

CASE NO. A08-141

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State of Minnesota  
**In Court of Appeals**

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In Re the Matter of:

RAYMOND CURTIS ZENTZ,

*Respondent,*

and

CASSANDRA MARIE GRABER,

*Appellant.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

1. Whether the trial court correctly applied the law when it deemed the Respondent to have standing in the underlying paternity action and ordered the parties to participate in genetic testing.

In re the Matter of Witso, 627 N.W.2d 63 (Minn. 2001)

Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471 (Minn. 1981)

Murphy v. Myers, 560 N.W.2d 752 (Minn. App. 1997)

Minn. Stat. §257.57, subd. 2

Minn. Stat. §257.55, subd. 1(d)

## STATEMENT OF THE CASE AND FACTS

This appeal arises from a paternity action in Ramsey County, Second Judicial District, wherein Referee Mary E. McGinnis and the Honorable Kathleen Gearin ordered genetic testing to determine the likelihood that the Respondent is the father of the Appellant's child, A.C.Z., born on August 5, 2003. Respondent filed a petition and Appellant filed an answer. Both parties filed affidavits. Because the Appellant is not admitting the Respondent's paternity, the Respondent requested genetic testing. Following argument at a hearing on November 28, 2007, the court issued an order for genetic testing, which the Appellant now appeals.

The district court issued an Order for Genetic Testing on December 24, 2007. In its Order, the court stated:

1. The following is undisputed:
  - a. On August 5, 2003, in the City of Robbinsdale, County of Hennepin, State of Minnesota, [A.C.Z.] was born to the Defendant, Cassandra Marie Graber.
  - b. The minor child's birth certificate was filed August 7, 2003, listing the Plaintiff and the Defendant as the minor child's parents, and listing the Plaintiff's surname as the child's surname.
  - c. At the time of the minor child's birth, the Defendant was married to James Jeffrey Graber.
  - d. On June 29, 2004, the Defendant's marriage to James Jeffrey Graber was dissolved by the Circuit Court of the Eighteenth Judicial Circuit, In and For Seminole County, Florida. The Final Judgment for the

dissolution of the marriage does not mention the minor child, [A.C.Z.], born on August 5, 2003.

2. The Plaintiff states in his November 8, 2007, affidavit that he and the Defendant were "having an intimate relationship" at the time the minor child was conceived; that he and the Defendant lived together from the date of the minor child's birth, August 5, 2003, until they broke up in June 2005; that since the parties separation the Defendant has allowed him to see the child approximately twice per week at her home; that the Plaintiff has taken the minor child to a park and the store; and the Plaintiff has attended the minor child's soccer games, swimming lessons, and other activities with the Defendant's consent. The Plaintiff states that he has always held himself as the father of the minor child and that there is no question in his mind that he is the minor child's biological father.

(Order, Appendix pp. 19-20).

The district court concluded that the Respondent has standing under Minn. Stat. §257.57, subd. 2 and that the court is required to order genetic testing based on the fact that a party requested such. (Order, Appendix p. 20).

In fact, both parties requested genetic testing. The Appellant requested testing in her amended answer and counterclaim, in the event that the court found that the Respondent "has presented clear and convincing evidence to rebut the statutory presumption of paternity, and that he has standing to bring his Complaint." (Appendix, p. A-10).

At the hearing on Respondent's request for genetic testing and in the

written submissions that followed the hearing, the Appellant argued that the Respondent<sup>2</sup> is not a presumptive father because he has not “established” the necessary facts to make him such and that he should have brought his paternity action sooner. (Appendix, p. A-17). The Appellant did not ask the district court to determine whether the paternity statutes are constitutional. At the hearing, Respondent asked that the case move as quickly as possible because he had not been allowed to see the child in several months. (T., p. 12).

