

COURT OF APPEALS NO. 44546-8-II

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

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

In Re the Parentage of A.MC.

GREGORIO J MERINO GONZALEZ,

Appellant,

V.

SOCORRO CONTERRAS SALDIVAR

Respondent.

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

The Honorable Frank Cuthbertson, Judge

AMENDED OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed find fraud for mother's failure to inform Appellant that there was another potential father of the child.
2. The trial court erred when it failed to find clear and convincing evidence to support a finding of fraud.
3. The trial court erred when it failed to reverse the decision of the lower court denying Appellant's request to bring a motion for genetic testing after rejecting the valid DNA tests that were done voluntarily by the parties.
4. The trial court erred when it refused to accept a valid DNA test voluntarily submitted by the parties.
5. The trial court erred when it refused to consider the absent father's rights to his child because he was not present in Washington State.
6. The trial court erred when it determined that there was no error as a matter of law and upheld the lower court's decision to adjudicate Appellant to be the father of the child.
7. The trial court erred when it failed to consider mother's position as the primary parent of the child and what is in the child's best interests.

8. Appellant assigns error to the trial court's order finding no clear and convincing evidence of fraud or other basis for requiring DNA testing.

9. Appellant assigns error to the trial court's order finding no error in denial of request to rescind paternity.

Issues Presented on Appeal

1. Did the trial court err by refusing to find fraud for mother's failure to inform Appellant of the other potential father?
2. Did the trial court err by refusing to reverse the lower court's ruling denying Appellant the opportunity to have DNA testing done?
3. Did the trial court err by finding that there was no clear and convincing evidence of fraud or other basis for requiring DNA testing?
4. Did the trial court err when it determined that there was no error as a matter of law and upheld the lower court's decision to adjudicate Appellant to be the father of the child?

B. STATEMENT OF THE CASE

1) **Substantive History**

According to the investigative report of the Guardian ad Litem (GAL) , Appellant met respondent on or about March 6, 2011. [CP 44] Appellant was 29 years of age at the time and respondent was 18 years of age. [CP 38,44] Prior to meeting appellant, respondent reported to the GAL that she had been having a sexual relationship with a man named Juan in Mexico. [CP 38] Respondent reported that, besides Appellant, Juan was the only other person she had a sexual relationship with. [CP 38] Juan initially used condoms for birth control, but, eventually, no birth control was used.

Respondent reported that her last sexual encounter with Juan was two days before she left Mexico to return to Washington State. [CP 38] Respondent/mother also reported having one or two menstrual periods after her return from Mexico. Unlike her previous periods, the two she experienced on her return from Mexico were one to three days shorter than the typical five days she was used to experiencing. [CP 39]

On or about March 7, 2011, Respondent and Appellant started having sexual relations. [CP 44] According to Appellant, he was using condoms until March 25, 2011, when, at that time, he had

unprotected sex [CP 44] Appellant further reported that, on March 28, 2011, respondent informed him that she was pregnant. [RP 45] Appellant had doubts about the parentage, but he had not been told about the other relationship mother had been involved in. [CP 45] Also, nothing in the record shows that respondent informed Appellant of the existence of her previous relationship that apparently ended only days before she met Appellant.

Sometime in May of 2011, Appellant stated that he started living with respondent. [CP 45] He did not ask the mother about the child's parentage, and he took care of most of the household and medical expenses during mother's pregnancy. [CP 46] It should be noted that Appellant also has another 8 year old child that he is financially responsible for. [CP 126-27]

On November 8, 2011, the child was born at St. Joseph's Hospital in Tacoma. Appellant believed that he and the mother signed paternity papers on either November 9th or 10th 2011, but, according to the GAL report, records reflect that the paternity affidavit was signed on November 17, 2011. [CP 41, 46]

In February of 2012, approximately three months after the birth of the child Appellant and the mother separated; Appellant indicated that he was having friction with the mother because she stopped doing household work, and because one of mother's

family members caused an accident with one of Appellant's work vehicles. [CP 47-48] Appellant reported that, after their separation, the mother informed him he was not the father of the child. [CP 48] She only told him this, however, after Appellant said he wanted to perform a DNA test. [CP 48] Apparently there was an effort made to have Appellant's name removed from the birth certificate, but the Department of Vital Statistics informed him that removal of his name would not be possible without first submitting to a DNA test.

