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No. 64334-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Parentage of J.M.W.,

MICHAEL A. TIPPIE,

Appellant,

vs.

MARY V. WILSON,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE GEORGE F. APPEL

BRIEF OF RESPONDENT

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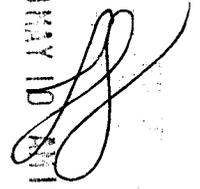


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I. INTRODUCTION

Appellant is the former husband of respondent, the mother of a daughter, now age 10. Respondent adopted her daughter at birth, three years before the parties married. The trial court dismissed the appellant's petition to establish himself as a *de facto* parent of his former stepdaughter because he could not show that the respondent "consented to and fostered a parent-like relationship" – a "critical" threshold requirement for the status of a *de facto* parent. ***Parentage of L.B.***, 155 Wn.2d 679, 712 ¶47, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). Because appellant's petition failed as a matter of law based on the absence of necessary facts to establish *de facto* parentage, the trial court properly dismissed his action.

While this appeal has been pending, our Supreme Court confirmed the correctness of the trial court's decision, holding that the *de facto* doctrine cannot extend to stepparents because "an avenue already exists for a stepparent seeking a legal, custodial relationship with a child." ***Parentage of M.F.***, __ Wn.2d __, *2, ¶ 11, __ P.3d __ (April 1, 2010). The Court held that "the *de facto* parent test we applied in ***L.B.*** could not, in the stepparent context, be applied in a meaningful way. The elements of the test are ill-

suites to determinations in the stepparent context because in most cases they will be very easily satisfied.” *Parentage of M.F.*, ___ Wn.2d ___, *4, ¶ 17. Thus, even if the appellant could show that the respondent “consented to and fostered a parent-like relationship,” his petition would still fail as a matter of law because the *de facto* doctrine does not apply to stepparents.

This court should affirm the trial court’s decision dismissing appellant’s petition as his action fails as matter of law under *Parentage of L.B.* This court should award attorney fees to respondent for having to respond to this appeal because of appellant’s persistence in pursuing this appeal in light of the Supreme Court’s decision in *Parentage of M.F.*

II. RESTATEMENT OF ISSUES

1. The Supreme Court’s decision in *Parentage of M.F.* limited the application of the common law cause of action for *de facto* parentage under *Parentage of L.B.*, holding that the *de facto* doctrine cannot extend to stepparents seeking parental rights to stepchildren of a former marriage. Did the trial court err in dismissing the *de facto* petition of a child’s former stepfather?

2. Even if the *de facto* doctrine could allow a stepparent to seek parental rights in a former stepchild, did the trial court err in

dismissing a former stepfather's petition when he failed to allege any specific facts or evidence that the child's mother "consented to and fostered a parent-like relationship" beyond what would be expected in any marriage where families are blended, and the mother consistently refused to consent to the stepfather's adoption of the child during their marriage?

3. Should this court award attorney fees against appellant for pursuing this appeal in light of the Supreme Court's decision in *Parentage of M.F.*, which was issued while this appeal was pending but before respondent was required to incur any significant attorney fees to respond to the appeal?

III. RESTATEMENT OF FACTS

A. **Four Years Before The Parties Married, The Mother Began The Process For A Single-Parent Adoption.**

Respondent Mary Wilson is the adoptive mother of a daughter who was born on July 8, 1999. (CP 262) Appellant Michael Tippie is Mary's former husband and former stepfather of her daughter. (CP 194, 261) The parties were married on July 19, 2002, and divorced on December 18, 2008. (CP 261) There are no children of the marriage. (CP 261)

In 1994, five years before the parties began dating, Mary, who was then single, decided she wanted a child. (CP 183) Toward that goal, Mary underwent four years of painful and expensive efforts at conception, which eventually proved ineffective. (CP 183) In 1998, Mary decided that she would adopt a child. (CP 183) In April 1999, over three years before the parties married, Mary was approved as a prospective adoptive mother of a girl due to be born in July 1999 in Guatemala. (CP 183) Mary anticipated being able to pick up the child six months after birth. (CP 183) In the meantime, Mary was required to complete medical checks, income verification, pre-placement interviews, fingerprinting, background checks, reference letters, and other stringent requirements before the child would be released to her. (CP 183)

B. Towards The Conclusion Of The Adoption Process, The Parties Began Dating. Appellant Was Not Involved In The Adoption Process.

