Supreme Court No. 101070-2_____

No. 82839-8-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TARA MARTIN,

Petitioner,

v.

DANIEL MARTIN and KRISTIN PRUST,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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I. INTRODUCTION

Review in this case should be accepted because the Court of Appeals opinion (the "Opinion") deprived a special needs child and her common law de facto parent who cared for the child and functioned as the child's parent for over five years of their relationship and the familial rights they both were guaranteed. Moreover, Petitioner remained in an abusive relationship with the child's guardian up until he was arrested for domestic violence. Then, as is typical for abusers, the guardian violated his criminal no contact order to deprive the Appellant and child access to one another. He then, like the genetic parent in *In re Parentage of L.B.*, used the genetic mother to object to the Appellant's de facto parentage status. The trial court, and then the Court of Appeals, denied Appellant of her and the child's de facto parent-child relationship under the best interests of the child standard. She had arranged treatment for the child for her special needs, enrolled her in school, coached her with independent living skills, and left her indelible fingerprints on the child. Then, in a power and control

dynamic relationship with her former husband, who was the child's legal guardian, the love and nurturing that both the child and Petitioner experienced was taken from them through an unconstitutional statute that was unconstitutionally applied to them by the trial court and the Court of Appeals. This unconstitutional deprivation of constitutional rights must be remedied through review to this Court for the countless children and third parties who have become de facto parents and seek to have their de facto parentage status adjudicated in this and other states under the Revised Uniform Parentage Act ("RUPA").

II. PETITIONER'S IDENTITY

Petitioner Tara Martin is the Appellant at the Court of Appeals and the Petitioner in the trial court.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington Supreme Court review the Washington State Court of Appeals Unpublished Opinion in *In the Matter of the Parentage of A.P.,* Case No. 82839-8-I, Washington

Court of Appeals, Division One (June 6, 2022), referred to herein as the "Opinion."

IV. ISSUES PRESENTED FOR REVIEW AND ARGUMENT

A. Summary of Grounds for Review

1. Constitutional Rights.

a. The Opinion violates the Appellant's and the child's substantive due process rights that they are guaranteed by both the federal and our state's constitutions. At its heart, the Opinion does not give a defacto parent (a person who is a legally recognized parent), the deference required when a third party (not a legally recognized parent) challenges the de facto parent's status because it uses the "best interests of the child" standard. *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

Here, the Opinion unconstitutionally deprives a child's de facto parent to deference in decision making over the child by allowing the child's legal guardian and unfit genetic parent to

challenge the de facto parent's status using the "best interests of the child standard." A de facto parent stands in parity with a genetic parent or adopted parent and is a legally recognized parent. *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). A child's guardian is a third party who temporarily makes parent-like decisions for a child when all the child's legally recognized parents are unfit. *In re Parentage of J.B.R.*, 184 Wn. *App*. 203, 336 P.3d 648 (2014). In Washington, a legally recognized parent has a fundamental constitutional right to make parental decisions for their child without government interference. *In re Custody of Smith*, 37 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd on other grounds sub nom*. That is why a guardian must show that a parent is unfit and not capable of making parent decisions for a child before courts may deprive a legally recognized parent of their constitutional right to be free from interference with their decision making. *In re Parentage of J.B.R.*, 184 Wn. *App*. 203, 336 P.3d 648 (2014). At the very least, the courts must allow a legally recognized deference to their decision and that deference

requires more than a best interests of the child" standard." *Troxel v. Granville*, 530 U.S. at 68. In doing so, the Opinion failed to recognize or address a child's constitutional rights like the ones recognized in *McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987) and *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985).

Here. the trial court and the Court of Appeals allowed the legal guardian to use the unfit genetic parent's status to defeat Appellant's petition to establish herself as the child's de facto parent status by applying RCW 26.26.440A(g) to require Appellant continuing in her role as the child's de facto parent upon her proving that it is in the child's best interests. RCW 26.26A.441(3)(b) allows a child's legal guardian as well as an unfit genetic parent a right to respond to a de facto parentage petition, but does not establish the standard that is to be applied to them when making a de facto parentage determination. Here, the guardian ad litem, the trial court, and the Court of Appeals considered the guardian's challenge to Appellant's de facto

parentage petition by finding the Appellant did not prove she met the burden of proof to establish that her continuing in the role as the child's de facto parent is in the child's best interests.

This is manifest Constitutional error it multiple regards. First, it did not allow her deference to her continuing to make parental decisions for the child by requiring her to prove that they were in the child's best interests. Second, it allowed a legal guardian, who is a third-party non-parent, to require the de facto parent to meet that burden of proof. Third, it allowed a genetic parent, who had voluntarily abdicated her parental responsibilities for over five years knowing the Appellant would be acting as the parent and establishing the parental bond with the child without her asserting she was now a fit parent and challenging the guardianship. IN conclusion, the legal guardian and unfit parent were allowed to deprive the child and the only person who asserted was a fit legally recognized parent from their relationship based on the best interest of the child standard. This is manifest constitutional error and was raised to the trial court in closing argument on April 8, 2021.

b. The Opinion unconstitutionally applies RCW 26.26A.440(g) to extinguish Appellant's de facto parenting rights that she acquired prior to the statute becoming effective. *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013); and *In re Parentage of J.B.R.*, 184 Wn. App. 203. Here, the Opinion, which requires Appellant prove the 7 factors in RCW 26.26.440A, extinguished Appellant's common law de facto parent status. Because Appellant had lived with the child for almost six years prior to the statute's effective date (January 1, 2019) and separated from the child by the guardian one month after the effective date, Appellant's de facto parent status had either been obtained or not obtained prior to the statute becoming effective. *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013).