DNA samples were taken from Appellant, the mother and the child on August 8, 2012. [CP 11, 48] DNA testing was done through DNA Diagnostics Center, and appropriate chain of custody of the samples was submitted with the DNA test results. [CP 99-107] The results indicate that Appellant has 0% probability of being the child's father. [CP 100] By this time, Appellant had not been living with the mother since the child was three months old. The parties did sporadically continue to see each other until either September or October 2012. This casual contact, contact, however did not create nor continue a parental relationship with the child.

On December, 9, 2012, the GAL noted in his report that the mother contacted him and reported that the maternal grandmother informed her that Appellant may not be the father, but she never

conveyed this to Appellant. [CP 49] The GAL report notes that Appellant does not speak fluent English, and that he had to communicate through someone who could interpret for him. Not knowing that there was another potential father, Appellant signed the acknowledgement of paternity in good faith, and relied on respondent's representation. Despite the facts that were presented, including the voluntary DNA test results, the GAL was of the opinion that there was no fraud or material mistake of fact, and that it was in the child's best interests to deny rescinding the paternity affidavit. [CP 54-56]

2) Procedural History

On August 28, 2012, just weeks after obtaining the DNA results, Appellant filed his Petition for Challenge to Paternity Acknowledgement. [CP 3-9] Appellant had no counsel at that time, and a friend apparently helped with filling out the appropriate papers.

On October 2, 2012, respondent/mother filed her response to the Petition for Challenge to Acknowledgement of Paternity. [CP 12-14] In her formal response, the mother admits to fraud under section 1.6 of the Petition, and she admits that child support should be suspended. [CP 12] She also requested that genetic testing be

performed, but says testing was already done. [CP 13]

On October 10, 2012, the State of Washington filed its response to Appellant's Petition for Challenge to Acknowledgement of Paternity. [CP 18-20] In its reply, the state noted that the effective and correct date of the Acknowledgement of Paternity was January 3, 2012, not November 2011. [CP 19] The State further corrected that Appellant was not a presumed father, but rather an acknowledged father. [CP 19] In its request for relief, the State further noted that the court should appoint a GAL prior to permitting genetic testing, and that the court should order Appellant to conduct genetic testing that complies with RCW 26.26.410 and RCW 26.26.415. [CP 19]

On October 29, 2012, the court, on its own motion, entered an order appointing a Guardian ad Litem indicating that the court had no authority to suspend child support until a GAL made an investigation and filed report with the court. [CP 23]

On December 13, 2013, Appellant, through his attorney Pamela Rodriquez, filed a Motion to Rescind Acknowledgement of Paternity, Dismiss Appellant as Alleged Father, Dismiss Child Support Administrative Order, and Remove Appellant from child's birth certificate. [CP 24-32] On December 18, 2012, the GAL filed his response to Appellant's motion asking that the court deny the

motion. [CP 33-34] The State of Washington filed its response to Appellant's motion on December 19, 2012, also asking the court deny Appellant's motion, asserting that it was not in the child's best interests. [CP 64-77, 77] The mother/respondent, filed her reply affidavit on January 7, 2013, which was late, but considered by the court regardless. [CP 91-93, 130] It should also be noted that, though Appellant and Respondent's DNA tests had inadvertently not gotten filed, the State and GAL were provided copies and the court had a working copy. [CP 146] In her response to the Petition to Rescind, the mother/respondent asked that Appellant be removed from her child's birth certificate. [CP 91] She noted that Appellant had nothing to do with her and her child's life any longer. [CP 91]

Appellant's Motion to Rescind the Affidavit of Paternity was heard on January 8, 2013, in front of the Honorable Commissioner Diana Kiesel. [CP 128-150] The respondent/mother was sworn in and the court inquired as to the parentage of the child. [CP 147-148] In her testimony, the mother noted that Appellant is not the father of her child, that the father was another man who lived in Mexico. [CP 148] The mother also stated that it was not fair to have Appellant continue to be named as the child's father. [CP 148] After hearing argument of counsel, review of the pleadings,

the report of the GAL, and mother's testimony, the court made finding that there was no fraud, and that it was not in the best interests of the child to disestablish paternity. [CP 149] More specifically, as per the Court's Order Denying Motion to Rescind, the court found that 1) There was no fraud by clear and convincing evidence; 2) Genetic testing should have been done by motion; 3) Conduct of the parties was inconsistent with rescission request; 4) Denial of a motion seeking an order for genetic testing is based on clear and convincing evidence; and 5) the Appellant (Appellant) is adjudicated to be the father of the child. [CP 95] The court further found that, even though father had no relationship with the child after three months of age, genetic tests would not be in the best interests of the child. [CP 95] On the record, the court further denied Appellant's request for an order permitting genetic testing on the basis that there was no fraud by clear and convincing evidence. [CP 148]

