

NO. 35142-1

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

Kassie Starr Dugger, Appellant,

v.

Theodore Robert Lopez, Appellee.

STATE OF WASHINGTON
DIVISION TWO
PIERCE COUNTY
JAN 14 2014
BY _____

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

**Matthew J. Bellmer, WSBA#19824
Attorney at Law
Attorney for Appellant, Kassie S. Dugger
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A. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court abused its discretion when it denied the Appellant's motion to continue the trial date for the purpose of appointing a Guardian ad Litem in a private paternity matter wherein neither party was represented, the child's best interests were not adequately represented and placement of the parties' child is in issue.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court abuse its discretion when it denied the Appellant's motion to continue the trial date for the purpose of appointing a Guardian ad Litem in a private paternity matter wherein neither party was represented, the child's best interests were not adequately represented and placement of the parties' child is in issue? (Assignment of Error No. 1)

B. STATEMENT OF THE CASE

This matter was initiated on May 3, 2005, by Appellant, Kassie Dugger pursuant to RCW 26.26.375. CP 1-5. The minor child is SML. The biological mother is Kassie Starr Dugger, and the biological father is Theodore Robert Lopez. The father stipulated to paternity. CP (Under seal); RP 4. A Guardian Ad Litem ("GAL") was never appointed throughout these private paternity proceedings. The child, SML, was not

represented, and neither party had been represented by an attorney throughout any of the proceedings involving SML.

In her Petition filed on May 3, 2005, the Appellant asked the court for residential placement of her daughter, SML. CP 1-5. In her proposed Parenting Plan, also filed on May 3, 2005, she suggested a rather typical residential schedule wherein the Appellee father, Theodore Lopez, would have visitation on weekends, and no discretionary or mandatory restrictions pursuant to RCW 26.09.191 were requested. CP 6-15.

It appears from the court record that the Appellant set a hearing by Order to Show Cause for June 6, 2005, and asked the court to allow SML to reside with her pending the outcome of the Show Cause Hearing. CP 16-18. In the Show Cause Order, the Commissioner indicated, in writing on the order, the following: "May need GAL at Show Cause Hearing." The Order to Show Cause was issued on May 16, 2005 at 2:38 p.m. CP 16-18. However, it appears from the record, in the absence of any ruling, that a Show Cause Hearing set by the Appellant never took place.

Subsequently, the Appellee, Thloedore Lopez, after being served with some documents by Appellant, not including the Order to Show Cause obtained by Appellant on May 16, 2005, filed his own Motion and Declaration for Ex-Parte Restraining Order and Order to Show Cause [and

for Temporary Orders] on June 10, 2005. CP19-21, CP 22-26, CP 27-29. His hearing was set for June 28, 2005. Among his requests, the Appellee, Theodore Lopez, requested that SML be placed with him pending the outcome of the hearing, and he requested the appointment of a GAL. CP 22-26. It is clear that placement continued to be contested.

The Show Cause Hearing set by the Appellee, Theodore Lopez, took place on June 28, 2005, at 10:38 a.m. A Pro Tem Commissioner, Ronald Heslop, heard the matter. CP 30, CP 31-32. As a result, placement was granted to the Appellant and a visitation schedule was determined, which was somewhat convoluted. However, it appears that the Pro Tem ruled that the Appellant would have SML a majority of the time. CP 30, CP 31-32. A GAL was not appointed in this hearing even though it appears from the record that *the Appellant and Appellee contested placement*, and the Appellee had requested appointment of a GAL, otherwise, it is unlikely there would have been a hearing.

The residential schedule, as determined by Pro Tem Heslop remained in place from June 28, 2005, until a settlement conference was held in January 2006, before Judge Tollefson. CP 33. The parties did not settle the matter at the settlement conference or as a result of it. CP 33. There is no indication that the settlement judge was aware that a GAL had

never been appointed throughout the proceedings to represent the best interests of SML. CP 33.

On February 2, 2006, the Appellant filed a motion for a continuance of the trial date of February 14, 2007, and she set the continuance for February 10, 2007, at 9 a.m. before the Honorable Frank Cuthbertson, the trial judge. CP 34-35. The purpose of her motion to continue was to obtain a GAL prior to a trial taking place. CP 34-35. Although she set the motion for a continuance before the trial date, the Appellant's motion to continue the trial date was addressed on the day of trial. CP 36-37; RP 3, 11-12, 20. The court denied the Appellant's request for a GAL and a continuance for that purpose, and the matter proceeded to trial. CP 36-37. The court then took testimony and reserved written ruling to be provided to the parties within two weeks of the trial date. CP 36-37; RP 3, 11-12, 20.