2. Conflict with this Court's Opinions.

The Opinion fails to obey vertical stare decisis and conflicts with other decisions from this Court in two other important ways.

a. First, it rewarded the wrongdoer(s) and punished the child when it erroneously concluded that Petitioner could not

be a de facto parent because the bonded relationship they established while they lived together for over five years had deteriorated because the child's guardian, a third-party non-parent, interfered with and prohibited their access to one another. This was exacerbated and held against Appellant and the child due to delays caused by COVID-19 and an unanticipated disruption in the guardian ad litem producing a report. If estrangement caused by another person with control over the child were allowed, then the de facto parent in *In re: Parentage of In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005) would not have been held to be a de facto parent

b. Second, the Opinion erroneously concluded a statutory gap was a condition precedent to an equitable common law de facto parentage adjudication. The Court of Appeals ignored the precedent in *In re Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2016) and concluded there must be a gap in the statutory framework before allowing equity to legally recognize de facto parentage, and that any statutory gap was eliminated by the

enactment of the RUPA and was unavailable. See *In re Parentage of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (Div. 3, 2014).

In doing so, the Opinion holds the RUPA, specifically, RCW 26.26A.440 abrogates equitable common law de facto parentage as articulated in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005))RCW 26.26A.440 abrogated equitable common law de facto parentage actions. This application is both unconstitutional and erroneous. See, *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013); and *In re Parentage of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (Div. 3, 2014)

Not only is this unconstitutional, but it reads out of existence RCW 26.26A.020 that specifically states that the RUPA shall not abrogate or reduce rights a de facto parent may have under the common law.

3. Conflict with Other Divisions.

The Opinion did not analyze horizontal stare decises and did not address patent conflicts with other published Court of Appeals' opinions from other divisions. The Opinion conflicts

with *In re Parentage of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (Div. 3, 2014), and *Walker v. Riley*, 19 Wn. App.2d 592, 498 P.3d 33 (Div. 3, 2021) when it concluded a genetic parent who voluntarily abdicated their parental duties to a third party for over 5 years, knowing the third party was fulfilling the parental duties for the child in the genetic parent's absence and was developing a parent-child relationship with the child did not "*necessarily*" "foster *or* encourage" that relationship. This conflicts with the holding in *Walker* explicitly holds that when this occurs, fostering and encouraging "*necessarily*" results. *Walker v. Riley*, 19 Wn. App.2d 592, 498 P.3d 33 (2021).

4. Public Importance.

Finally, this is a matter of great public importance. Not only is this a case of constitutional proportions that affects the Appellant and the child in this case, but its impact will be felt by defacto parents and children in this State that confront the same issue. The impacts will be felt by children and third parties who have become de facto parents beyond our State's borders. The RUPA is

Washington's enactment of a *uniform* act. Because it is a uniform act, this decision will serve as persuasive authority for other states that have adopted their own version of the RUPA.

B. Conflicts with Decisions of this Court and other Appellate Divisions.

4. Whether a parent who voluntarily absents herself from her child's life for an extended period "necessarily" "fosters or encourages" the resulting de facto parent relationship.

The Opinion held that a genetic parent who voluntarily absented themselves from their child's life for over five years knowing that another adult would provide the child the care and love they deserve can challenge de facto parenting because their abdication with that knowledge did not "foster *or* encourage" the resulting parent-child relationship. Division Three has held in two reported decisions that when a parent engages in this abdication with that knowledge, then they "*necessarily*" foster and encourage that relationship. *In re Parentage of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (Div. 3, 2014), and *Walker v. Riley*, 19 Wn. App.2d 592,

498 P.3d 33 (Div. 3, 2021). The Opinion conflicts with these two decisions.

C. Substantial Public Interest.

1. Rights of de facto parents. This matter substantially affects public interest because it involves an adult who lived with and cared for a child, for a period of years, managing her medical appointments and helping with school, and treating her as her own child, but whose de facto parentage petition was denied.

V. CASE STATEMENT

A.P. (or the "Child"), today a teenage girl (although still under age 18, RP 546:20-24, March 18, 2021), lived with Tara Martin (now known as Tara Charf, the "Petitioner") and her husband Daniel Martin. CP 1, 280, 282. Tara and Daniel Martin had been married since 2013. *Id*. The relationship that developed between Tara and A.P. during the years they lived together was the basis for Tara's de facto parentage petition.

The Child's genetic father, Bill Prust, died July 8, 2012. CP 282; RP 546:20-24; 555 (March 18, 2021). Respondent Kristin

Prust, the Child's genetic mother, assumed sole custody after Bill Prust died. RP 560-62 (March 18, 2021). Kristin Prust then traveled in July, 2013 with the Child and the Child's brother to Malaysia to live aboard a sailboat with the Child's maternal grandfather (Respondent Kristin Prust's father). RP 563-64 (March 18, 2021).