On January 14, 2013, Appellant timely filed a Motion for Revision for de novo review of the Commissioner's ruling. [CP 108-112] Appellant's Motion for Revision noted the following errors to be reviewed on revision: 1. The failure of the court to find fraud for mother's failure to inform Appellant that there was another potential father of the child; 2. Failure to specifically state what clear and

convincing evidence supported the failure to find fraud; 3. Failure to permit Appellant to bring a motion for genetic testing if the court was rejecting the valid DNA tests that were done voluntarily by the parties prior to the beginning of the case; 4. Failure of the court to accept a valid DNA test voluntarily submitted by the parties; 5. Failure of the court to consider the absent father's rights to his child because he was not present in Washington State; 6. Error of the court in adjudicating Appellant to be the father of the child; and, 7. Failure of the court to consider mother's position as the primary parent of the child and what is in the child's best interests. [CP 110-111] Appellant's Memorandum of Law in support of his Motion for Revision was filed on January 24, 2013. [CP 118-127] The GAL filed his response to Appellant's Motion for Revision on January 18, 2013, and asked that the court affirm the Commissioner's findings and decision of January 8, 2013. [CP 113-117]

On January 25, 2013, Appellant's Motion for Revision was heard before the Honorable Judge Frank Cuthbertson in Pierce County Superior Court. [RP 1] Certified Court Interpreter Ivelisse Vela'zquez was present to interpret for Appellant. [RP 2] As noted in the record, the respondent/mother was still a pro se party for the hearing. [RP 4] After hearing argument of counsel on Appellant's Motion for Revision, the court denied Appellant's motion stating 1)

that it did not believe there was an error as a matter of law; 2) That there was no clear and convincing evidence of fraud to support the lower court's decision to not grant an order for genetic testing; 3) that the lower court committed no error when it denied the request to rescind the paternity affidavit; and 4) that the commissioner followed the statute and could not accept the DNA test results. [CP 40, RP 152] In the Order Denying Revision, the court noted that it was not making any further findings than the lower court already ruled and found. [CP 152] This appeal timely follows the court's decision.

C ARGUMENT

1. THERE WAS CLEAR AND CONVINCING EVIDENCE OF FRAUD AND IT IS NOT IN THE CHILD'S BEST INTERESTS TO ADJUDICATE APPELLANT AS THE FATHER OF THE CHILD

RCW 26.26.330 provides that a signatory of an acknowledgement of paternity may rescind the paternity acknowledgement for any reason within 60 days of filing the acknowledgement by commencing a court proceeding to rescind. After the 60 day period, a signatory can commence a proceeding to challenge the paternity acknowledgment only on the basis of fraud,

duress, or material mistake of fact, and it must be commenced within four years of filing the acknowledgement with the state registrar of vital statistics. RCW 26.26.335(1)(a) and (b). The party challenging the acknowledgement of paternity has the burden of proof. RCW 26.26.335(2) In the case at bar, it is not disputed that Appellant signed a paternity acknowledgement. Appellant, however, was not given information about the other possible father at the time he signed, and he was not informed about it until the 60 day period had lapsed.

a. Children's rights to due process:

The Washington State Supreme court has held that children have due process rights in paternity determination actions. State v. Santos, 104 Wash.2d 142, 143, 702 P.2d 1179 (1985). In particular, they have financial and relationship interests that are protected by due process. *Id.* at 146-148. Those rights include the right to an accurate determination of paternity. *Id.* at 147-148; State ex rel. McMichael v. Fox, 132 Wash.2d 346, 352, 937 P.2d 1075 (1997).