## ARGUMENT

### I. STANDARD OF REVIEW

The issue in this case is one of statutory interpretation. As such, it is reviewed *de novo*. In re the Matter of Witso, 627 N.W.2d 63 (Minn. 2001). The Minnesota Parentage Act (MPA) must be construed liberally to achieve its "remedial and humanitarian purposes." Weber v. Anderson, 269 N.W.2d 892, 895 (Minn.1978). This Court and the Minnesota Supreme Court have conducted reviews of the paternity statutes in cases with facts very similar, if not identical, to this case. See Witso, *supra*, and Frieson v. Pahkala, unpublished, 2002 (included in Appendix at A-1 to A-6).

The Appellant asserts throughout her brief that in order for the Respondent to have standing, he must prove by clear and convincing evidence that he is a presumed father under the MPA. She cites no authority for this assertion, because there is none. In fact, the references to clear and convincing evidence in the MPA all relate to the fact that a presumption of parentage can only be rebutted by clear and convincing evidence. (See Minn. Stat. §§257.55 and §257.62). Since the Respondent is a presumptive father, as will be discussed below, it is the Appellant who will have to provide clear and convincing evidence to rebut that presumption.

## II. THE RESPONDENT HAS STANDING TO SEEK A COURT ORDER FOR GENETIC TESTING BECAUSE HE HAS ALLEGED THAT HE IS THE CHILD'S FATHER

The law relating to determinations of paternity in Minnesota is governed exclusively by the MPA, codified at Minn. Stat. §257. Witso, 627 N.W.2d at 65.

"The MPA provides the exclusive bases for standing to bring an action to determine paternity." Id., at 65-66, quoting Morey v. Peppin, 375 N.W.2d 19, 22 (Minn. 1985).

Although the Respondent is a presumptive father, as will be discussed below, even as just an alleged father, the MPA gives him standing to obtain an order for genetic testing. This very issue was addressed by the Supreme Court in Witso, 627 N.W.2d 63. There, the man alleged to be a father (Witso) did not qualify as a presumed father under the statute. Nonetheless, the Court held that he had standing to bring a paternity action to compel genetic testing. Id., at 69. In Witso, as in this case, the mother was married at the time of both the conception and the birth of the child at issue. Just as in this case, the alleged father was not the man to whom the mother was married. Witso, however, differs from this case because Witso was not a presumed father. Despite the lack of a presumption, however, the Supreme Court held that the MPA gave Witso a specific statutory right to seek genetic testing, as a party to

the paternity proceeding. In Witso, party status for the purpose of compelling genetic testing was obtained simply by Witso's allegation that he had sexual contact with the mother during a time that could have resulted in conception of the child at issue. In making this holding, the Court stated:

We conclude that a party alleging he is a child's father has standing to bring a paternity action under section 257.57, subdivision 2 to compel blood or genetic testing as provided in section 257.62, subdivision 1 even though he does not at the time the action is commenced possess blood or genetic tests that establish he is the child's presumed father under section 257.55, subdivision 1(f).

Id., at 69.

In Witso, the mother acknowledged that she did have sexual contact with the alleged father. . Id., at 69. In this case, the Appellant has not denied sexual contact with the Respondent but attempts to argue that since she has not specifically admitted it, the trial court should deny the Respondent standing to seek paternity or request genetic testing. The law does not support the Appellant's assertion. In Witso, the Supreme Court noted that the trial court retains, under the MPA, the opportunity to weigh the allegations of sexual contact to determine whether a paternity claim is frivolous. Id., at 69. Here, the court has determined the paternity claim to be credible.

### **III. THE RESPONDENT'S ALLEGATIONS ARE CREDIBLE, THOUGH CREDIBILITY IS NOT A PREREQUISITE TO STANDING**

In this case, the Respondent did not simply allege sexual contact with the Appellant, but his name appears on the child's birth certificate, the child bears his surname, and his affidavit states that he and the Appellant lived together with the child for the first two years of the child's life. (Appendix, p. A-12). The Appellant has admitted that the child bears the Respondent's surname and that the Respondent's name appears on the birth certificate. (Appendix, p. A-8). In her affidavit, she stated that this is due to the fact that she and the Respondent had "a relationship" at the time of the child's birth and because the Respondent believed himself to be the child's father. (Appendix, p. A-15 to A-16). Since the Appellant was married at the time of the child's conception and birth, giving a surname and birth certificate recognition to Respondent, without reason to believe he is the biological father, would be completely illogical. The Respondent also alleged that he has carried insurance for the child since birth. (Appendix, p. A-14). The Appellant never disputed this allegation, nor did she ever state that her relationship with the Respondent was not sexual or that she does not believe him to be the child's father.