The Child's brother adapted comfortably to the new setting. RP 565:16-19 (March 18, 2021). The Child herself however did not do well living on the boat. RP 741:21-22 (Mar. 26, 2021); 565:20-566:14 (March 18, 2021). Consequently, after just four months in Malaysia, Respondent Kristin Prust traveled with the child from Malaysia to Washington state. RP 566:15-22 (March 18, 2021). Kristin Prust's plan for herself and the Child was to stay for about a week with the Martin family (Respondent Daniel Martin and his then-wife Petitioner Tara Martin), at the Martin family's invitation. RP 568:2-4 (March 18, 2021). Daniel Martin had been Bill Prust's best friend and was also a

long-time acquaintance of Respondent Kristin Prust. RP 568:12-21 (March 18, 2021).

However, Kristin Prust left the Martin home and moved to a hotel after just three days. RP 569:7-14 (March 18, 2021). From there, she moved to a rental in the Crown Hill neighborhood of Seattle. RP 569:25-570:5 (March 18, 2021).

The Child, meanwhile, remained living with the Martin family. RP 569:15-22 (March 18, 2021). To facilitate enrolling the Child in school and arranging for her routine healthcare, Kristin Prust discussed establishing a guardianship; she was not herself capable of taking care of the Child. RP 570:8-571:4 (March 18, 2021). After discussion, Kristin Prust agreed to a guardianship for the Child. RP 570:25-571: 1 (March 18, 2021).

Daniel Martin then became the legal guardian of A.P. (not a parent) on November 27, 2013. CP 2, 281-82. Kristin Prust relinquished custody of A.P. to Daniel Martin on or around July 24, 2014, when a Decree and Findings of Fact were entered in a third-party custody action. CP 3. A.P. is a child with special

needs; over the years, she has gone through counseling and many appointments with professionals to address diagnosed ADHD. CP 282.

A.P. continued to live with Tara and Daniel Martin for approximately five years and three months, until the couple separated in February of 2019. CP 280. This followed Daniel Martin's arrest for domestic violence. CP 27. After the separation, A.P. lived with Daniel Martin and his family, CP 280. The trial court found that there had been a February 22, 2019 domestic violence incident and arrest of Daniel Martin from which the separation and dissolution was derived. CP 283. *See also* CP 27. The trial court also found that "Mr. Martin was solely responsible for… when and how to discipline [A.P.]," CP 283, and significantly, "found some acts of discipline concerning." *Id.*

During the many years that A.P. lived with Petitioner and Daniel Martin, the Petitioner fully assumed a parental role for A.P. Petitioner made decisions regarding her medical care,

assisted with schoolwork, helped her decorate her room, helped purchase clothing for her, facilitated sports and planned birthdays, and attended counseling with her. CP 28. Petitioner was a stay-at-home mom to her son and to A.P. for over three years. CP 29. Petitioner attended A.P.'s parent/teacher conferences, attended school performances, made sure A.P. had either a home-made lunch or bought lunch each school day, prepared her breakfast, volunteered at her school, and scheduled and took her to medical appointments. CP 29. Petitioner tracked A.P.'s medication and signed her up for sports. CP 30. She included A.P. in all family vacations, introduced A.P. to her extended family, and made costumes for A.P. for Halloween and school events. CP 31. She would read to A.P. at bedtime, taught her crafts and gardening, and enjoyed games and puzzles with her. CP 32.

After leaving the Martin home, Kristin Prust visited with the child, RP 574 (March 18, 2021). But in 2014 she discovered and disclosed that she had developed an infection, and she

stopped visiting the child that year. RP 580:2-582:10 (March 18, 2021). Ms. Prust did not have any further in-person contact with A.P. until after the February 2019 separation of Daniel and Tara Martin. RP 659:7-14 (March 26, 2021). Respondent Kristin Prust did not resume regular visits with A.P. until November, 2019. RP 600:2-13 (March 18, 2021).

On June 17, 2019, approximately four months after the separation, Tara Martin filed a Non-Parent Custody Petition in the King County Superior Court, seeking custody of A.P. CP 1-12. Petitioner also asked the court to recognize her as a de facto parent of A.P. CP 279. Her Petition named Daniel Martin and Kristin Prust as Respondents. CP 1.

In her Petition, Tara Martin alleged that Kristin Prust was either unfit as a parent, or even if fit, that A.P. would suffer actual detriment to her growth and development if she lived with Kristin Prust, and that Kristin Prust had not seen or spoken to A.P. since the end of 2014. CP 2.

As to Daniel Martin, Tara Charf alleged he was not a suitable third party custodian for A.P. for having engaged in a history of acts of domestic violence, his substance abuse/dependency problem, and his abusive use of conflict posing a danger to A.P.'s development. CP 3.

Both Daniel Martin (A.P.'s non-parent guardian) and Kristin Prust (A.P.'s genetic mother) filed Responses in opposition to the Petition in July of 2019. CP 13-16 and 17-21. The Martins' dissolution case was not consolidated with the custody case.

On October 14, 2019, the trial court entered an Order on Adequate Cause for Non-Parent Custody (CP 161-65), stating: "The court does not find there is sufficient evidence to support a finding of adequate cause for a Non Parental Custody Action. However, the court finds there is sufficient information for the court to determine that Ms. Martin may be a de facto parent under [RCW] 26.26A.440." CP 162. Also on October 14, 2019, the court entered an Order Appointing Guardian ad Litem, appointing Dr. Melanie English as GAL. CP 166-69. The order

apportioned GAL fees to Petitioner, adding that these fees were subject to reapportionment. CP 168.