Just as Mary was completing the final stage of the adoption process, Mary began dating Michael, a divorced father of two children who shared parenting half-time (alternating weeks) with his former spouse. (CP 184) On October 25, 1999, the Guatemalan adoption decree was entered, and in November 1999 – two months

earlier than expected – Mary was notified that she could pick up her daughter from Guatemala. (CP 262) The parties had at that point been dating only six months. (CP 120) While Michael was supportive of Mary’s efforts to adopt a child, he had taken no active role in procuring the adoption. (CP 184)

Mary and Michael traveled to Guatemala in November 1999. (CP 120, 184) The parties dispute whether Mary invited him on the trip or whether Michael invited himself (CP 121, 184), but it is undisputed that Michael remained in Guatemala for just a short time. (CP 121, 185) Mary remained in Guatemala alone awaiting the completion of paperwork necessary before her daughter could be transferred to her. (CP 185) On November 19, 1999, Mary’s daughter, who was then four months old, was permanently delivered to Mary’s care, and Mary returned to the United States with her daughter. (CP 185, 262)

C. For The First Year After The Mother Adopted Her Daughter, The Parties Continued To Date But Lived Separately. Appellant Took No Active Role In The Care of The Mother’s Daughter.

Mary took an extended maternity leave after returning home with her daughter. (CP 185) The parties were dating but did not live together, and Michael did not play an active role in the day-to-

day care of Mary's infant daughter. (CP 185) Mary hired babysitters if she needed additional care while working or running errands. (CP 185) Mary and Michael saw each other once or twice a week. (CP 185) Michael and his children, then ages 7 and 9, got along well with Mary's daughter – the older children played with her and Michael occasionally fed her bottles. (CP 185)

As part of the adoption process, Mary was required to undergo three post-placement interviews. (CP 263) In the final report issued thirteen months after the adoption, the adoption counselor made only passing reference to Michael, focusing entirely on Mary's role as the adoptive parent:

Personality: [The daughter] is happy and sweet and she is adored by everybody. Mary's boyfriend has two children who are 7 and 9 and they love to play with [the daughter] and hate to see her leave.

Adjustment of family: Mary believes she has the perfect child for her and there have been no problems adapting her lifestyle to being a parent. While Mary is working, [the daughter] is cared for by two Spanish-speaking women and also a nanny who comes into the home.

(See e.g. CP 271)

D. Approximately A Year After Mary Brought Her Daughter Home, The Parties Moved In Together. Around The Same Time, The Mother Adopted Her Daughter Through The U.S. Courts. As With The Original Adoption, Appellant Was Not Involved In The U.S. Adoption.

At the end of 2000, over a year after Mary brought her daughter home, the parties bought a house together, where their families would reside together. (CP 185) The purchase of the home closed on December 11, 2000. (CP 185) On the same day, Mary petitioned to adopt her daughter in King County Superior Court, so that her daughter could obtain a U.S. birth certificate. (CP 185, 267-69) Michael did not ask to be included in the petition to adopt Mary's daughter, nor did Mary offer to include Michael in the petition as an adopting parent. (CP 185) Mary asserted that her failure to include Michael as a petitioner in the U.S. adoption "was not an oversight, but reflected the fact that I did not see this adoption in any way as a joint endeavor with him." (CP 263)

The U.S. adoption was finalized on February 28, 2001 in King County Superior Court. (CP 185) Michael claims he attended the adoption. (CP 291) Both Mary and a friend who attended the adoption deny that Michael was present for the adoption ceremony. (CP 185-86, 223)

E. The Mother Continued To Be The Sole Parent For Her Daughter. On A Number Of Occasions, Appellant Asked To Adopt The Mother's Daughter. Each Time The Mother Said No.

Mary continued to be the primary, if not sole, caregiver for her daughter even after the parties moved in together. (CP 186-87) Michael inquired on occasion about the possibility of adopting Mary's daughter. Mary consistently rejected these requests. (CP 187)

A source of conflict between the parties was Mary's sense that Michael was unreliable, and that she shouldered the responsibility not only for the care of her daughter but for Michael's children, who lived with the family half-time. (CP 187) The parties participated in couples' counseling to help Mary deal with the overload and frustration she was feeling. (CP 187) After counseling, the parties became engaged to be married. (CP 187)

F. Appellant Presented The Mother With A Prenuptial Agreement That Would Have Allowed Him To Adopt "As Soon As Possible Post-Marriage." The Mother Once Again Rejected The Proposal, But Under "Tremendous Pressure" Agreed That Appellant Could Adopt In Six Years.