The Appellant has failed to either admit or deny that she and the Respondent had sexual contact during the period of the child's conception, even though the Appellant filed an affidavit and an amended answer and counterclaim in the trial court. In her amended answer, Appellant stated:

5. Defendant admits the allegations in Paragraph 4 of the Complaint.

6. Defendant admits the allegations in Paragraph 5 of the Complaint to the extent that the child bears Plaintiff's surname and his name appears on the birth certificate of the minor child. Defendant denies all remaining allegations. Plaintiff (sic) affirmatively states she was married to her ex-husband, James J. Graber, at the time of the minor child's conception and birth. Plaintiff (sic) also affirmatively states and and (sic) Mr. Graber did not divorce until June 29, 2004, approximately 11 months after the minor child's birth.

7. Defendant denies the allegations in Paragraph 7 of the complaint, . . .

(Appendix, pp. A-8 to A-9).

Appellant's reference to "Paragraph 5" in Paragraph 6 of her amended answer appears to be a typographical error, because the allegations she addresses in Paragraph 6 were not contained in Paragraph 5 of the Complaint, but were contained in Paragraph 6 of the Complaint. (Appendix, p. A-7). Additionally, in Paragraph 7 of her amended answer, the Appellant addresses the allegations of Paragraph 7 of the Complaint, appearing to skip

right over Paragraph 6. Actually, the paragraph she skipped in the complaint was paragraph 5,<sup>8</sup> the paragraph that alleges the sexual contact between the Appellant and Respondent. The Appellant has not denied the alleged sexual contact, either in her amended answer, in her affidavit, or in any other pleading filed with the court. The only denial that has occurred is in the Appellant's brief to this Court.

In her brief, the Appellant refers to the facts of Kelly v. Cataldo, 488 N.W.2d 822 (Minn. App. 1992) as being "the same circumstances" as in this case. (Appellant's brief, p. 9). The circumstances in Kelly were that the mother was still married when the paternity proceeding was filed, her husband held himself out as the child's father, and the mother denied under oath in an affidavit that the petitioner was the father of the child. Id., at 823-24. None of those facts are present in this case.

The Appellant's pleadings in the trial court demonstrate an effort to rely on half-truths and omissions to challenge the validity of the allegations in Respondent's affidavit. The lack of any credible allegations from the Appellant that would tend to call Respondent's assertions into question, however, justifies the trial court's apparent determination that the Respondent's affidavit was sufficiently credible to deem him a presumptive father.

Even if the credibility of the Respondent's allegations were not apparent from the record, the Respondent would still have standing to seek genetic testing. In Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471, 472 (Minn. 1981), the Supreme Court instructed that district courts are to treat affidavits of moving parties as true. Though Nice-Peterson involved a post-decree motion to transfer custody, this Court has applied the same standard to paternity actions. Frieson v. Pahkala, Appendix, p. A-4.

The Appellant asks this Court to create a more stringent standard that would require the petitioner in a paternity action to prove by clear and convincing evidence the allegations of his affidavit before he would have standing to seek a paternity determination or genetic testing. The Appellant does not explain how such facts could be proven outside of the action itself, other than to suggest that the mother in all paternity actions should be able to prevent the action from moving forward simply by refusing to admit to the claimant's paternity. (Appellant's brief, pp. 6, 11).

Similar circular reasoning was rejected by the Supreme Court in Witso.