Ten days later, on October 24, 2019, both Petitioner and Respondent Daniel Martin filed Motions to Revise Commissioner's Ruling. CP 177-91. Daniel Martin argued that it was error to find that Tara Martin might be a de facto parent and that her Petition should be dismissed. CP 177. Tara Martin argued that it was error not to have found sufficient evidence to support a finding of adequate cause for a non-parental custody action. CP 189. The judge who heard the revision motions denied them both and entered an order on November 13, 2019, stating that the matter would proceed to trial on the de facto parentage issue. CP 207-208.

Dr. English, the GAL, determined that she had a conflict of interest and withdrew from the case on March 5, 2020. CP 210. The parties agreed to substitute Elise Buie as GAL, CP 210, and the trial court entered an agreed order on April 10, 2020 making this GAL substitution. CP 209-214. Just a few weeks later,

however, Elise Buie withdrew, citing scheduling conflicts and COVID issues, and the trial court entered a second agreed order on May 11, 2020, this time substituting Matthew Jolly as GAL. (Jolly was also the guardian ad litem for the de facto parentage case *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). CP 215-20. Jolly filed his Report of Guardian ad Litem with the trial court on October 22, 2020. CP 304-308 and CP 309-361. Throughout the case, and up through Matthew Jolly issuing his GAL report, the Petitioner paid all of the GAL fees, a total of $9,924.50. The Petitioner argued that it would be equitable and fair to reapportion the GAL fees equally (1/3 to each party) such that she was entitled to a judgment against Respondent Daniel Martin for $3,308.16 and against Respondent Kristin Prust for $3,308.16.

Petitioner had not had any further residential time with A.P. since Petitioner's separation from Daniel Martin in February, 2019. CP 280, ¶ 8.

The court conducted trial for the case on March 15, 16, 17, 18 and 26, and on April 2, 2021. CP 278.

Two months after conclusion of the trial, on June 2, 2021, the trial court entered its Final Findings and Conclusions (CP 278-86) and also a Final Order Denying Parentage Petition (CP 287-89). The trial court stated in its Findings and Conclusions that A.P. had lived with the Petitioner for a significant period, that the Petitioner had provided consistent caretaking for A.P. and undertaken full and permanent parenting responsibilities without expectation of being paid, and that the Petitioner had held out the child A.P. as her own. CP 280.

As to whether A.P. and the Petitioner had a bonded and dependent parental relationship, the trial court's finding was an equivocal "Yes and No." CP 281. The findings include that "A.P. and Ms. Charf were bonded and that both cared about each other" during the years they lived together. CP 281. The court also found that A.P. missed Petitioner's son "with whom

she shared a close sibling-like relationship." CP 281. Petitioner had testified that whenever A.P. was distraught, she turned to her for comfort. RP 409:14-16 (March 17, 2021).

However, addressing whether at least one of the child's parents had fostered or supported Petitioner's bonded and dependent relationship with A.P., the trial court concluded No, finding that although Kristin Prust had agreed to granting non-parental custody to Daniel Martin, she had not agreed to do so as to Tara Martin Charf. CP 281. The court did note however that "Ms. Charf played a major role in helping A.P. to become the smart, curious, strong-minded and direct speaking person that all have described her as having become." CP 283.

The trial court made extensive findings and conclusions as to one additional factor, which it described as the "most significant[]," CP 283: whether it was in A.P.'s best interest for the relationship with Petitioner to continue. CP 282-83. Here, the trial court concluded that it was not in A.P.'s best interest to

continue the relationship because it found that A.P. had not expressed any desire to see Tara Martin. CP 282.

On June 29, 2021, Tara Martin filed a timely Notice of Appeal, appealing two final orders entered June 2, 2021:

1. The *Final Order Denying Parentage Petition*; and
2. The accompanying *Final Findings and Conclusions*.

CP 290-303.

The Appellate Court affirmed the trial court's determination that Tara Martin was not a *de facto* parent. Op. at 1.

The Opinion is incorrect on a number of factual matters. First, it is not correct that Tara Martin never objected to the trial court's consideration of A.P.'s testified preferences based on hearsay. *See* Op. at 10. Following objection by Tara Martin's counsel,[1] the GAL report in which the child is reported to have

[1] "The only objection that I have, Your Honor, is that the hearsay statements contained within the GAL report are used and limited to supporting Mr. Jolly's opinions in this matter and not used for the purpose of substantive evidence." RP 98:9-13 (March 15, 2021).

made certain hearsay statements to the GAL about whether she wished to continue her relationship with Tara Martin was admitted as an exhibit for only a limited purpose. RP 98:9-16 (March 15, 2021). That purpose was to support the opinions of the GAL, Mr. Jolly, and not for the purpose of substantive evidence. *Id*.

Second, it is incorrect that Tara Martin did not raise a constitutional challenge to RCW 26.26A.440 below. See Op. at 5-6. Her counsel argued in the trial court:

> On inheritance, that is a constitutionally recognized right of the child. It's the reason that you have to appoint a GAL in a parentage action, like this, like the one that we were involved in, because it says the child has an interest not only in obtaining support, but also in inheritance rights, family bonds, and accurate identification of their parents. And that's *Santos v. Santos*, 104 Wn.2d at 104, 107, as well as *McDaniels v. Carlson* at 108 Wn.2d 299.