The court entered the final orders in the matter on April 13, 2006, placing the child with the *father*, after the child had primarily been in the Appellant's care from June, 2005 to February 14, 2006, the trial date, with the Appellee having weekend visits. CP 38-39, CP 40-50. During the trial, the Appellant and Appellee both disputed placement, but neither the parents nor the child, SML, was represented and there was no GAL. RP 2-48 [2/14/06 - Trial]

It appears from the Final Parenting Plan that the court made the following finding:

“ . . . a party’s “involvement or conduct may have an adverse effect on the child’s best interests because of the existence of the factors which follow: The abusive use of conflict . . . “ CP 40-50; RP 7-9 [4/18/06].

The court did not clearly identify in the Parenting Plan to which parent the court was referring when it made its finding regarding “abusive use of conflict.” CP 36-37, CP 38-39, CP 40-50. The court made an attempt to clarify that ruling in a hearing that took place on April 18, 2006, although the final orders were entered on April 13, 2006. CP 38-39, CP 40-50; RP 7-9 [4/18/06]. In its clarification of the ruling regarding the “abusive use of conflict,” the court backed off its trial finding regarding this issue. RP 7-9 [4/18/06]. Thus, there were no statutory restrictions placed on either parent pursuant to RCW 26.09.191. RP 7-9 [4/18/06]. However, there also was no GAL report to assist the court and upon which the court could base its findings, if it so chose. Further, neither party was represented by an attorney who could have assisted the court in determining what was in the best interest of SML. Finally, SML, the parties’ minor child was not represented.

Subsequent to entry of the final orders, on April 17, 2006, (before the April 18, 2006 clarification hearing), the Appellant filed a Motion for Reconsideration (again) requesting a GAL be appointed in the matter and

a new trial, and set the hearing for May 5, 2006. CP 52. On May 5, 2006, the trial court heard the Appellant's Motion for Reconsideration and reserved ruling on the motion. CP 53-54. On May 17, 2006, the court ordered the parties to obtain a settlement conference prior to the court's ruling on the Appellant's Motion for Reconsideration. CP 55-56, CP 57. Another settlement conference was held before the Honorable Kitty-Ann Van Doorninck on May 25, 2006. CP 58. On June 14, 2006, Judge Cuthbertson issued a ruling on the Appellant's Motion for Reconsideration denying her motion to reconsider appointing a GAL. CP 59.

The Appellant filed this timely appeal to the Court of Appeals appealing the denial of the Appellant's motion to continue the trial date to appoint a GAL followed the trial court's ruling on June 14, 2006.

CP 60-70.

C. ARGUMENT

(1) The Standard of Review

The standard of review in this appeal is *abuse of discretion*. A trial court will be found to have abused its discretion only where the decision is "manifestly unreasonable or exercised on untenable grounds for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971); Barfield v. City of Seattle, 100 Wn.2d 878, 676 P.2d 438 (1984). In this appeal, the trial court abused its discretion in determining

residential placement and factual findings that were not in the best interests of the minor child, SML. The court's findings affected the substantial rights of the child, SML, who was not represented. In re the Custody of Brown, 77 Wn. App. 350, 890 P.2d 1080 (1995). It does not appear that the trial court carefully considered all the factors that a court must consider in making a determination regarding placement, and a proper residential schedule. RCW 26.26; RCW 26.09. For, example, the court did not fully consider the past residential schedule utilized by the parents. The child, SML, resided with the Appellant a majority of the time which is a factor that, without any restrictions imposed, must be given great weight. RP 3-48; RCW 26.26; RCW 26.09.

(2) **The Trial Court Abused Its Discretion When it Denied the Appellant's Motion to Continue the Trial Date for the Purpose of Appointing a Guardian Ad Litem in a Private Paternity Matter wherein Neither Party was Represented, the Child's Best Interests Were Not Adequately Represented and Placement of the Parties' Child was Disputed.**

The *new* Uniform Parentage Act ("UPA") was enacted in Washington in June 2002, effective June 13, 2003. Chapter 26.26 RCW. The effect of the new UPA was that a child was a permissible party, but not a mandatory party to the action, unless the child was made a party or the court found that the interests of the child were not adequately represented. If so, a GAL would be appointed. RCW 26.26.