There, the Court stated:

The Overbys argue that Witso does not have standing because the phrase "declaring the existence of the father and child relationship presumed" in section 257.57, subdivision 2 requires that Witso have evidence of blood or genetic tests establishing that he is a presumed biological father before he is permitted to

commence a paternity action. In effect, the Overbys argue that Witso is foreclosed from bringing an action to conduct blood or genetic tests<sup>®</sup> to determine whether he is a presumed father because he does not possess test results that show he is a presumed father. We disagree, as we do not believe that the legislative scheme posits such a chicken-or-egg dilemma. If a putative father were required to be a presumed father under Minn. Stat. 257.55, subd. 1(f), the mother could foreclose the putative father from obtaining the test results to prove paternity. Further, the terms "alleged" or "alleging" in section 257.57, subd. 2 providing for who may bring an action would have no meaning independent from the term "presumed," clearly ignoring the important statutory distinction between the terms "alleged" or "alleging" and "presumed."

Witso, 627 N.W.2d at 67.

The same logic applies to the arguments made by the Appellant, who would have this Court rule that the Respondent does not have standing to establish that he is the father of A.C.Z. because the Appellant has not admitted that he is the father. However, if Appellant were to admit Respondent's paternity, then the need for genetic testing would cease to exist and the portions of the statute relating to genetic testing would have no meaning at all. In fact, the Respondent only asked for genetic testing if, in fact, the Appellant refused to acknowledge his paternity. (Appendix, p. A-12). Allowing a mother to have complete control over the adjudication of a father would effectively eliminate fathers from the process. If the legislature had intended such a result, there would have been no need for the MPA. Unlike

the Appellant's unfounded assertions regarding legislative intent (Appellant's brief, pp. 14, 17), it is apparent from the mere existence of the statute that the legislature did not intend for mothers to have exclusive control over paternity adjudications.

**IV. THE RESPONDENT HAS FURTHER STANDING TO SEEK PATERNITY BECAUSE HE IS A PRESUMED FATHER PURSUANT TO MINN. STAT. §257.55, SUBD. 1(d)**

Minn. Stat. §257.55, Subd. 1(d) creates a presumption of paternity when, "While the child is under the age of majority, [the alleged father] receives the child into his home and openly holds out the child as his biological child." The purpose of presumptions in the parentage act has been discussed by this Court:

The parentage act is founded on several presumptions of paternity. These presumptions are not conclusive of paternity, but rather create a functional set of rules that point to a likely father. The presumptions serve the practical purpose of establishing paternity in the eyes of the law and the community until something more is done either to attack the presumption or to establish by action a father who will be viewed as conclusive in the eyes of the law. The presumptions also serve a second purpose--to provide a presumption to be applied in an action to establish paternity.

Welfare of C.M.G., Matter of, 516 N.W.2d 555, 558 (Minn. App., 1994)

The Respondent alleged by affidavit that he has held the child out as his own and even lived with the mother and the child for the first two years of the

child's life. As with the issue of sexual contact, the Appellant has not denied this claim. Rather, she stated in her sworn affidavit that the Respondent and the child had "a bit of a relationship" before the parties "broke up." (Appendix, p. A-16). Continuing in her pattern of half-truths and omissions, the Appellant did not elaborate on how that relationship developed or even state that it was anything less than the Respondent claims.

Since the Appellant did not provide any explanation to the district court that would detract from the credibility of the Respondent's affidavit, it was appropriate for the district court to accept the Respondent's assertion that he lived with the child for two years and has consistently held the child out as his own. In light of that assertion, the Respondent is a presumed father under Minn. Stat. §257.55, subd. 1(d). Although the presumption is not required in order for the Respondent to have standing to bring this paternity action and demand genetic testing, the fact of the presumption makes the Respondent's standing in the case even stronger. The right to demand genetic testing could be eliminated by the Appellant – if she were to admit the paternity of the Respondent. Since she refuses, however, the Respondent has the right to demand such testing. In fact, testing would be required even if the Respondent did not request it, because the Appellant requested it.

The Appellant's behavior demonstrates a belief that her child is not entitled to the benefit of a father. By using every possible tactic, even without the support of the law, to avoid the establishment of Respondent's paternity, while at the same time ensuring that no relationship exists between the child and the Appellant's former husband (the child's other presumed father), the Appellant has effectively denied the child any paternal relationships whatsoever. When this matter returns to the district court for genetic testing, likely to be followed by a custody trial, the Appellant will surely argue that the child has not had any contact with the Respondent for many months. Though the lack of contact has been created entirely by the Appellant, she will no doubt argue that it weighs in her favor when the district court looks at the issue of custody.