RP 996:14-22 (April 8, 2021), and

> the problem is, we've got a new statute that came into effect with no case law… because we do have these significant—we have these significant issues involving constitutionality.

RP 970:5-9 (April 8, 2021).

Third, it is incorrect that Tara Martin did not object below to the validity of the statutory framework found in RCW 26.26A.440 over the common law standard. *See* Op. at 5. Her counsel argued below:

> in one hand it says, in RCW 26.26A.020(2), that this new law that became effective on January 1, 2019, that does not create, affect, enlarge, or diminish parental rights and duties under the laws of this state, other than this chapter. …since they separated in late February 2019, if Ms. Charf was a de facto parent, it would have been prior to the effective date of this statute. And so you've got a common law element, and now you've got a statutory element. And there is a difference because, in the common law element, you only had to show four, maybe five factors, and they are the natural or legal parent consenting to and fostered the parent-like relationship.

RP 971:10-23 (April 8, 2021).

A. Significant Question of Law under the U.S. Constitution.

The law presumes that biological parents are not only fit, but will act in the best interest of their children.[2] The "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes the right of parents to "establish a home and bring up

[2] *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

children."[3] The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest fundamental liberty interest recognized by the U.S. Supreme Court.[4]

In *In re Custody of Smith*, this Court applied a strict scrutiny analysis in determining whether a grandparent's use of the visitation statute infringed on the biological parent's "fundamental 'liberty' interest."[5] In doing so, this Court stated that "state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved."[6]

The *L.B.* court embraced the position that the first of the four *de facto* parent standards, that the "natural or legal parent consented to and fostered the parent-like relationship," incorporates the constitutionally requisite deference to the legal parent.[7] A showing of having "consented to and fostered" the parent-like relationship is

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[3] *Id.* at 65, *quoting Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).
[4] *Troxel*, 530 U.S. at 65.
[5] 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd on other grounds sub nom.*
[6] *Id.*
[7] *In re Parentage of L.B.*, 155 Wn.2d 679, 709, 122 P.3d 161 (2005).

therefore a threshold requirement that is critical to the constitutional analysis.[8] *L.B.* is clear that this requirement can be met only through the active encouragement of the biological (or adoptive) parent by affirmatively establishing a family unit with the *de facto* parent and child that accompanies the family.[9] The requisite "active encouragement" is in contrast to "mere passive acquiescence," which does not satisfy the threshold requirement for establishing *de facto* parent status.[10] Furthermore, the requirement of affirmatively establishing a family unit, with another adult and the child, necessitates that the child first be born. Participation in pre-natal care fosters no parent-like relationships.

RESPECTFULLY SUBMITTED July 6, 2022.

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/s/ Dennis J. McGlothin
By: _____
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[8] *Id.* at 712.
[9] *Id.* at 712 (emphasis added).
[10] *In re Adoption of R.L.M.*, 138 Wn. App. 276, 289, 156 P.3d 940 (2007); *In re Dependency of D.M. & S.R.*, 136 Wn. App. 387, 397, 149 P.3d 433 (Div. 2, 2006).

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By my signature above, I certify that the foregoing document contains 4,746 words, in compliance with RAP 18.17.

Appendix A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parentage of A.P.:	)	No. 82839-8-I
TARA MARTIN,	)	DIVISION ONE
Appellant,	)	UNPUBLISHED OPINION
v.	)	
DANIEL MARTIN and KRISTIN PRUST,	)	
Respondents.	)	

HAZELRIGG, J. — Tara Martin filed for a petition for de facto parentage based on her relationship with A.P. The petition was separately opposed by both A.P.'s legal guardian, who is also Tara's[1] ex-husband, and A.P.'s mother. After trial, the court determined Tara had failed to establish three of the seven statutory elements contained within RCW 26.26A.440. Tara now appeals, raising numerous challenges to the trial court proceedings. Finding no errors, we affirm.

FACTS

A.P. was born in 2005 and lived with one or both of her biological parents until 2013. A.P.'s parents had divorced in 2010 and her biological father, Bill Prust, was named her primary residential parent. Two months later, her parents

[1] Because several parties to this case share last names, we refer to them by their first names. No disrespect is intended.

reconciled. Bill then died in January 2012 when A.P. was nearly seven years old. Both A.P. and her mother, Kristin Prust, were devastated by Bill's death and struggled in the immediate aftermath, during which some other traumatic family events occurred.

Dealing with her grief and other health issues, Kristin was no longer able to work and was ultimately granted long term disability benefits. A.P. was having behavioral issues including hyperactivity, disruptive conduct in class, and difficulty concentrating. In 2013, Kristin moved herself, her son, and A.P. to Malaysia where Kristin's father lived. Though A.P.'s brother adjusted well, A.P. did not. After four months, A.P. and her mother returned to Washington as it was clear A.P. needed more structure than that which was provided by her homeschooling in Malaysia.