The parties were set to be married on July 19, 2002. (CP 187) Either one week or one month before the wedding, Michael

presented Mary with a two-page outline of a prenuptial agreement. (CP 122, 187) While most of the provisions dealt with financial matters, one provided that Michael would adopt Mary's daughter, then age 3, "as soon as possible after the parties married." (CP 187)

As she had before, Mary rejected the idea of Michael adopting her daughter. (CP 187) In order to placate him, Mary agreed to include a provision that Michael would be allowed to adopt her daughter in six years. (CP 188, 263) Both parties recognized that such a provision was likely unenforceable, and in the agreement acknowledged that "we recognize that not all of this section is legally binding on the court." (CP 263, 386) Mary felt "tremendously pressured" to include this provision because it was "dropped [] on her at the very last minute, after all the wedding arrangements had been made, invitations sent out, and [she] was dealing with all the last minute details." (CP 263) Because of the timing, Mary did not have an opportunity to consult a family law attorney on this issue before the wedding. (CP 188) The trial court held in the parties' dissolution action, Snohomish County Cause No. 08-3-00943-4, that this prenuptial agreement was unenforceable.

G. During The Marriage, Appellant Maintained The Role Of Stepfather. The Mother Continued To Resist Appellant's Requests To Adopt Her Daughter.

Michael continued to demand on "numerous occasions" that Mary allow him to adopt her daughter. (CP 264) Michael had his friends, children, and family members, lobby Mary to consent to an adoption. (CP 264) Each time, Mary refused. (CP 264)

Michael's children lived with the family and referred to Michael as "dad." (CP 91, 289) Mary's daughter also referred to Michael as "dad" or "daddy." (CP 289) Mary thought "it would have been awkward and confusing for [her daughter] to insist that [her daughter] refer to Michael by some other designation." (CP 91) Like any stepparent, Michael was present during several milestones during the parties' marriage— birthdays, Christmas, first days of school, and other occasions. (CP 291) Michael also engaged the children in "fun" activities such as cooking, music, skiing, and hiking. (CP 191-92, 291-92) But Michael remained no more involved in the day-to-day care and upbringing of Mary's daughter during the marriage than he was before the parties moved in together. (CP 191) Mary continued to be the primary caregiver and the sole decision-maker for her daughter. (CP 191) Her daughter always retained Mary's last name. (See e.g. CP 142-71)

H. Less Than Six Years After Marriage, Appellant Filed For Divorce, Simultaneously Seeking A Determination That He Was A *De Facto* Parent. The Court Dismissed His *De Facto* Petition.

Michael filed a petition to dissolve the parties' marriage on March 25, 2008, less than six years after the parties married. (CP 250) In the petition, he sought a determination that he was Mary's daughter's *de facto* parent. (CP 250) In her response to the petition, Mary denied that Michael was a *de facto* parent. (CP 250-51)

Michael subsequently filed a separate petition to establish himself as Mary's daughter's *de facto* parent on May 13, 2008. (CP 251, 357-63) The court denied Michael's motion to have this *de facto* action consolidated with the dissolution action. (CP 251) The court also rejected Michael's motion for appointment of a guardian ad litem, recognizing that it had no authority to appoint a guardian ad litem without at least a *prima facie* determination that Michael could prove he was a *de facto* parent:

The court finds there needs to be at least a *prima facie* threshold hearing before the court appoints a guardian ad litem, and there is no authority for the court to do so.

(CP 300, 301)

On May 20, 2009, Mary filed a CR 12(b)(6) motion to dismiss Michael's *de facto* petition. (CP 275) The superior court refused to dismiss Michael's petition under CR 12(b)(6), but with the parties' consent considered Mary's motion as a summary judgment motion. (CP 14) In granting summary judgment of dismissal, the court noted that "the **L.B.** test for the creation of a *de facto* parent status is a rigorous one, and consent is one of its critical elements." (CP 15) The court on the basis of Michael's factual allegations "concluded that he does not, on the basis of those facts, create a material issue of fact on that necessary element of his case." (CP 15) The court dismissed Michael's *de facto* petition with prejudice and denied Mary's request for attorney fees. (CP 16)

Michael appealed. (CP 12) After Michael filed his opening brief, the Supreme Court confirmed the correctness of the trial court's decision, holding that the *de facto* doctrine cannot extend to stepparents because "an avenue already exists for a stepparent seeking a legal, custodial relationship with a child." ***Parentage of M.F.***, ___ Wn.2d ___, *2, ¶ 11, ___ P.3d ___ (April 1, 2010). Michael has not responded to the respondent's requests that he dismiss his appeal.

