IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Parentage of: S.C., A Minor. V.H. Respondent, And G.C. f/k/a G.D., mother; T.D., presumed father, Petitioner.	No. 41640-9-II UNPUBLISHED OPINION

Armstrong, J. – We granted discretionary review of a trial court order directing T.D. to submit to DNA[1] testing and directing him to arrange for DNA testing of S.E.C. to determine her genetic parentage. We agree with T.D. that the trial court's findings do not demonstrate that DNA testing would be in S.E.C.'s best interest and reverse.[2]

Facts

Four children were born during the marriage of T.D. and G.C. S.E.C., born on August 9, 2001, was the youngest. During the year before her birth, T.D. and G.C. often lived apart, and G.C. stayed with V.H. several times. She was physically intimate with V.H. and T.D. and possibly other men at the time of S.E.C.'s conception. Because of his involvement with G.C.,

[1] Deoxyribonucleic acid.

[2] We use initials to identify the parties to maintain anonymity.

V.H. believed he was the natural father of S.E.C. from the date of her birth until 2004, when T.D. took custody of her under a 2003 divorce decree. T.D. already had custody of S.E.C.'s three siblings, and S.E.C. joined the family in California.

When T.D. took custody of S.E.C., V.H. filed a parentage petition, claiming that he was her biological father and was seeking to have her birth certificate amended to identify him as such. (Although V.H. was present at S.E.C.'s birth, no father is listed on her birth certificate.) A guardian ad litem recommended against paternity testing regarding then three-year-old S.E.C. The trial court dismissed that petition as time-barred, but we reversed and remanded for the trial court to determine whether further proceedings were in S.E.C.'s best interest. *In re Parentage of S.E.C.*, No. 34392-4, 2007 WL 1677960 (Wash. Ct. App. 2007).

Before making that determination, the trial court ordered DNA tests to determine S.E.C.'s biological parentage. The matter came back before this court, and we held that the Uniform Parentage Act, chapter 26.26. RCW, requires a hearing to determine the best interest of the child before a trial court can order a DNA test. *In re Parentage of S.E.C.*, 154 Wn. App. 111, 225 P.3d 327 (2010).

On remand, a different guardian ad litem again recommended against DNA testing. After hearing testimony from the parties and V.H.'s sister, the trial court concluded that DNA testing was in S.E.C.'s best interest and entered findings of fact in support of its decision.

The trial court found that T.D. is the presumed father of S.E.C. because he was married to her mother when S.E.C. was born. S.E.C. has little if any memory of V.H., and knows no life or family unit except for what she has had for the last six years with T.D. Although a father-child

relationship existed between V.H. and S.E.C. for the first two years of her life, this relationship has not existed since she left Washington. The court found that the absence of any relationship between S.E.C. and V.H. is not his fault; "he has spent a lot of time and effort in a number of courts to try and pursue this relationship." Clerk's Papers (CP) at 32. The court further found that V.H.'s attempts to gain custody and establish paternity show a sincere desire to establish his legal relationship with S.E.C.

The trial court also found that S.E.C.'s age "is a difficult issue in the sense that she is still very emotionally vulnerable." CP at 33. S.E.C. may not be mature enough to understand the differences between T.D., who has acted as a de facto parent for a significant period of time, and V.H., whom she does not remember. The trial court found, however, that S.E.C.'s age was not determinative:

> [S.E.C.] is not too young or too old to make the potential of a reunification not in her best interest. At [S.E.C.'s] age, there is a lot of life left in the relationship between herself and [V.H.] and there are factors that may . . . and can mitigate any damages to her. Determination of this issue is deferred to a later time for a finding to be made herein. [S.E.C.'s] age does not automatically exclude this Court from establishing the need for the parties to undergo DNA genetic testing.

CP at 33.

The trial court also found that there is the potential for emotional or psychological harm to S.E.C. if V.H. is reintroduced into her life, or if T.D. is disproved by DNA testing as being her biological father, but that such harm could be mitigated:

> While there is the potential for [S.E.C.'s] life to be turned upside down by her reunification with [V.H.], I find that courts are much more sensitive and aware of these issues than they were 10 or 15 years ago. The Courts are sophisticated enough now that they can mitigate a lot of the harm that would otherwise be there if they were to simply say, "Here's your father, have a good time." Such reunification between [V.H.] and [S.E.C.] is not going to happen in this case.

CP at 33. In a separate finding, the court reasoned that while there is the possibility of harm to S.E.C. if V.H. is introduced into her life, "his request to be so reintroduced to her is not an unreasonable one and is in her best interests based on the fact that there is still enough age and potential maturity for that to be a positive reintroduction." CP at 34.

The trial court found no evidence to indicate that T.D. and S.E.C. do not have a strong relationship, and noted that the guardian ad litem reported that T.D. has done a fine job as her father. The court also found, however, that S.E.C. has the right to receive child support from V.H., who has the ability to benefit her if his paternity is established.

The court emphasized that the passage of time should not defeat V.H.'s efforts to establish paternity, noting that he acted promptly to establish paternity and maintain his relationship with S.E.C. and has been "in a constant state of litigation to enforce his rights as a parent." CP at 34.