The Appellant's attempts at manipulation are not limited to the district court. Even the brief Appellant submitted to this Court attempts to distort the law that applies to this case. Specifically, the Appellant spends time in her brief arguing that the Respondent is not a presumed father under many paragraphs of Minn. Stat. §257.55. (Appellant's brief, pp. 10-12). However, she noticeably fails to address the language of subdivision 2(d) – the very paragraph that establishes the Respondent as a presumptive father.

Under the plain language of the statute, the Respondent is a presumptive father. Minn. Stat. §257.57, Subd. 2, authorizes a man “alleged or alleging himself to be the father” to bring an action under paragraph (1) “at any time for the purpose of declaring the existence of the father and child relationship presumed under sections 257.55, subdivision 1, paragraph (d) . . .” The Respondent, therefore, has full standing to pursue the establishment of paternity, even without genetic testing. He also has standing, upon the adjudication of paternity, to pursue whatever contact and custody will be in the best interests of the child. The need for genetic testing in this case does not arise from the competing presumptions between the Respondent and Appellant’s ex-husband. Rather, it arises as a result of the Appellant’s refusal to acknowledge the Respondent’s paternity.

**V. THE TRIAL COURT CORRECTLY DETERMINED THAT IT WAS REQUIRED TO ORDER GENETIC TESTING**

Minn. Stat. §257.62, subd. 1(a) states:

The court or public authority may, and *upon request of a party shall*, require the child, mother, or alleged father to submit to blood or genetic tests. (Emphasis added)

The word “shall” is mandatory, pursuant to Minn. Stat. §645.44, subd. 16. Because the court is mandated to order genetic testing when requested by a party, and because both the Respondent and the Appellant requested testing,

the district court had no discretion to deny either party's request for genetic testing. \*

The issue of the district's court discretion with regard to testing was addressed by this Court in the unpublished decision of Frieson v. Pahkala, C8-02-708 (Minn. App. 2002). (Appendix, pp. A-1 to A-6). In that case, the district court denied a request for genetic testing because the request was made by a man who: (1) had given inconsistent information regarding the dates of sexual contact with the mother; (2) had a criminal history; and (3) may have abused the mother. (Appendix, p. A-3). The mother had denied sexual contact with the man during the period of conception and had executed a recognition of parentage with another man. (Appendix, p. A-2). This Court concluded that the district court had no authority under the statute to consider whether genetic testing would be in the child's best interests or to question the truthfulness of the man's affidavit. (Appendix, p. A-3 to A-4). Therefore, it was required to order genetic testing. Id.

The same is true in this case. The Respondent has alleged sufficient facts to establish a reasonable probability that sexual contact occurred between the parties during the time of conception. As a result, the trial court is mandated by statute to order genetic testing in response to the request made

by each party, which is dictated by the Appellant's refusal to admit the Respondent's paternity. In fact, the Appellant has also requested genetic testing, in the event the court determined that the Respondent has standing to seek a paternity adjudication. Since the Respondent's standing is clearly authorized by statute, the court's grant of the dual request for genetic testing is mandated by law.

#### **VI. THE APPELLANT'S CONSTITUTIONAL CHALLENGE MUST FAIL**

On appeal, the Appellant asserts that giving the Respondent standing violates the constitutional rights of the Appellant, her ex-husband, and the child. (Appellant's brief, pp. 12-14). The Appellant has not attempted to make either her ex-husband or the child a party to this appeal – despite arguments in her brief that they should be parties. The constitutionality of the statute is argued for the first time on appeal and, despite ample opportunity to raise the argument to the district court both orally and in a subsequent brief, the Appellant chose not to give the district court an opportunity to rule on the issue or constitutionality, either on the face of the statute, or as applied to the Appellant.