IV. RESPONSE ARGUMENT

A. The *De Facto* Doctrine Does Not Allow A Stepparent To Claim Rights Equal To Those Of A Child's Legal Parent.

1. A Stepparent Cannot Rely On The Factors Set Forth In *Parentage Of L.B.* To Assert *De Facto* Parentage.

Appellant's attempt to establish himself as a *de facto* parent of his former stepdaughter, with all of the same rights and privileges as the child's legal parent, is based entirely on his claim that he could meet the factors set forth in *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). The Supreme Court recently limited its holding in *L.B.* and declined to extend the *de facto* doctrine to parties who seek a custodial and legal relationship with their former stepchildren, as is the case here. *Parentage of M.F.*, ___ Wn.2d ___, *4, ¶ 17, ___ P.3d ___ (April 1, 2010).

In *L.B.*, the Court considered the parental rights of a woman who could not establish any legal right under the Washington Parentage Act to a child she had raised since birth with the biological mother. Recognizing that “[o]ur legislature has been conspicuously silent when it comes to the rights of children . . . who are *born into* nontraditional families . . . ,” *L.B.*, 155 Wn.2d at 694, ¶ 21 (emphasis added), the Court held that a non-biological mother

could maintain a common law *de facto* parentage action because there was no other statutory mechanism to allow her to pursue her parental rights over the objection of the child's only legal parent. 155 Wn.2d at 688-89, 707, ¶¶ 14, 38. The Court adopted this common law cause of action in *L.B.* to "fill the interstices that our current legislative enactment fail[ed] to cover in a manner consistent with our laws and stated legislative policy." 155 Wn.2d at 707, ¶ 38.

In *M.F.*, the Court recognized that the reasons for creating the common law *de facto* parentage cause of action in *L.B.* were not present in cases where a former stepparent seeks a custodial or legal relationship with a former stepchild. The *M.F.* Court held that unlike the factual scenario in *L.B.*, the legislature and courts have already contemplated the situation that arises when a blended family results from consecutive marriages in which a stepparent during the marriage accepted a parenting role with the child of his or her spouse. ___ Wn.2d ___, *3, ¶ 16. The *M.F.* Court noted that in the case of stepparents, "an avenue already exists for a stepparent seeking a legal, custodial relationship with a child. The legislature has created and refined a statutory scheme by which a stepparent may obtain custody of a stepchild." ___ Wn.2d ___, *2, ¶ 11.

Relying on RCW ch. 26.10 and *Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981), *Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989), and *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006), the Court held that “this intertwined judicial and statutory history illustrates the legislature’s ongoing intent to create laws accommodating stepparents who seek custody on or following dissolution.” *M.F.*, ___ Wn.2d ___, * 2-3, ¶¶ 11-14.

In each of these cases that were relied upon by the *M.F.* Court, there was a third party who claimed to be the psychological parent of the child. But despite the apparent strong bond between the third party and child, the third party was still required to meet the detriment standard of RCW ch. 26.10 before a court could place the child with the third party over the objection of a fit biological parent. See *Stell*, 56 Wn. App. at 365 (aunt was psychological parent for nephew); *Allen*, 28 Wn. App. at 649 (stepmother was psychological parent for stepson); *Shields*, 157 Wn.2d at 144 (stepmother was psychological parent for stepson). The *M.F.* Court recognized that “though our statutory scheme does not permit a stepparent to petition for parental status, this does not equate to a lack of remedy. The legislature has provided a statutory remedy for a stepparent seeking a custodial relationship with a stepchild by

enabling stepparents to petition for custody.” ___ Wn.2d ___, * 3, ¶ 14. Accordingly, the Court held that the equitable doctrine of *de facto* parentage does not extend to stepparents. *M.F.*, ___ Wn.2d ___, *3-4, ¶¶ 16, 17.

Because appellant as a stepparent has a statutory remedy to establish a custodial relationship with his former stepdaughter if he can demonstrate that the placement of the child with her fit parent will result in actual detriment to the child’s growth and development, he cannot establish himself as a *de facto* parent under the factors set forth in *L.B.* as a matter of law. The trial court properly dismissed his petition.

2. The Court’s Holding In *Parentage Of M.F.* Is Not Limited To Families With Two Legal Parents.

Appellant may argue on reply that the limitations to the *de facto* doctrine established in the Court’s decision in *M.F.* do not apply here because the child in *M.F.* had “two already existing parents,” whereas here, the child has only one legal parent – the respondent mother. But the Court did not limit its holding to families with two parents, nor could it. A parent’s right to the care, custody, and control of her child free from interference from third parties and the State is “the oldest of the fundamental liberty

interests recognized.” *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000). The Court’s decision in *M.F.* cannot provide less protection to children in families with a single parent than to families with two parents. See e.g. *Gomez v. Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 875 (1973) (“Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”) Furthermore, as this court previously recognized, “a child need not have two parents.” *State ex rel. D.R.M.*, 109 Wn. App. 182, 190, 34 P.3d 887 (2001).