Previously, the UPA required that a GAL be appointed in all private paternity actions. RCW 26.26; In re the Custody of Brown, 77 Wn. App. 350, 890 P.2d 1080 (1995). The purpose behind the requirement was to protect the child's rights in both determinations of parentage and support by requiring that the child be made a party to the action and independently represented. Brown, at 352. This would especially be true when the child is very young, as is true in the instant matter. RP 3 [2/14/06 – Trial]. Further, the court in Brown stated that “failure to join a child as an indispensable party represented by a GAL divests the court of jurisdiction and renders all judgments made by the court void.” Brown, at 352, 353. However, the most compelling reason for the appointment of a GAL is stated as follows in Brown:

“The constitutional due process requirements of the Fourteenth Amendment and Const. art. 1, Sec. 3, also require a guardian ad litem to represent the child in a paternity action even when, . . . , the father stipulates to paternity. Brown, supra, at 353; State v. Santos, 104 Wn.2d 142, 702 p.2d 1179 (1985).

In this matter, the Appellee father did stipulate to paternity. RP 4 [2/14/06 – Trial]. However, SML was never represented by counsel, by a GAL, nor were the Appellant or the Appellee represented by counsel. The court in Brown stated further that:

“Procedural due process also requires that the child be represented by a guardian ad litem in a private paternity case because “ ‘no individual should be bound by a judgment affecting his or her [*best*] interests where

he [or she] has not been made a party to the action.” [Emphasis added.] Santos, at 147, 702 p.2d 1179 (quoting Hayward v. Hansen, 97 Wn.2d 614, 647 P.2d 1030 (1982)).

The child’s best interests would include support and placement in a stable, nurturing home environment. Brown, *supra*, at 353.

In the matter before the court, the Appellant and Appellee strongly disputed the placement of SML through out the entirety of the proceedings leading up to and including trial. RP 3-48 [2/14/06 – Trial]. The child, SML, had no way of representing her best interests. The Appellant mother could not; the Appellee father could not. The court clearly did not.

It is not clear that the findings made by the trial court, which later had to be clarified, are in the best interests of SML, especially because there was no one to represent her best interests.

C. CONCLUSION

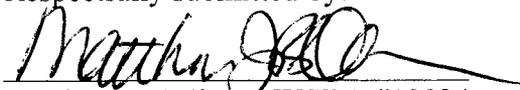
It is evident from the record that the Appellant mother and the Appellee father contested placement of the parties’ minor child, SML, throughout these proceedings. It is also evident from the record that neither the Appellant mother nor the Appellee father was ever represented. Certainly, SML was never represented, nor did she have a GAL appointed to represent her best interests.

The court abused its discretion by making findings at trial that were not in the best interests of SML. For example, the court did not

carefully consider and weigh all the statutory factors in determining placement of SML. Finally, and most importantly, the court abused its discretion by violating SML's constitutional rights by failing to appoint a GAL to represent her best interests because she could not represent her own.

DATED this 29th day of March, 2007.

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "Matthew J. Bellmer", with a long horizontal flourish extending to the right.

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COURT OF APPEALS
DIVISION II
07 MAR 30 PM 2:22

Declaration of Mailing

On this day, March 29, 2007, I placed in the U.S. Mail, postage prepaid, a true and correct copy of the *Brief of Appellant, Kassie S. Dugger*, and a copy of this declaration of mailing to the following:

Theodore Robert Lopez
22106 – 43rd Avenue East
Spanaway, Washington 98387

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of March, 2007 at Tacoma, Washington.


Matthew J. Bellmer, WSBA #19824
Attorney for Kassie S. Dugger, Appellant

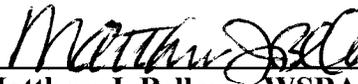
Declaration of Delivery

On this day, March 30, 2007, I hand-delivered, a true and correct copy of the *Brief of Appellant, Kassie S. Dugger*, and a copy of this declaration of hand-delivery to the following:

Court Clerk
Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, Washington 98402-4454

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of March, 2007 at Tacoma, Washington.


Matthew J. Bellmer, WSBA #19824
Attorney for Kassie S. Dugger, Appellant

APPENDIX

Westlaw

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C

In re Custody of Brown Wash.App. Div. 3, 1995.
 Court of Appeals of Washington, Division 3,
 Panel Four.