When A.P. and Kristin returned to Washington in 2013, A.P. was eight years old. The two initially stayed with Daniel Martin, a close friend to Kristin and Bill. Daniel was living with his then wife, Tara, and her son from a previous relationship, C.C., who was two-years-old at the time. Daniel knew A.P. well and was her godfather. Daniel offered to care for A.P. based on some conversations that he had with Bill prior to his death regarding care of A.P. Believing this would be in her daughter's best interests, Kristin agreed to a nonparental custody order designating Daniel as A.P.'s guardian. The agreed order was entered in July 2014 and, while Kristin was aware Tara, as Daniel's wife, would likely assist in parenting A.P., she only named Daniel as guardian in the nonparental custody order. Kristin maintained regular contact with A.P. for the first year of the new custody

arrangement until medical issues arose which impacted her ability to see her daughter regularly.

In fall 2014, Kristin stopped visits with A.P. based on health-related limitations on contact imposed by Daniel and Tara, though she did maintain some infrequent communication with her daughter. By January 2015, Tara had transitioned to staying home full-time in order to care for her son who has special needs. As a result, Tara ensured both C.C. and A.P. were cared for on a day-to-day basis. Not long after she began living with Daniel and Tara, A.P. started medication to address some of her behavioral concerns. Tara later returned to full-time employment outside the home in August 2018.

Tara and Daniel separated in early 2019, following Daniel's arrest arising from an alleged domestic violence incident. After Daniel was arrested, Tara sent A.P. to go stay with a close friend of Daniel's for the night. The following day, Daniel's brother picked A.P. up from the friend's house and took her to his home. A pretrial order pursuant to the pending criminal charge temporarily restricted Daniel from being with A.P. unless another adult was present. As a result, A.P. and Daniel resided with his family until the restriction was lifted, approximately six months, and Daniel was able to find his own home for himself and A.P. From that period on, A.P. had minimal contact with Tara, but regularly spent time with Daniel.

In June 2019, four months after she sent A.P. out of her home, Tara filed a petition for nonparental custody, or alternatively, de facto parentage. Daniel and Kristin objected to Tara's petition based on lack of adequate cause. In October 2019, a court commissioner agreed and found no adequate cause to support

Tara's petition for nonparental custody. The commissioner nevertheless found "sufficient information for the court to determine that Ms. Martin may be a de facto parent under [RCW] 26.26A.440." The commissioner denied Tara's request for residential time, but did appoint a guardian ad litem (GAL). Tara was ordered to pay the GAL fees, but the court indicated that it would consider reapportionment of the fees if any of the parties sought to revisit the issue.

In November 2019, a judge denied Daniel and Tara's cross-motions for revision of the commissioner's ruling. Following replacement of the designated GAL on two separate occasions, the third appointed GAL issued a report in October 21, 2020 recommending against de facto parentage. A trial was conducted over several days in March and April 2021. Numerous witnesses were called by all parties, but A.P. did not testify at trial. The court entered findings of fact and conclusions of law and a final order denying Tara's parentage petition. Tara timely appealed.

ANALYSIS

I. Common Law or Statutory Standard for De Facto Parentage

As a preliminary matter, we reject Tara's argument that the proper framework for consideration of her petition for de facto parentage is the common law standard which existed prior to the legislature's enactment of RCW 26.26A.440. RCW 26.26A.440 became effective on January 1, 2019 and contains the statutory elements for de facto parentage. Tara filed her petition June 17, 2019, nearly six months after the enactment date, therefore the statute applies. The crux of Tara's argument on this issue is that because the majority of the

relationship with A.P. which she says supports a finding of de facto parentage arose during the period of time when the court utilized a common law standard, her case should be considered under that framework. Tara fails to persuasively argue why the statute in effect at the time she filed her petition does not control.

A common law remedy only survives the enactment of a statutory remedy if our "'legislature has not expressed an intention to preempt the common-law remedy and the common law remedy fills a void in the law.'" In re Parentage of C.S., 134 Wn. App. 141, 153, 139 P.3d 366 (2006) (quoting In re Parentage of L.B., 121 Wn. App. 460, 476 n.2, 89 P.3d 271 (2004)). Further, this challenge to the validity of the proceedings was not raised in the trial court. For example, the commissioner expressly noted that Tara "may be a de facto parent under [RCW] 26.26A.440" in ruling on adequate cause and the GAL report clearly utilizes the statutory elements contained in RCW 26.26A.440 in reaching its recommendation. The record establishes that Tara did not object to the commissioner's consideration of her petition under the statute or to the GAL report based on use of a purportedly erroneous standard. Neither did she object to the court's final ruling on that basis when it similarly applied the controlling statutory framework. Accordingly, we decline to consider such argument for the first time here. RAP 2.5(a).

The same is true as to Tara's constitutional challenge to RCW 26.26A.440. She asserts that the statutory standard for de facto parentage violates her fundamental right to parent. As a preliminary matter, this argument is not well taken as it, too, is raised for the first time on appeal and Tara does not attempt to

argue that this issue is manifest such that we should consider it. See RAP 2.5(a). Further, and more critically, Tara is not entitled to constitutional protection in this regard because, since she is not a parent of A.P., she does not have a fundamental right to parent A.P. Finally, Tara frames this constitutional argument as entitling her to parity with Daniel as A.P's legal guardian in terms of the court's consideration of their competing claims. However, this ignores the critical fact that Kristen remains A.P.'s legal and biological parent with full rights over her child. Tara offers no argument as to how her perspective of what is best for A.P. as a prospective de facto parent might override the wishes of an actual legal parent whose rights have not been forfeited or limited in any way.