The case at hand is no exception to the rule, and the child in this matter has a right to an accurate determination of paternity. It is not disputed that Respondent/mother admitted that she had sex with someone other than Appellant just days before she met

Appellant. [CP 38] Mother admitted to the GAL that the other possible father resides in, and is a citizen of Mexico. [CP 38] Mother also admitted that she did not let Appellant know about the prior relationship with the other potential father, which ended just days before they met. Appellant and mother reported that they voluntarily performed a DNA test from a facility suggested to them by the office of vital statistics. [CP 11, 48] The mother called the facility and set up the appointment, and she helped facilitate getting the testing set up because the Appellant does not speak English. [CP 40] Although the voluntary DNA test was performed prior to filing the Petition to Rescind, this court cannot deny that the results provide overwhelming evidence that Appellant is not the father of the child. [CP 100-107]

Fraud is a simple act of deception where one makes a representation that is known to be untruthful or misrepresents the truth, which causes another to perform some act on reliance of the misrepresentation. Blacks Law Dictionary, 594 (5th Edition 1979), *citing*, Citizens Standard Life Ins. Co. v. Gilley, Tex.Civ.App., 521 S.W.2d 354, 356 (1975). The misrepresentation is usually done to obtain a perceived benefit from the person who was given the false or misleading information. In this case, part of the benefit to the mother was to maintain the stability, financial and otherwise, of her

relationship with Appellant. The mother knew that the other potential father was in Mexico and not readily available to help with her child. The mother also knew that this other man was a possible father, but she did not disclose that information to Appellant. [CP 49] Obviously, it was more convenient for her to simply hide that information. Instead of adjudicating Appellant as the father of the child because he signed an affidavit in reliance on mother's representation that he was the only possible father, the court should have ordered a DNA test to be performed.

The child has a fundamental right to an accurate determination of paternity, and the natural father has parental rights as well even though he is outside of this jurisdiction. It is inequitable, against public policy and contrary to the child's best interests to adjudicate Appellant as the father under the present set of facts. The Washington Supreme Court has previously held that identification is not only for support, but for a determination that the correct father has been identified. State v. Santos 104 Wn.2d. 142, 150, 702 P.2d 1180, 1183 (1985), *citing*, Salas v. Cortez, 24 Cal.3d 22,34, 593 P.2d 226, 154 Cal.Rptr. 529, cert. denied, 444 U.S. 900, 100 S.Ct. 209, 62 L.ed 136 (1979) Had Appellant known of another possible father at the time of the child's birth, he would have requested a DNA test prior to signing the affidavit of paternity.

More importantly, however, is the miscarriage of justice and fraud being perpetuated on the child by forcing the non-father Appellant to remain as the child's designated father.

b. Child's best interests:

Prior to ordering genetic testing to disestablish the paternity of a presumed or alleged father, the court is required to consider several statutory factors and determine whether proceeding with genetic testing is in the child's best interest. RCW 26.26.535(2). The appointment of a Guardian ad Litem (GAL) is also required before a court may deny a request for genetic testing for an accurate determination of a child's paternity. In re the Parentage of Q.A.L., 146 Wn.App. 631, 637, 191 P.3d 934, 937 (2008). A determination of the child's best interests involves questions of fact, and the trial court's resolution of those questions will not be disturbed on review absent an abuse of discretion. Kelley v. Centennial Contractors Enterprises Inc., 147 Wn.App. 290,298, 194 P.3d 292 (2008), affirmed, 169 Wn.2d 381 (2010). A trial court abuses its discretion if its decision is based on untenable reasoning, as demonstrated where the court applies the wrong legal standard or where the facts do not establish the legal requirements of the correct standard. In re Parentage of Schroeder,

106 Wn.App. 343, 349, 22 P.3d 1280 (2001).

If a child is conceived during a marriage, Washington's Uniform Parentage Act gives rise to a presumption of paternity. RCW 26.26.116(1)(a). The paternity of a child having a presumed father may be disproved only by admissible results of genetic testing that excludes that man as the father or identifies another as the father. RCW 26.26.600(1). In this case, the parties were not married, but Appellant signed an affidavit of paternity shortly after the child was born. [CP 41]. Where there is a challenge to the paternity of a presumptive father, the trial court must hold a hearing before determining whether DNA testing is in the "best interest of the child." RCW 26.26.535. The conduct of the mother or acknowledged parent may estop a party from denying parentage if it is found that it is not in the child's best interest. RCW 26.26.535 (1)(a)(i) and (2). A denial of a motion seeking an order for genetic testing must be based on clear and convincing evidence. RCW 26.26.535(4).