In re the CUSTODY OF Samantha Clare BROWN.
 Brian WOODS, Respondent,
 v.
 Denise BROWN, Appellant.
No. 13464-4-III.

March 28, 1995.

In paternity action initiated by putative father, the Superior Court, Douglas County, John Bridges, J., established paternity and placed child with plaintiff, and he appealed. The Court of Appeals, Sweeney, J., held that even though putative father stipulated to paternity, Uniform Parentage Act and due process required appointment of guardian ad litem to represent child's interests.

Reversed.

West Headnotes

[1] Constitutional Law 92 ↪274(5)

92 Constitutional Law

92XII Due Process of Law

92k274 Deprivation of Personal Rights in General

92k274(5) k. Privacy; Marriage, Family, and Sexual Matters. Most Cited Cases

Infants 211 ↪78(1)

211 Infants

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k78 Necessity of Appointment

211k78(1) k. In General. Most Cited Cases

Infants 211 ↪87

211 Infants

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k87 k. Failure to Procure Appointment. Most Cited Cases

Even though putative father stipulated to paternity, Uniform Parentage Act and due process required appointment of guardian ad litem to represent child's interests in paternity proceeding, and therefore order establishing paternity and placing child with father was void. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 3; West's RCWA 26.26.090.

[2] Children Out-Of-Wedlock 76H ↪30

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk30 k. Nature and Form of Remedy. Most Cited Cases

Children Out-Of-Wedlock 76H ↪64

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk63 Judgment or Order

76Hk64 k. In General. Most Cited Cases

Infants 211 ↪78(1)

211 Infants

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k78 Necessity of Appointment

211k78(1) k. In General. Most Cited Cases

Under Uniform Parentage Act, failure to join child as indispensable party represented by guardian ad litem divests court of jurisdiction to determine parentage or support and renders all judgments made by the court void. West's RCWA 26.26.090.

[3] Appeal and Error 30 ↪170(1)

30 Appeal and Error

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30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k170 Nature or Subject-Matter of Issues or Questions

30k170(1) k. In General. Most Cited Cases

Jurisdictional issues may be raised for first time on appeal.

[4] Constitutional Law 92 ⇨274(5)

92 Constitutional Law

92XII Due Process of Law

92k274 Deprivation of Personal Rights in General

92k274(5) k. Privacy; Marriage, Family, and Sexual Matters. Most Cited Cases

Infants 211 ⇨78(1)

211 Infants

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k78 Necessity of Appointment

211k78(1) k. In General. Most Cited Cases

Constitutional due process requires guardian ad litem to represent child in paternity action even when putative father stipulates to paternity. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 3.

[5] Constitutional Law 92 ⇨274(5)

92 Constitutional Law

92XII Due Process of Law

92k274 Deprivation of Personal Rights in General

92k274(5) k. Privacy; Marriage, Family, and Sexual Matters. Most Cited Cases

Infants 211 ⇨78(1)

211 Infants

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k78 Necessity of Appointment

211k78(1) k. In General. Most Cited

Cases

Procedural due process requires that child be represented by guardian ad litem in private paternity action, because no individual should be bound by judgment affecting his or her interests where he or she has not been made party to the action. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 3.

[6] Statutes 361 ⇨190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Statute clear on its face is not subject to judicial interpretation.

[7] Estoppel 156 ⇨52.15

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.15 k. Essential Elements. Most Cited Cases

Elements of equitable estoppel include: admission, statement or act inconsistent with claim afterwards asserted; action by other party on faith of such admission, statement or act; and injury to such other party resulting from allowing first party to contradict or repudiate such admission, statement or act.

[8] Children Out-Of-Wedlock 76H ⇨30

76H Children Out-Of-Wedlock

76HV Paternity Proceedings

76Hk30 k. Nature and Form of Remedy. Most Cited Cases

Infants 211 ⇨78(1)

211 Infants

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k78 Necessity of Appointment

211k78(1) k. In General. Most Cited Cases

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Mother could not, by stipulating to paternity, waive jurisdictional requirement that child be made party to paternity action and be represented by guardian ad litem. West's RCWA 26.26.090.

*351 Clayton E. King, Seattle, for appellant.
 Grant M. Johnson, Wenatchee, for respondent.
 SWEENEY, Judge.