Our Courts have never limited the application of the “heightened standard” that is necessary before the State can interfere with a fit parent’s parenting decision to maintain custody of his or her child against a third party to cases when the child has two legal parents. For example, seven months after deciding *L.B.*, the Court held that a stepmother could obtain custody of her former stepson over the objection of the child’s one living parent only by first showing harm or detriment. *Shields*, 157 Wn.2d at 144-45, ¶¶ 46-47.

In **Shields**, a stepmother sought custody of her stepson, who had resided primarily with her and the father for nearly half of the child's life, after the death of the child's father. The Court held that the stepmother had standing to seek third party custody under RCW 26.10.030, but that she was still required to show that placement with the mother would result in actual detriment to the child. **Shields**, 157 Wn.2d at 150, ¶ 60. Because under the constitutionally required "heightened standard," "a court can interfere only with a fit parent's parenting decision to maintain custody of his or her child if the nonparent demonstrates that the placement of the child with the fit parent will result in actual detriment to the child's growth and development." **Shields**, 157 Wn.2d at 144, ¶ 46; see also **Troxel v. Granville**, 530 U.S. 57, 120 S.Ct. 2054 (2000) (paternal grandparents versus single mother); **Custody of E.A.T.W.**, 168 Wn.2d 335, 227 P.3d 1284 (2010) (maternal grandparents versus single father); **Custody of Nunn**, 103 Wn. App. 871, 14 P.3d 175 (2000) (paternal aunt versus single mother).

Furthermore, even if the courts could distinguish between families with one parent and families with two parents, under our Supreme Court's reasoning in **L.B.**, which is premised on the

unavailability of statutory remedies, they should be to be more protective of the families with one parent from the claims of a former spouse who seeks *de facto* rights after a marriage ends. This is because there are fewer statutory constraints to formalizing the parental status of a spouse if there is only one parent, as the legal parent need only consent to a stepparent adoption.

In a stepparent adoption the pre-placement report otherwise required by RCW 26.33.190 is not necessary, making it significantly easier for a spouse to adopt his or her spouse's child. RCW 26.33.220 (if petitioner seeks to adopt child of petitioner's spouse pre-placement report is not required). If there are two parents and one parent's spouse wishes to adopt the child, on the other hand, a stepparent must terminate the second parent's parental rights, or at a minimum obtain his or her consent. See e.g. ***Marriage of Allen***, 28 Wn. App. 637, 640, fn. 2, 626 P.2d 16 (1981) (stepmother of child to whom she was a "psychological parent" was prevented from adopting child during the marriage because natural mother refused to consent to adoption); ***Parentage of J.A.B.***, 146 Wn. App. 417, 421, ¶¶ 8-9, 191 P.3d 71 (2008) (third party had to obtain the biological father's consent to terminate his parental rights before he could pursue adoption of his former girlfriend's son;

biological father had previously objected to a third party custody order); RCW 26.33.100(1)(c) (a prospective adoptive parent may petition to terminate parental rights of one parent if he or she seeks to adopt the child of his or her spouse).

While not an issue specifically addressed in the Court's decision in *L.B.*, it is likely that the intrusiveness of the adoption procedure under the family's circumstances in *L.B.* may have been a hindrance to the non-biological mother's adoption of the child before the parties' relationship ended. Because the parties were two unmarried women, both a pre-placement report and post-placement report would have been required before the adoption could be finalized. RCW 26.33.180; RCW 26.33.200. These reports are intrusive, requiring background checks and an investigation of the "home environment, family life, health, facilities, and resources" of the potential adoptive parent. RCW 26.33.190(2), (3); RCW 26.33.200(1). These reports also require a recommendation as to the "fitness of the adoptive parent," and must report "the propriety and advisability of the adoption." RCW 26.33.190(2); RCW 26.33.200(1). A pre-placement report must be filed with the court before the child can even be placed with the prospective adoptive parent. RCW 26.33.180. As a consequence,

the non-biological mother in *L.B.* would have been required to move out of the family home, where she had lived with the biological mother for six years before the child's birth, until the pre-placement investigation and report was completed.

None of this would have been an impediment to stepparent adoption by the appellant, had Mary consented. As was her legal right, however, Mary did not. Mary's constitutional right is not limited because she was a single parent, and the Supreme Court's decision in *M.F.* was not limited to actions brought by stepparents who seek parental rights to a stepchild with two legal parents. The appellant's *de facto* petition failed as a matter of law. The trial court properly dismissed his petition.

B. Even If The *De Facto* Doctrine Was Available To Appellant, He Could Not Establish Himself As A *De Facto* Parent As A Matter Of Fact.