In determining whether it is in the best interest of the child to perform genetic testing, the trial court must consider (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed father was placed on notice that he might not be the genetic father; (2) the length of time during which the

presumed father has assumed the role of father of the child; (3) the facts surrounding the presumed father's discovery of his possible non-paternity; (4) the nature of the father-child relationship; (5) the age of the child; (6) the harm to the child that may result if presumed paternity is successfully disproved; (7) the relationship of the child to any alleged father; (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child support obligation in favor of the child; and (9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child. RCW

26.26.535(2)(a)-(i). If the court denies genetic testing, it must issue an order adjudicating the presumed father to be the father of the child. RCW 26.26.535(5). In the present case, however, it should also be noted that the parents already submitted to genetic testing, which provides clear evidence that appellant is not the biological father of the child. [CP 100-107]. The results of the tests themselves have not been disputed by any party to this matter.

RCW 26.26.535 was enacted in 2002, and it was crafted to protect the child against a circumstance where she would be bereft of the only person she has been led to believe is her father. III
Washington Family Law Deskbook, § 58.7(2) at 58-32 (Wash. St.

Bar Assoc. 2nd ed. and 2006 Supp.). This statute codifies case law previously developed. Washington Family Law Deskbook, *supra*, at 58-33. Several of its factors reflect the courts' understanding that the stability of the present home environment is key in evaluating a child's best interests:

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. . . . A paternity suit, by its very nature, threatens the stability of the child's world. . . . It may be true that a child's interests are generally served by accurate, as opposed to inaccurate or stipulated, paternity determinations. However, it is possible that in some circumstances a child's interests will be even better served by no paternity determination at all.

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

(citations omitted); see also In re Marriage of Wendy M, 92

Wn.App. 430, 438, 962 P.2d 130 (1998) (presumed father's

petition to disestablish paternity was denied because "[w]hatever

stability is present in the minor child's life regarding the identity of

his father would be destroyed" by the disestablishment of

paternity). When the rights of a parent conflict with those of a child

in a paternity proceeding, the rights of the child should prevail.

McDaniels, 108 Wn.2d at 311. "Despite the numerous burdens and

benefits of being a father... It is the child who has the most at stake

in a paternity proceeding." State v. Santos, 104 Wn.2d 142, 143

(1985).

Regardless of the guardian ad litem's report in this matter, the trial court is not bound by guardian ad litem's report recommendation; Instead, the court must make its own assessment of the child's best interest. In re Marriage of Swanson, 88 Wn.App. 128, 138, (1997).

In McDaniels the appellant, who was father by presumption due to marriage, was the only father that the child had known. The appellant/father argued that he had not lived with the mother for extended periods of time, but he was the only father the child had known. McDaniels, 108 Wn.2d at 438, 962 P.2d 134. The appellant treated the child consistently with his biological children and, more significantly, the child referred to appellant as "Daddy." Id. at 438.

Unlike McDaniels, in the case at hand, there is no family unit. There is no stability to be destroyed if the court rescinded Appellant's paternity affidavit. The child is too young to even know what a father is let alone know that Appellant signed a paternity affidavit. More significantly, there is no parent/child relationship between Appellant and the child. Appellant is not even a parent figure to the child, and he has not been acting in a parental role since the child was three months old when Appellant and mother separated, and she then informed him of the other possible father.

The guardian ad litem's recommendation is contrary to the case law supporting the child's constitutional right to an accurate paternity determination, and it is contrary to the child's best interests to force a defunct relationship on the child. Moreover, there is no harm to the child in this case because there is no stability to destroy. There is no family unit, there is no parent/child relationship and there is no parental figure in the child's life. It is also important to note that the mother is also desirous of having Appellant disestablished as the father of this child.

c. DNA testing:

To protect a child's constitutional right to an accurate determination of paternity, RCW 26.26.090(1) directs that a minor child shall, in certain circumstances, be represented by a general guardian or guardian ad litem. RCW 26.26.090(1); RCW 74.20.310. In paternity actions where public support for the child has been paid, the State may act as guardian ad litem for the child pursuant to RCW 74.20.310 State on Behalf of McMichael v.. Fox, 132 Wn.2d 346, 353 (1997). Where there is overwhelming evidence of paternity, including blood/genetic test results, testimony from the mother and alleged father regarding sexual relations near the time of conception, and evidence of a resemblance between

the alleged father and the child, the State satisfies its duty as the child's guardian ad litem under constitutional due process and RCW 74.20.310 to secure a swift and accurate determination of paternity even though another possible father is not joined in the action. Fox, 132 Wn.2d at 348

In the Santos case, the court's concern was with the accuracy of the paternity determination in context with the potential conflicting interests of the State in securing support for the child and the child's interest in an accurate determination of paternity:

[i]t is in the child's interest not only to have it adjudicated that some man is his or her father and thus liable for support, but to have some assurance that the correct person has been so identified. **When the state initiates paternity proceedings, whether on behalf of the mother ... or the child ... the state owes it to the child to ensure that an accurate determination of parentage will be made.**

Santos, 104 Wash.2d at 149-50, (emphasis added). The court held that the State failed to protect the interests of the child noting that "[a] prudent guardian for the child would not blindly accept an admission of paternity from one of several potential fathers without further investigation and scientific evidence of paternity [,]" Santos, 104 Wash.2d at 150, and the court offered guidelines addressing the particular facts before it.

Because many non-fathers tend to admit paternity on the basis

of mistake or threats, at least a cursory check into available anthropological and biological evidence of paternity is essential. The court in Santos noted that the State should at least identify whether other potential fathers exist (1) by asking the natural mother whether she had sexual relations with any other men within 1 month Before or after the calculated date of conception; and (2) by comparing the physical characteristics of the father, child, and mother.... [R]outine employment of blood grouping tests to exclude biologically impossible fathers is also desirable when a question as to paternity is raised by preliminary inquiry. Santos, 104 Wash.2d at 150. Santos requires "that the procedures of a paternity, determination ensure accuracy." Santos, 104 Wash.2d at 150.

In the case at hand, the guidelines of Santos were followed here. The State did inquire about other sexual relations the mother had around the time of conception, and blood/genetic tests were performed, albeit, prior to the filing of this case. Unlike the circumstances in Santos, overwhelming evidence in the record indicated Appellant is not the natural father of he child. Since there was scientific proof of parentage, no independent guardian ad litem was even required under Santos. The parties agreed and submitted to a DNA test resulting in overwhelming evidence that Appellant is not the father of the child. Mother in this case supports

and agrees with disestablishing father's paternity. The mother does not disagree that she failed to inform Appellant that there was another potential father at the time of the child's birth.

The burden is not on Appellant to produce another potential father for DNA testing. The court requires the state to at least identify whether other potential father's exist. The answer here is that there is another potential father. The mother has admitted her sexual relations with a man named Juan in Mexico approximately a week prior to meeting and having unprotected sexual relations with Appellant.

In the case at hand, the Appellant is not the correct father and the DNA results are overwhelming evidence that Appellant is not the correct father. The court should reverse the lower courts order because of the existence of 1) the DNA test 2) mother's admission of the other potential father of the child; 3) mother's concealment from Appellant of the other potential father; 4) the absence of any harm to the child should paternity be disestablished; and 5) mother's agreement that paternity should be disestablished. If the court disagrees with the DNA test because it was not performed during the pendency of this case, then there is certainly a clear basis for the court to order another DNA test to be performed. Appellant should not be adjudicated the father of this child with the

evidence before the court, and it was error for the trial court to uphold the commissioner's ruling. It is against public policy to adjudicate the wrong person to be the father of a child where DNA testing shows he is not the father. It is also contrary to the child's constitutional right to an accurate determination of paternity, especially where no family unit or parent/child relationship exists. This is clearly not in the child's best interest. When mother is in agreement to disestablish paternity of her child, the natural mother's wishes should be considered in the best interests of her child.

Appellant has an 8 year old biological son whom he does support financially and has a relationship with. It is damaging to this child to adjudicate Appellant the father of a child that is not his and where he has not relationship.