Although there is a lengthy series of events preceding this action, the facts material to the disposition of this case are brief and undisputed. Brian Woods and Denise Brown met in the summer of 1989 and engaged in a sexual relationship. As a result of that relationship, a child was conceived. Mr. Woods acknowledges paternity. He petitioned for permanent custody of the child, Samantha Clare Brown, *352 pursuant to the nonparent custody statute, RCW 26.10,^{FN1} as well as the Uniform Parentage Act, RCW 26.26. The court concluded that placement with the father was in the best interest of the child, granted permanent placement with Mr. Woods, and provided visitation for Ms. Brown in a parenting plan.

FN1. Relevant provisions of the act, which relate to third party actions involving custody of minor children, RCW 26.10, include:

In entering an order under this chapter, the court shall consider, approve, or make provision for:

- (1) Child custody, visitation, and the support of any child entitled to support;
- (2) The allocation of the children as a federal tax exemption; and
- (3) Any necessary continuing restraining orders.

RCW 26.10.040. "The court shall determine custody in accordance with the best interests of the child." RCW 26.10.100.

Ms. Brown appeals the order granting residential placement of her minor daughter, Samantha, with Mr. Woods, contending the order establishing Mr. Woods' paternity is void because the court failed to appoint a guardian ad litem to represent the interests

of Samantha and therefore the residential placement must be reversed. We agree and reverse.

DISCUSSION

The Uniform Parentage Act, RCW 26.26, governs actions in which paternity is an issue. *Gonzales v. Cowen*, 76 Wash.App. 277, 281, 884 P.2d 19 (1994). It requires that "[t]he child shall be made a party to the action. If the child is a minor, the child shall be represented by the child's general guardian or a guardian ad litem appointed by the court subject to RCW 74.20.310. The child's mother or father may not represent the child as guardian or otherwise." RCW 26.26.090(1).

[1][2][3] By enacting RCW 26.26.090, the Legislature ensured protection of the child's rights in both determinations of parentage and support by requiring that the child be made a party to the action and independently represented. *State v. Santos*, 104 Wash.2d 142, 148, 702 P.2d 1179 (1985) (quoting *Hayward v. Hansen*, 97 Wash.2d 614, 617, 647 P.2d 1030, 70 A.L.R.4th 1021 (1982)). Failure to join the child as an indispensable party represented by a guardian ad litem divests the court of jurisdiction and renders all judgments *353 made by the court void. *McDaniels v. Carlson*, 108 Wash.2d 299, 312, 738 P.2d 254 (1987); *Hayward*, 97 Wash.2d at 620, 647 P.2d 1030. Jurisdictional issues may be raised for the first time on appeal. *Santos*, 104 Wash.2d at 145, 702 P.2d 1179.

[4] The constitutional due process requirements of the Fourteenth Amendment and Const. art. 1, § 3, also require a guardian ad litem to represent the child in a paternity action even when, as here, the putative father stipulates to paternity. *Santos*, at 146, 702 P.2d 1179; *In re Luscier*, 84 Wash.2d 135, 139, 524 P.2d 906 (1974). In **1082 *Santos*, the State brought a paternity action on behalf of a mother and her child. The child was named, but not served, as a party, nor was she represented by independent counsel or a guardian ad litem. Without requiring blood tests, and without further investigation, the State accepted the father's stipulation of paternity. The provisions of RCW 26.26.090 requiring appointment of a guardian ad

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litem in paternity actions does not apply to proceedings brought by the State on behalf of the child. RCW 74.20.310(1), (2). The Supreme Court reversed, nonetheless, holding that when a guardian ad litem is not appointed to protect the interests of the child, the State must act in that capacity. Blind acceptance of an admission of paternity without further investigation into other possible fathers, the court concluded, was not the exercise of prudent guardianship. *Santos*, 104 Wash.2d at 150, 702 P.2d 1179.

[5] Procedural due process also requires that the child be represented by a guardian ad litem in a private paternity action because “ ‘no individual should be bound by a judgment affecting his or her interests where he [or she] has not been made a party to the action.’ ” *Santos*, at 147, 702 P.2d 1179 (quoting *Hayward*, 97 Wash.2d at 617, 647 P.2d 1030). The child's interests would include support and placement in a stable, nurturing home environment. *McDaniels*, 108 Wash.2d at 312-13, 738 P.2d 254.