This Court has repeatedly declined to address constitutional issues that were not raised in the trial court, even in matters as grave and weighty as

termination of parental rights cases. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (noting that reviewing courts are generally limited to issues raised in the trial court); Matter of the Welfare of A.L.F., 579 N.W.2d 152, 156 (Minn. App. 1998) (refusing to address unraised constitutional challenge even in termination of parental rights case). The issue presented in this case, seeking to create parental rights, is not nearly as final as decisions to terminate parental rights, so there can be no argument that this case warrants constitutional review despite the Appellant's failure to raise the issue in district court.

Even if the issue were properly before the Court, statutes bear a presumption of constitutionality that has not been rebutted in this case. In Re Tveten, 402 N.W.2d 551, 556 (Minn. 1987). The Appellant does not have a constitutional right to deny her child the benefit of a relationship with his father.

#### **VII. THE TIMING OF RESPONDENT'S SUIT IS NOT A BAR TO THE ESTABLISHMENT OF PATERNITY**

The Appellant has asserted that the Respondent should be denied the opportunity to establish paternity because the child is now four years old. (Appellant's brief, p. 17). In making this argument, the Appellant claims that the Respondent has had "minimal contact with the child throughout his life and has little or no relationship with the child." (Id.) The Respondent's affidavit in

district court states that he lived with the Appellant and the child for the first two years of the child's life. (Appendix, p. A-12). He also states that he provided significant care for the child during that time. (Appendix, p. A-13). The Appellant has not denied or explained this assertion in any of her pleadings.

As authority for her position regarding the delay in filing, the Appellant cites Lehr v. Robertson, 463 U.S. 248 (1983). However, Lehr is an adoption case that applied a New York law and the laws regarding paternity in adoption cases are dramatically different, in both New York and Minnesota, than the laws that apply to the establishment of paternity when a child has not been placed for adoption. In adoption cases, a putative father will lose the opportunity to object to an adoption unless certain conditions are met, including, among others, that he file a notice with the Minnesota Father's Adoption Registry within 30 days of the child's birth, is listed on the child's birth certificate, or openly lived with the child or the mother. Minn. Stat. §259.49. Minnesota's adoption statutes direct that the Respondent would be entitled to notice if the Appellant were to pursue an adoption of A.C.Z. (including by a future spouse of hers) because the Respondent's name is on the birth certificate and he openly lived with the child and the Appellant. In such a

situation, notice would be required no matter how old the child is or how long the Appellant had prevented the Respondent from seeing the child.

Even if the Respondent were not named on the birth certificate, the law regarding the timing of an action to declare the existence of a father/child relationship is extremely clear. Minn. Stat. §257.57, subd. 2, authorizes a man alleging himself to be the father to bring an action “**at any time** for the purpose of declaring the existence of the father and child relationship presumed under sections 257.55, subdivision 1, paragraph (d)” (Emphasis added). The fact that there is time limit attached to actions to declare the non-existence of a parent/child relationship is irrelevant to the question at hand. Likewise, the fact that there is a competing presumption in the Appellant’s ex-husband does not turn the Respondent’s action into one to declare the non-existence of the ex-husband’s relationship to the child.

As with the rest of the Appellant’s arguments, there is no merit to the assertion that the Respondent has forfeited his right to seek a paternity adjudication because he did not bring the action earlier.

#### **VIII. PUBLIC POLICY REQUIRES A DETERMINATION OF PATERNITY**

The Appellant suggests an outcome at odds with public policy, where the Respondent’s paternity action would be dismissed and the Appellant’s ex-

husband would continue solely as a presumed father with no legal obligation for or relationship with the child. Creating situations where children have no father is not a favored outcome in Minnesota. Based on the fact that the Respondent's name is on the child's birth certificate, the Appellant could not even remarry and pursue an adoption by her new husband without giving notice to the Respondent, so the child would likely be prevented from ever having a legal father.

The legislature and courts of Minnesota have stated a consistent policy in favor of determining paternity and collecting child support and have accordingly restricted the issues in paternity proceedings. Murphy v. Myers, 560 N.W.2d 752, 756 (Minn. App., 1997).