II. Trial Court Findings and Ruling on De Facto Parentage

Tara next assigns error to the trial court's denial of her petition for de facto parentage and the findings of fact and conclusions of law entered with that ruling.[2] We review a trial court's decision as to de facto parentage for abuse of discretion. See In re Parentage of J.A.B., 146 Wn. App. 417, 422, 191 P.3d 71 (2008). This court reviews the trial court's findings of fact for substantial evidence and considers the conclusions of law de novo, ensuring they properly flow from the findings. In re Custody of SA-M, 17 Wn. App. 2d 939, 952, 489 P.3d 259 (2021). "[A]n appellate court considers the evidence in a light most favorable to the prevailing

[2] Tara also assigns error to the commissioner's determination that she failed to meet the adequate cause standard as to her third party custody petition. However, her notice of appeal only designates the final order of the trial court denying de facto parentage and the accompanying findings of fact and conclusions of law. Accordingly, the ruling on adequate cause, and the subsequent denial of Tara's motion to revise that ruling, are outside the scope of this appeal. RAP 2.4(a)

party to determine if a rational trier of fact could find the fact more likely than not to be true." Id. Further, all unchallenged findings of facts are verities on appeal. In re Custody of A.T., 11 Wn. App. 2d 156, 163, 451 P.3d 1132 (2019). Though Tara assigns error to multiple findings, she does not provide substantive argument or otherwise demonstrate how they are not supported by substantial evidence. See Kauzlarich v. Yarbrough, 105 Wn. App. 632, 652 n.5, 20 P.3d 946 (2001) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). Therefore, we treat the trial court's findings as verities.

"Effective January 1, 2019, the Washington Uniform Parentage Act (WUPA), [chapter] 26.26A RCW, was updated to provide statutory recognition of de facto parents." SA-M, 17 Wn. App. 2d at 948. RCW 26.26A.440 "provides a statutory path to legal parentage for de facto parents, who, loosely speaking, are adults who, with the consent and encouragement of a legal parent, have formed a strong parent-child relationship with a child." In re Parentage of J.D.W., 14 Wn. App. 2d 388, 398, 471 P.3d 228 (2020). RCW 26.26A.440 requires an individual who claims to be a de facto parent to establish the following seven elements by a preponderance of the evidence:

> (a) The individual resided with the child as a regular member of the child's household for a significant period;
> (b) The individual engaged in consistent caretaking of the child;
> (c) The individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
> (d) The individual held out the child as the individual's child;
> (e) The individual established a bonded and dependent relationship with the child which is parental in nature;
> (f) Another parent of the child fostered or supported the bonded and dependent relationship required under (e) of this subsection; and
> (g) Continuing the relationship between the individual and the child is in the best interest of the child.

If the trial court finds the individual has met their burden, the trial court "shall adjudicate the individual who claims to be a de facto parent to be a parent of the child." Id.

Here, the trial court definitively found Tara failed to establish at least two of the elements necessary for de facto parentage and reached a mixed finding as to a third element. The two elements not met were (f) and (g). As to (f), the court concluded that Tara had failed to demonstrate that "at least one of the child's parents foster or support [Tara]'s bonded and dependent relationship with the child." The trial court noted A.P.'s biological mother granted nonparental custody to Daniel alone and that Kristin testified that this was a "conscious and clear decision on her part." The trial court found that Kristin "of course, knew that [Tara] would be caring for A.P. to assist [Daniel], but she did not support [Tara]'s forming of a bonded and dependent relationship with A.P." Though Tara assigns error to this finding, she provides no argument as to why it is unsupported by the trial record, therefore we treat the finding as true for purposes of our review. We further note that Kristin's testimony provides substantial evidence to support this finding.

Next, the trial court concluded as to element (g) that it was not in A.P.'s best interest for the relationship with Tara to continue. The trial court's conclusion here is supported by its finding that A.P. is "in a good place right now, despite all that has happened since the separation, including the onset and continuation of the current COVID-19 crisis."[3] The court went on to note A.P.'s expressed desire not to have contact with Tara at this point in time and that forced reunification would

[3] The element regarding the best interest of the child is extremely context dependent and often requires substantial discovery. See J.D.W., 14 Wn.2d at 411–12.

require a parenting assessment and potentially additional counseling. The court was disinclined to add these requirements into the life of an adolescent who was already engaged in counseling for her various behavioral diagnoses and who had settled into new patterns with her guardian and mother. The trial court noted its reliance on the GAL's expertise and A.P.'s own statements in reaching its determination as to this statutory factor. The trial court's findings are supported by substantial evidence in the record and the conclusion as to A.P.'s best interest properly flows from such findings. Despite Tara's desire to have this court reweigh the evidence underlying this element that is not the role of an appellate court. See Renz v. Spokane Eye Clinic, PS, 114 Wn. App. 611, 623, 60 P.3d 106 (2002) ("Appellate courts are not suited for, and therefore not in the business of, weighing and balancing competing evidence.").

