, 111 Wn. App. 393, 400, 44 P.3d 938 (2002).

⁶⁵ *Lavigne v. Chase, Haskell, Hayes & Kalamon, PS*, 112 Wn. App. 677, 681, 50 P.3d 306 (2002).

⁶⁶ CP 264.

the invited error doctrine because the only party who could arguably have invited the error (husband) is not the person who would be penalized for any such actions. The statutorily mandated presence and participation of a GAL in a contested proceeding is intended to benefit the interests of the child whose future circumstances the parties are contesting, not the interests of the parties to the proceeding.⁶⁷ Because relying on the doctrine of invited error would penalize the child and not the husband, it would be inappropriate to invoke this doctrine.⁶⁸

F. The Husband Should be Awarded his Reasonable Attorney Fees Pursuant to RCW 26.26.140 and RAP 18.1.

RAP 18.1 requires a party to request attorney fees if applicable law grants a party the right to recover attorney fees. The Uniform Parentage Act allows that the court may order all or a portion of a party's reasonable attorney's fees be paid by another party.⁶⁹ Because Mr. Grewal brought his action under the Uniform Parentage Act, he requests that he be awarded his reasonable attorney fees.

VI. Conclusion

Because the trial court issued an order denying genetic testing under the Uniform Parentage Act without a guardian ad litem (GAL) to represent the child and make a recommendation as to the child's best

⁶⁷ *In re Support of C.L.F.*, 298 Wis.2d 333, 344, 727 N.W.2d 334 (2007).

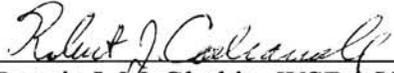
⁶⁸ *See id.*

⁶⁹ RCW 26.26.140.

interests, the trial court violated RCW 26.26.535's requirement that the child be represented by a GAL and the trial court violated the child's constitutional procedural and substantive due process rights. This is reversible error, and the matter should be remanded to the trial court with instructions to hold a hearing on the child's best interests with the child represented by a GAL. Additionally, Mr. Grewal should be awarded his reasonable attorney's fees under the Uniform Parentage Act and under RAP 18.1 for having to bring this appeal.

DATED this 17th day of September, 2012.

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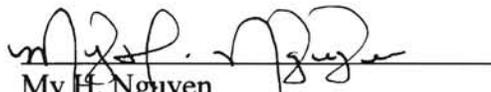
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action,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

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

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