Even if the *de facto* doctrine was available to appellant, a former stepparent, he could not establish himself as a *de facto* parent as a matter of fact and the trial court properly dismissed his petition. As the Supreme Court held in *L.B.*, obtaining the status of *de facto* parent should be "no easy task." 155 Wn.2d at 712, ¶ 47. The Court set forth a stringent four-part test to establish standing as a "de facto" parent that requires the petitioner to show: 1) the

natural or legal parent consented to and fostered the parent-like relationship; 2) the petitioner and child lived together in the same household; 3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and 4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. **L.B.**, 155 Wn.2d at 708, ¶ 40. Failure to meet even one factor is fatal to a *de facto* parentage claim. **Dependency of D.M.**, 136 Wn. App. 387, 397, ¶ 22, 149 P.3d 433 (2006), *rev. denied*, 162 Wn.2d 1003 (2007).

Whether the legal parent “consented to and fostered the parent-child relationship” is “critical” to the Court’s determination of whether a *de facto* relationship has been established, in order to avoid any constitutional interference with the legal parent’s ability to parent:

Critical to our constitutional analysis here, a threshold requirement for the status of the *de facto* parent is a showing that the legal parent “consented to and fostered” the parent-child relationship.

L.B., 155 Wn.2d at 712, ¶ 47. This is because the State otherwise would unconstitutionally interfere with a parent’s rights. To meet the threshold requirement to prove *de facto* parent status, consent

cannot simply be “mere passive acquiescence” to a parent-like relationship, *Dependency of D.M.*, 136 Wn. App. at 397, ¶ 22, but must be both “affirmative” and “active.”

The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family.

L.B., 155 Wn.2d at 712, ¶ 47.

Here, appellant could not meet this critical threshold requirement because there is no evidence that Mary “affirmatively establish[ed] a family unit” beyond what one would normally expect when parties with children from other relationships marry and blend their families into one household. Mary indisputably did not “actively encourage” a parent-like relationship between appellant and her daughter, as she was resolute in refusing to allow appellant to adopt the daughter throughout the parties’ relationship – before and during marriage.

1. **That The Mother May Have Encouraged A Relationship Between Her Husband And Her Child Is Not Evidence That She “Consented And Fostered A Parent-Like Relationship.” The Mother’s Actions Were Consistent With Those Of Any Responsible Parent Whose Marriage Results In A Blended Family.**

Appellant could not meet the first factor of the *de facto* test because there was no evidence that Mary “consented to and fostered a parent-like relationship” between appellant and her daughter beyond a normal stepparent relationship. The trial court correctly recognized that “consent” means something more than allowing a child to call her stepfather ‘dad,’ or allowing him to pick her up from school or read her bedtime stories. Otherwise, almost every stepparent would be a *de facto* parent, and that could not have been the intent of *L.B.*” (CP 15)

The trial court’s reasoning was confirmed by the Court in *M.F.*, where it held that the “*de facto* parent test we applied in *L.B.* could not, in the stepparent context, be applied in a meaningful way. The elements of the test are ill-suited to determinations in the stepparent context because in most cases they will be very easily satisfied.” ___ Wn.2d ___, *4, ¶ 17. The Court noted that the first factor – the same factor at issue here – was particularly ill-suited because in the “vast majority of cases a parent will encourage his

or her spouse, the stepparent, to act like a parent in relationship to the child. *M.F.*, ___ Wn.2d ___, *4, ¶ 17.

Appellant failed to raise any genuine issue of material fact that Mary “consented to and fostered a parent-like relationship.” Instead, appellant relied on facts that would be common in any relationship where a spouse is encouraging a good relationship between her spouse and child. For example, in support of appellant’s claim that Mary “consented to and fostered a parent-like relationship” he relied on the fact that “she (1) moved in with me prior to our marriage, with [her daughter]; [and] (2) encouraged and facilitated a relationship between [the daughter] and I before, during, and after our marriage.” (CP 374)

Assuming these allegations are true, they not create a genuine issue of material fact as to Mary’s consent to confer on appellant all of the rights of a legal parent. Absent the allegation of any specific facts to support a finding that Mary “consented to and fostered a parent-like relationship,” beyond a stepparent relationship, appellant’s “broad generalizations and vague conclusions are insufficient to resist a motion for summary

judgment.”¹ ***Niece v. Elmview Group Home***, 79 Wn. App. 660, 668, 904 P.2d 784 (1995), *aff’d*, 131 Wn.2d 39 (1997) (*citations omitted*); *see also* ***Thompson v. Everett Clinic***, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *rev. denied* 123 Wn.2d 1027 (1994) (“As the party opposing a summary judgment, [he] must submit competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact”).