A child's interests in an adjudication of paternity are "distinct and separate from those of both her mother and father." R.B. v. C.S., 536 N.W.2d 634, 638 n. 2 (Minn.App.1995). In addition to issues of monetary support, a child has unique interests in the establishment of paternity for the purpose of securing legal rights such as inheritance, medical support, the ability to bring certain causes of action (e.g., wrongful death), workers' compensation dependent's allowances, and veterans' education benefits. Johnson v. Hunter, 447 N.W.2d 871, 875 (Minn.1989).

Murphy v. Meyers, 560 N.W.2d at 754.

**IX. LACK OF NOTICE TO THE OTHER PRESUMED FATHER AND THE CHILD IS NOT FATAL TO THE COURT'S ORDER**

Pursuant to Minn. Stat. §257.60, any man presumed to be the father of a child in a paternity action is entitled at least to notice of the proceeding and an opportunity to be heard. A child is to be made a party when the mother is denying paternity. When a minor child is a party, a guardian or guardian ad litem must be appointed to represent the child.

The Appellant alleges that the district court has denied two indispensable parties the right to participate in this paternity proceeding – the Appellant's ex-husband and the child. She asserts that the trial court should have required the Respondent to name those parties and give them notice of his request for genetic testing and that failure to give such notice should result in dismissal of the paternity action. In fact, it is the Appellant herself who is in the best position to accomplish such notice. There is nothing in the record to suggest that the Respondent has access to information about the Appellant's ex-husband. The court can make the child a party at any time, and no notice will actually be provided to the child. Only the court can appoint a guardian ad litem for the child, which the Appellant certainly could have requested, so any failure with regard to the child is not attributable to the Respondent.

Though the child and the other presumed father will need to be made

parties to the proceeding at some point, there is no need for them to be parties yet. At the hearing on Respondent's request for genetic testing, the Respondent acknowledged the existence of the other presumed father and advised the court that he will provide him with notice when the court so directs.

(T., p. 7). The district court had no discretion with regard to the issuance of an order for genetic testing, so the involvement of a million additional parties would not have made any difference at this stage of the proceedings. After genetic testing, when it is time to proceed to adjudicating paternity and determining custody, the involvement of the additional parties will be appropriate. Once the test results are produced, a hearing can be set, and all parties can be given notice of that hearing. If the genetic testing shows the Respondent to be the father, a guardian ad litem will be appointed to participate in the custody evaluation that the court will be forced to order as a result of the Appellant's complete unwillingness to recognize the importance of the relationship between the Respondent and the child.

The Appellant cites Kelly v. Cataldo, 488 N.W.2d at 826, for her assertion that the entire matter should be dismissed for failure to name her ex-husband and the child as parties. (Appellant's brief, p. 9). However, the need to name the child did not arise until the Appellant denied the Respondent's

paternity and it is by the court's action in appointing a guardian ad litem for the child that the statute will be satisfied. With regard to the Appellant's ex-husband, any illusion the Appellant is trying to create that her ex-husband actually wants to participate in the paternity proceeding is completely undermined by the fact that this child was not even named in the Appellant's divorce proceeding in June 2004. Though that fact does not remove the need to provide notice to the ex-husband, it is naïve to expect that he will be flying to Minnesota to try and prevent the court from adjudicating the Respondent's paternity.

**X. THIS APPEAL IS FRIVOLOUS AND WARRANTS AN AWARD OF ATTORNEY'S FEES TO THE RESPONDENT**

By separate motion and affidavit, as required by Minn. App. Proc. R. 139.06, the Respondent has requested that Appellant be ordered to pay the fees he has incurred in defending this appeal. This request is based on the fact that the Appellant has acted in bad faith in filing this appeal and has used this process to harass the Respondent and, more importantly, to prolong the period of time whereby she is able to prevent the Respondent from having any contact with the child.

An award of attorney's fees is authorized by Minn. Stat. §518.14 when a party has unreasonably contributed to the length or expense of a proceeding.