As to the final the element Tara failed to definitively establish, whether she had "a bonded and dependent parental relationship with the child," the court reached a mixed finding, answering both yes and no. Its mixed conclusion was based on temporal considerations regarding the relationship as the court found Tara and A.P. were bonded during the time they lived together, but that the bond they had previously shared was not sufficiently strong to survive their separation. Specifically, the court based this conclusion on A.P.'s lack of interest in seeing Tara since she was sent away from Tara's home and Tara's lack of efforts to maintain contact with A.P. even during the pendency of her petition for de facto parentage. The trial court's findings as to this element are supported by substantial evidence from the record. Its conclusion on this element is properly supported by

the findings and precludes a determination that Tara has met the statutory criteria as a de facto parent.

The court, and GAL, properly used the statutory elements in effect at the time of Tara's petition for de facto parentage. Further, the court's findings regarding those statutory elements are supported by substantial evidence and the conclusions of law flow from those findings. Accordingly, we find no error in the trial court's denial of Tara's petition.

III. GAL Report on A.P.'s Preference as Hearsay

Tara next raises an evidentiary error, arguing the court improperly considered A.P.'s preferences as conveyed in the GAL report. She specifically asserts this was improper hearsay because A.P. did not testify at trial. In advancing this argument on appeal, Tara notes her objection at trial to hearsay statements contained in the GAL report, seeking that the court limit their use to supporting the "[GAL]'s opinions in this matter and not [ ] for the purpose of substantive evidence." Tara raised this objection when Daniel moved to admit the report. However, a careful reading of the transcript establishes that this ruling was clearly limited to hearsay statements contained in the report that arose from the GAL's interviews with other collateral informants. The record does not support Tara's claim on appeal that this ruling was intended to capture A.P.'s preferences as conveyed to the GAL during his investigation.

As with several of the other issues addressed herein, this is a challenge Tara raises for the first time on appeal. She did not object to the court's consideration of A.P.'s preference based on hearsay, nor did she present such an

objection to the order that expressly directed the GAL to determine, and report back on, A.P.'s preference. While it is true that A.P. did not testify at the trial, the GAL report contained statements regarding A.P's preference, and that the statements in the GAL report regarding A.P.'s wishes were considered by the court in reaching its final ruling, this was not error.

IV. Reapportionment of GAL Fees

Finally, Tara assigns error to the trial court's order as to GAL fees, specifically arguing that the fees should have been reapportioned at the conclusion of the trial. However, this argument is waived as it was not properly presented to the trial court. After ordering Tara solely responsible for the GAL fees at the conclusion of the adequate cause hearing, the court explicitly stated it was willing to "revisit" the apportionment of the fees at the request of any party. While Tara claims a request for reapportionment was built into her proposed orders, those documents are not part of the record on appeal.[4] Further, the report of proceedings demonstrates that she did not ask the court to reallocate or otherwise revisit the GAL fees at the conclusion of trial. We will not consider new arguments on appeal which were never presented to the trial court. RAP 2.5(a).

[4] The record shows that Tara's proposed orders were rejected by the clerk's office at the trial court based on King County Local Court Rule 7(b)(5)(C), which does not allow for the filing of proposed orders.

Affirmed.

WE CONCUR:

Appendix B

RCW 26.26A.440

Adjudicating claim of de facto parentage of child.

(1) A proceeding to establish parentage of a child under this section may be commenced only by an individual who:

(a) Is alive when the proceeding is commenced; and

(b) Claims to be a de facto parent of the child.

(2) An individual who claims to be a de facto parent of a child must commence a proceeding to establish parentage of a child under this section:

(a) Before the child attains eighteen years of age; and

(b) While the child is alive.

(3) The following rules govern standing of an individual who claims to be a de facto parent of a child to maintain a proceeding under this section:

(a) The individual must file an initial verified pleading alleging specific facts that support the claim to parentage of the child asserted under this section. The verified pleading must be served on all parents and legal guardians of the child and any other party to the proceeding.

(b) An adverse party, parent, or legal guardian may file a pleading in response to the pleading filed under (a) of this subsection. A responsive pleading must be verified and must be served on parties to the proceeding.

(c) Unless the court finds a hearing is necessary to determine disputed facts material to the issue of standing, the court shall determine, based on the pleadings under (a) and (b) of this subsection, whether the individual has alleged facts sufficient to satisfy by a preponderance of the evidence the requirements of subsection (4)(a) through (g) of this section. If the court holds a hearing under this subsection, the hearing must be held on an expedited basis.

(4) In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by a preponderance of the evidence that:

(a) The individual resided with the child as a regular member of the child's household for a significant period;

(b) The individual engaged in consistent caretaking of the child;

(c) The individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;

(d) The individual held out the child as the individual's child;

(e) The individual established a bonded and dependent relationship with the child which is parental in nature;

(f) Another parent of the child fostered or supported the bonded and dependent relationship required under (e) of this subsection; and

(g) Continuing the relationship between the individual and the child is in the best interest of the child.

[**2018 c 6 § 509**.]

Appendix C

RCW 26.26A.020

Scope.

(1) This chapter applies to an adjudication or determination of parentage.

(2) This chapter does not create, affect, enlarge, or diminish parental rights or duties under law of this state other than this chapter.

[**2018 c 6 § 103**.]

WESTERN WASHINGTON LAW GROUP, PLLC

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Transmittal Information

Filed with Court:	Supreme Court
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