This court should reverse the trial court's ruling and remand to the trial court with instruction to either permit Appellant to rescind the paternity affidavit, or, in the alternative, order DNA testing. Appellant signed the affidavit of paternity relying on mother's knowing misrepresentation of fact that Appellant was the only potential father. The court should find that mother failed to inform petitioner of any other potential father's at the time of the child's birth or during the pregnancy. The court should also find it is in the

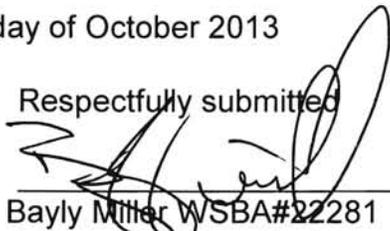
child's best interests to disestablish paternity because the correct person has not been identified, there is no harm to the child, there is no family unit, there is no parent/child relationship between petitioner and the child and there is no destruction of stability because none exists. This court should find that the DNA test is overwhelming evidence that Appellant is not the father of the child. The court should find petitioner is not the father of the child. In the alternative, the court should remand to the trial court and order a DNA test for further ruling once the DNA results are received.

D. CONCLUSION

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

DATED this 13th day of October 2013

Respectfully submitted


Bayly Miller WSBA#22281
Attorney for Appellant

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

In re the Parentage of:

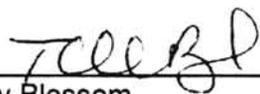
A.M.C.

NO. 44546-8-II

CONFIRMATION OF SERVICE

Prosecuting Attorney, Sherry Buchanan, was served a copy of, Amended Brief of Appellant, in the above named case by ABC Messenger on October 14, 2013. (receipt attached)

Dated: 10/15/13



Tiffany Blossom
Assistant to Attorney C. Bayly Miller



Messenger Service Request Form

Messenger Service LAST DAY	FIRM NAME Bayly Miller	PHONE 253-383-5253	EXT. #	EMAIL (SECRETARY) legalassistants@earthlink.net								
DATE/TIME 10/14/2013	ADDRESS 818 South Yakima Avenue Tacoma WA 98405		ATTORNEY Bayly Miller		SECRETARY Tiffany							
	CASE NAME Gonzalez				YOUR ABC ACCOUNT NO. 100456							
	CAUSE NO. 44546-8-II		CLIENT MATTER #		DATE							
DOCUMENTS Amended brief of appellant												
<input type="checkbox"/> SIGNATURE REQUIRED ON DOCUMENTS <input checked="" type="checkbox"/> RETURN CONFORMED ABC SUP ONLY <input type="checkbox"/> RETURN CONFORMED COPY <input type="checkbox"/> CONFORM ORIGINAL, DO NOT FILE												
OTHER INSTRUCTIONS												
1 Family Support Division, Prosecutor 949 Court E. Tacoma, WA 98402		3										
2		4										
FILING	COUNTY	SUPERIOR COURT	DISTRICT COURT (INDICATE DISTRICT)	AUDITOR	Appeals Court		Federal Court		SEA	TAC	STATE SUPREME COURT	SEC STATE CORP.
	PIERCE				I-(SEA)	II-(TAC)	CIVIL	BANKRUPTCY	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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FAMILY SUPPORT DIVISION

OCT 14 2013

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7 **IN THE COURT OF APPEALS DIVISION II IN AND FOR THE STATE OF WASHINGTON**

8 In re the Parentage of:

9 A.M.C.

No. 44546-8-II

10 **Return of Service**
11 **(Corrected)**

12 ***I Declare:***

- 13 1. I am over the age of 18 years, and I am not a party to this action.
- 14 2. I served the following documents to Socorro Contreras Saldivar.
- 15 Amended Opening Brief of Appellant
- 16 3. The date, time and place of service were (if by mail refer to Paragraph 4 below):
- 17 Date: 10/15/13 Time: 12:30 p.m.
- 18 Address:
- 19 1212 South 27th Street Apt #C12, WA 98409
- 20 4. Service was made:
- 21 by delivery to the person named in paragraph 2 above.

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

23 Signed at Tacoma, WA on 10/15/13.

24 
C. Bayly Miller

25 Return of Service (RTS) - Page 1 of 1

**The Law Office of
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818 South Yakima Ave. 1st floor
Tacoma, WA 98405
Phone: 253-383-5253
Fax: 253-572-7445**