Mr. Woods argues, however, that Washington has only addressed the necessity of a guardian ad litem in paternity actions in which the identity of the father was an issue or the child's rights were adversely affected by dismissal of the action. *See, e.g.,* *354 *Miller v. Sybouts*, 97 Wash.2d 445, 645 P.2d 1082 (1982) (failure of guardian ad litem to appear at the motion for summary judgment rendered the summary judgment of dismissal void); *State ex rel. Henderson v. Woods*, 72 Wash.App. 544, 865 P.2d 33 (1994) (either the State must conduct a reasonable inquiry into the identity of the natural father or the child must be represented by a guardian ad litem to ensure due process); *State ex rel. Partlow v. Law*, 39 Wash.App. 173, 692 P.2d 863 (1984) (because child who was not named as a party was represented by a guardian ad litem, the court had jurisdiction to decide paternity); *In re Burley*, 33 Wash.App. 629, 658 P.2d 8 (dismissal of a paternity action with prejudice when the child was not represented by a guardian ad litem or made a party to the action reversed on appeal), *review denied*, 99 Wash.2d 1016 (1983). Mr. Woods argues that the requirement should not be extended here because the issues are limited to placement and

visitation.

[6] A statute clear on its face is not subject to judicial interpretation. *In re Marriage of Kovacs*, 121 Wash.2d 795, 804, 854 P.2d 629 (1993). RCW 26.26.090 is clear on its face. The appointment of a guardian ad litem is mandatory for all private paternity actions, including residential placement determinations authorized by RCW 26.26.130(6). *State ex rel. T.A.W. v. Weston*, 66 Wash.App. 140, 147, 831 P.2d 771 (1992) (“The act requires the court to make appropriate provisions for child support and for residential care of the child.”). Further, RCW 26.26.130(1) provides that “[t]he judgment and order of the court determining the existence or nonexistence of the parent and child relationship shall be determinative for all purposes.”

The court retains jurisdiction, over the parties and subject matter, from the initial determination of parentage through any temporary and permanent residential placement. RCW 26.26.080(1).

The residential placement authorized by the Uniform Parentage Act is contained in RCW 26.26.130(6), which states in its entirety: “*On the same basis as provided in chapter 26.09 RCW*, the court shall make residential provisions with *355 regard to minor children of the parties, except that a parenting plan shall not be required unless requested by a party.” (Italics ours.) Mr. Woods contends this provision of the parenting act effectively invokes the dissolution statute, RCW 26.09, which does not require the appointment of a guardian ad litem for development of a parenting plan, including residential placement. We disagree. The statutory authority for a parenting plan is set out in RCW 26.26.130(6); the reference to RCW 26.09 is merely the direction to apply the same procedures and criteria as those used **1083 in the Parenting Act of 1987, Laws of 1987, ch. 460, in formulating a paternity parenting plan.

Finally, Mr. Woods contends that at least the residential placement order is valid under RCW 26.10. He is mistaken. This statute authorizes custody for a nonparent only after he or she establishes the parent is unfit or that “ ‘ circumstances are such that the child's growth and development would be detrimentally affected by

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placement with an otherwise fit parent' ". *In re Stell*, 56 Wash.App. 356, 365, 783 P.2d 615 (1989) (quoting *In re Marriage of Allen*, 28 Wash.App. 637, 647, 626 P.2d 16 (1981)). Mr. Woods does not contend Ms. Brown is unfit. As he notes in his brief: "[T]his was not a circumstance in which the child needed to be protected from the possibility of being placed in one home or the other."

[7][8] Mr. Woods also contends Ms. Brown is equitably estopped from raising the issue of paternity on appeal. He argues her stipulation to paternity in the order of paternity and his reliance on that stipulation should estop Ms. Brown from relitigating the paternity issue.^{FN2} His argument, however, ignores the central issue, which is jurisdiction over Samantha or her guardian ad litem, jurisdiction which Ms. Brown could not waive.

FN2. The elements of equitable estoppel include:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

McDaniels, 108 Wash.2d at 308, 738 P.2d 254 (quoting *Harbor Air Serv., Inc. v. Board of Tax Appeals*, 88 Wash.2d 359, 366-67, 560 P.2d 1145 (1977)).

*356 The decision of the trial court is reversed for lack of jurisdiction.

SCHULTHEIS, J., and THOMPSON, C.J., concur.
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