As the Supreme Court stated recently in ***Custody of E.A.T.W.***, 168 Wn.2d 335, ¶ 20, 227 P.3d 1284 (2010), with regard to third party custody actions, “before the courthouse doors will open to the third party petitioner,” the petitioner must “alleg[e] specific facts that, if true, will establish a prima facie case supporting the requested order.” (See Arg. § C *infra*) Because appellant failed to allege “specific facts” sufficient to support a finding that the mother “consented to and fostered a parent-like relationship,” his *de facto* petition failed as a matter of fact and was properly dismissed.

¹ Although the parties consented to review of the mother’s motion to dismiss under summary judgment standards, the more appropriate standard would be an “adequate cause” determination similar to the standards governing threshold determinations under RCW 26.09.270 and RCW 26.10.032. See Arg. § C *infra*.

2. The Parties' Prenuptial Agreement Is Not Evidence That The Mother "Consented To And Fostered A Parent-Like Relationship." Instead, It Confirmed Her Current Intent To Maintain Full And Sole Parental Rights.

Appellant also relies on the parties' prenuptial agreement to claim that Mary "consented to and fostered a parent-like relationship." (App. Br. 21-22) A prenuptial agreement providing for the future parenting of children is unenforceable. **Marriage of Littlefield**, 133 Wn.2d 39, 58, 940 P.2d 1362 (1997); *see also* **Marriage of Thier**, 67 Wn. App. 940, 944, 841 P.2d 794 (1992), *rev. denied*, 121 Wn.2d 1021 (1993) (custody provisions in a separation agreement are not binding); **Marriage of Burke**, 96 Wn. App. 474, 479, 980 P.2d 265 (1999) (as a matter of public policy, courts are not bound by parties' agreements relating to children); (CP 320: "we recognize that not all of this section is legally binding on the court") Further, although appellant claims that the prenuptial agreement was intended to "memorialize the several verbal agreements we'd made up to that point regarding [the daughter]" (CP 122), nowhere in this declaration (or any other declaration), does appellant explain what those "verbal agreements" were. (See CP 120-27)

Appellant alleges that Mary's "consent" at the time of the parties' prenuptial agreement was based not on what she said, but on what she did not say – that "[she] will not consent to [him] ever adopting [her daughter]." (CP 123, emphasis in original) Again, these "broad generalizations and vague conclusions," without specific facts, were insufficient to resist a motion for summary judgment. See *Niece*, 79 Wn. App. at 668; *Thompson*, 71 Wn. App. at 555. The trial court properly recognized that the prenuptial agreement, regardless whether it was enforceable, is irrelevant to determining whether Mary "consented to and fostered a parent-like relationship," because "the contemplation of a future act is very different from an agreement in the present. A promise to become a parent years in the future does not rise to the level of commitment required under *L.B.*, and a promise to allow a full parental role years in the future is too attenuated to constitute a present consent to that status." (CP 15)

The terms of the agreement in any event show that Mary did not intend for appellant to have full (or any) parental rights unless an adoption was formalized. For example, the residential schedule and child support provisions were not effective until appellant adopted Mary's daughter "upon [the daughter] turning nine years of

age, or when the Parties agree to do so, whichever comes first.” (CP 320) If Mary were to die before appellant adopted, the agreement provided for the appointment of an arbitrator to decide the custody of the daughter. (CP 320) Mary provided that appellant would share custody with Soney Wilson, Mary’s sister-in-law. The agreement imposed strict conditions that appellant would be required to meet before Mary’s daughter could reside with him during the school year. (See CP 320-21) If he could not meet these requirements, Soney Wilson would retain “primary custody” of Mary’s daughter. (CP 321) These terms clearly show that Mary never “consented to and fostered a parent-like relationship” between appellant and her daughter, and that she intended to retain full parental rights over her daughter to the exclusion of appellant, until such time that she allowed him to adopted her.

3. The Trial Court Did Not Conclude That Appellant’s Failure To Adopt Was Fatal To His Petition For *De Facto* Parentage.

The trial court nevertheless did not rely solely on the fact that appellant did not adopt Mary’s daughter as the basis for concluding that there was no genuine issue of material fact as to Mary’s consent. (App. Br. 25-26) That it was undisputed that Mary consistently and adamantly refused to allow appellant to adopt,

both before and during the parties' marriage, is however indisputably evidence that Mary did not "consent to and foster a parent-like relationship."