> It would be contrary to the law and would give no meaning to our law if simply because it took [V.H.] six years to get to this point in time to be told by a court that he had taken too long to establish paternity and his relationship with [S.E.C.] and that he was out of luck. [V.H.] has, in good faith, attempted t[o] pursue his relationship with [S.E.C.] from the time she left Washington state.

CP at 34.

After observing that its "paramount interest" was S.E.C.'s best interests, the court found sufficient evidence "to move forward in that regard by ordering genetic testing of the parties." CP at 34. The court denied T.D.'s motion for reconsideration.

After the Washington Supreme Court denied direct review, we granted discretionary review and stayed the order requiring the parties to submit to DNA testing.[3] The single issue

presented is whether the trial court abused its discretion by ordering the parties to undergo DNA testing to determine S.E.C.'s paternity.

Discussion

Before a trial court can order genetic testing to disestablish the paternity of a presumed father, it must consider several statutory factors and determine whether proceeding is in the child's best interest. *In re S.E.C.*, 154 Wn. App. at 114; RCW 26.26.535(2). A determination of the child's best interests involves questions of fact, and the trial court's resolution of those questions will be not be disturbed on review absent an abuse of discretion. *Kelley v. Centennial Contractors Enters., 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).

Under Washington's Uniform Parentage Act, being married to the mother when a child is born 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 excluding that man as the father or identifying another as the father. RCW 26.26.600(1). As the trial court found, T.D. is the presumed father of S.E.C.

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. *S.E.C.*,

[3] V.H. challenges the commissioner's ruling granting discretionary review in his appellate brief. This challenge is untimely, and we will not consider it further. RAP 17.7.

154 Wn. App. at 112. As pertinent here, 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 nonpaternity; (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). 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).

Enacted in 2002, RCW 26.26.535 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) (denying presumed father's petition to disestablish paternity 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). Where 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, 702 P.2d 1179 (1985).

In this case, T.D. does not challenge the trial court's findings of fact but argues that they do not support the conclusion that genetic testing is in S.E.C.'s best interest. The trial court found that S.E.C. could be emotionally or psychologically harmed by DNA testing that excluded T.D. as her father and that such test results could disrupt the only family unit she knows. In the court's own words, S.E.C.'s life could be "turned upside down" by her reunification with V.H. CP at 33. Although the court then speculated that any such harm could be mitigated by the courts, the possibility of such mitigation does not lead to the conclusion that testing with the potential for significant harm to S.E.C. is in her best interest.

As T.D. asserts, the real question is what benefit to S.E.C. would be accomplished by ordering genetic testing at this time. Although the trial court is not bound by a guardian ad litem's recommendation, it is significant that two different guardians identified no benefit to S.E.C. from the testing. *See In re Marriage of Swanson*, 88 Wn. App. 128, 138, 944 P.2d 6 (1997) (trial court not bound by guardian ad litem's recommendation but must make own

determination of child's best interests). The first guardian wrote that S.E.C. could risk "permanent attachment and bonding issues if she is again uprooted and taken out of the stable home and family relationships" she enjoyed with T.D. in California. CP at 18. The second guardian wrote that S.E.C. and her siblings have not been parented by their mother, "so their stability has been established solely by the presumed father and the closeness of the family unit and the small community in which they have been living for the past seven years." CP at 29. She added that "[a] possible disruption of the father-child relationship between [S.E.C.] and the presumed father would necessarily create a disruption in [S.E.C.'s] whole family support system, as her mother and the potential biological father live in another state." CP at 30. T.D. and V.H. harbor "very bad feelings" toward one another, and the guardian ad litem found no reason to assume that they would change their positions about excluding the other from the lives of their children if testing established V.H. as S.E.C.'s biological father. CP at 30.

The trial court also found that S.E.C. has the right to receive the benefit of financial support from V.H. The court did not refer otherwise to the financial condition of either V.H. or T.D., however, and it did not add that support in addition to what T.D. is able to provide would be in S.E.C.'s best interests. As T.D. asserts, wealth is not among the considerations governing a best interest determination under RCW 26.26.535. Rather, stability appears to be key. *See In re Parentage of C.S.*, 134 Wn. App. 141, 154, 139 P.3d 366 (2006) (two-year statute of limitation for bringing action to adjudicate parentage of child with presumed father rests soundly on the value of stability).

Although the trial court's findings refer to S.E.C.'s best interests, the court appeared to be

at least as concerned with V.H.'s interests, and with ensuring that the passage of time would not undermine his good faith efforts to establish paternity.[4] While V.H. is not to blame for the length of time this case has been in the courts, his good faith in attempting to establish his paternity does not trump S.E.C.'s best interests. *See In re Marriage of Thier*, 67 Wn. App. 940, 946, 841 P.2d 794 (1992) (where paternity determination was clearly not in child's best interests, mother could not sacrifice his best interests to protect her own). The trial court's findings with regard to S.E.C. do not support its conclusion that DNA testing is in her best interest. Accordingly, we reverse and remand for proceedings in accordance with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, J.

Johanson, A.C.J.

[4] We understand the trial court's sympathy for V.H. and note that we too are sympathetic with his plight. As stated above, however, the child's best interests control the outcome of this case.