This statute has been applied to paternity proceedings by Minn. Stat. §257.66, subd. 3, as noted in Morey v. Peppin, 353 N.W.2d 179, 184 (fn 4) (Minn. App. 1984).

### **CONCLUSION**

This appeal is about a mother who is: (1) refusing to accept the law; (2) refusing to be bound by her own choices; and (3) abusing the appellate system to seek an unjustified advantage in a district court proceeding. This appeal has no legal basis whatsoever but accomplishes for the Appellant a significant break in the relationship between the Respondent and the child he both believes to be his and has held out as his own for over four years.

The Respondent complied with the legal process set forth in the Minnesota Parentage Act to establish his paternity of the child. The Respondent's belief regarding paternity is based on numerous factors, all presented to the district court by affidavit: (1) the parties had a sexual relationship during the time the child was conceived; (2) the child bears the Respondent's surname; (3) the Respondent is named as father on the child's birth certificate; (4) the parties lived together with the child for the first two years of the child's life; (5) the Respondent has continuously held the child out as his own; (6) though the Appellant was married during the conception and

birth of the child, the Appellant's divorce judgment makes no mention of the child; and (7) the Appellant has neither denied her sexual contact with the Respondent nor denied that he is the child's father.

Unlike the Respondent's position, which is based on facts, the Appellant's position appears to be based on her own desires. Her submissions to the district court and now to the Court of Appeals claim that the Respondent should be denied standing to seek paternity based on: (1) the fact that she has not admitted his paternity; (2) the fact that her marriage at the conception and birth of the child creates a competing presumption of paternity in her ex-husband; and (3) her assertion that because the Respondent did not seek paternity earlier, he should be precluded from doing so now. None of these bases provides a legal bar to the Respondent's pursuit of a paternity adjudication.

The Minnesota Parentage Act is very clear. It gives both alleged fathers and presumed fathers access to the courts in pursuit of a paternity adjudication. For an alleged father in cases where someone else is a presumed father, the Supreme Court in Witso interpreted the MPA to provide a right to file a paternity action for the purpose of seeking genetic testing that could elevate the alleged father to the position of a presumed father, which

would then entitled him to seek an adjudication of paternity.

In this case, the Respondent is both an alleged father and a presumed father. He is an alleged father because he has alleged sexual contact with the Appellant during the time of conception. This allegation entitles him to seek genetic testing. The Respondent is a presumed father because he lived with the child and the Appellant for two years and consistently held out the child as his own. As a presumed father, he has standing to pursue a paternity adjudication and custody even without genetic testing. It is the Appellant's refusal to acknowledge the Respondent's paternity that has triggered the need for genetic testing. She could have chosen to admit paternity, at which point the court would have been required to weigh the competing presumptions and determine the child's best interests regarding paternity and custody.

The process the Appellant now challenges on appeal is in place entirely due to her choices – the choice to have sex with someone other than her husband, the choice to exclude any mention of the child from her divorce proceedings, and the choice to refuse to admit the Respondent's paternity. The Appellant has asked this Court to now let her choose to forever exclude the Respondent from the life of the child he believes to be his.

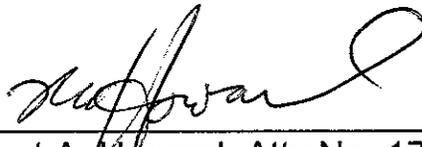
The Appellant's choices have unjustifiably increased the length and

expense of the paternity proceeding, despite the fact that four years ago she chose to put the Respondent's name on the birth certificate, give the child the Respondent's surname, and live with the Respondent for two years. The Appellant's current choices and behavior demonstrate that her true intent in bringing this appeal is to harass the Respondent and to completely undermine the relationship he had with the child prior to filing his paternity action. The Appellant's desire to punish the Respondent for seeking to do right by his child is not a choice to be commended by the legal system and is completely against the public policy that favors legal relationships between children and fathers.

Because this appeal is wholly without merit, the district court's order for genetic testing must be affirmed and the Respondent should be awarded attorney's fees in accordance with the motion and affidavit filed separately with this Court.

Respectfully submitted,

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