As the New York Court of Appeals recently stated, an important component of a parent's constitutional fundamental rights "entitles biological and adoptive parents to refuse to allow a second-parent adoption. . . even if they have permitted or encouraged another adult to become a virtual parent of the child." ***Debra H. v. Janice R.***, ___ N.E.2d ___ (N.Y., May 4, 2010). Encouragement of such a relationship does not leave "single biological and adoptive parents and their children" trapped in a "limbo of doubt" simply because "they could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party." ***Debra H. v. Janice R.***, ___ N.E.2d ___ (N.Y., May 4, 2010).

Appellant's reliance on ***Parentage of J.A.B.***, 146 Wn. App. 417, 191 P.3d 71 (2008) to claim that *de facto* parentage could still be established despite a legal parent's express refusal to consent to adoption is inapt. First, it is questionable whether ***J.A.B.*** remains good law in light of the Supreme Court's decision in ***M.F.*** The

issue in **J.A.B.** was nearly identical to the one presented in **M.F.** – whether a former stepfather to a child with two legal parents can establish himself as a *de facto* parent. While this court in **J.A.B.** held that the stepfather could establish himself as a *de facto* parent, it is clear from the Supreme Court’s more recent decision in **M.F.** that he could not.

In any event, the facts in **J.A.B.** are decidedly different from those presented here. In **J.A.B.**, the mother had throughout the relationship “consented to and fostered a parent-like relationship” between her live-in boyfriend and her child. Even after a custody action was commenced by the boyfriend, the mother continued to consent to the parent-like relationship, and joined in his petition to adopt her child. The child’s biological father also consented to terminate his parental rights to accommodate the adoption, even though he had previously objected to a third party custody order. While the court noted that from the record the reason is not clear, the adoption did not go through. This court speculated it was because the mother stopped taking her medication. **J.A.B.**, 146 Wn. App. at 421, ¶ 9.

Here, it is undisputed that save for the prenuptial agreement contemplating an adoption six years in the future, Mary steadfastly

and consistently, before, during, and after the marriage, refused to consent to appellant's adoption of her daughter. The trial court properly concluded that the mother did not "consent to and foster a parent-like relationship," and under the facts of this case, *J.A.B.* does not require a different result.

4. The Trial Court Did Not Hold That Consent To A Parent-Like Relationship Was Necessary At The Inception Of The Relationship.

The trial court also did not hold that as a matter of law "the element of consent [] was required to occur at the inception of the relationship between the parties with a solemnizing event." (App. Br. 27, *citing* CP 15) Instead, the trial court simply highlighted a factual distinction between the circumstances in *L.B.* and the circumstances present in this case – a distinction that was also noted by the Court in *M.F.*

The Court in *M.F.* recognized that when a stepparent first enters the child's life, the child already has "legal parents and their respective roles were already established under our statutory scheme," __ Wn.2d __, *2, ¶ 9, whereas in *L.B.*, the parties agreed from the onset to "conceive a child with the intention of forming a family." *M.F.*, __ Wn.2d __, *1, ¶ 7. Thus, under the factual circumstances of *L.B.*, the Court had to establish a remedy to

“tak[e] into account the original intent and agreement of the parents and the lack of statutory remedy [to] fashion a remedy to fulfill the parties’ agreement.” *M.F.*, ___ Wn.2d ___, *2, ¶ 8. Here, the only “original intent and agreement of the parents” is that Mary intended to adopt her daughter as a single parent.

Appellant’s reliance on *Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981) to assert that the *de facto* parentage of a child could be established “at any point” is misplaced. In *Allen*, the stepmother sought custody of her former stepson, but did not, as appellant does here, demand rights equal to the child’s legal parents. In consideration of the legal parents’ constitutional rights, the *Allen* court held that the trial court erred when it used a best interests standard to award custody to the former stepmother. 28 Wn. App. at 647. Instead, the court held that in order to protect the constitutional rights of the legal parents, the trial court was required to consider custody under the third party custody statute.

In other words, before the trial court could award custody to the stepmother, the stepmother would have to prove either unfitness of the legal parents or detriment to the child if placed with the legal parents. *Allen*, 28 Wn. App. at 649. Under the circumstances of *Allen*, the court held that the stepmother proved

actual detriment to the child if he were placed with either of his legal parents. 28 Wn. App. at 649. Here, to the extent appellant demands a custodial and legal relationship with the mother's daughter, he must, as did the stepmother in *Allen*, show either that Mary is an unfit mother or that there would be actual detriment to the child if she remained in Mary's custody. See also *Custody of E.A.T.W.*, 168 Wn.2d 335, ¶ 23, 227 P.3d 1284 (2010).

C. The Trial Court Did Not Abuse Its Discretion In Refusing To Appoint A Guardian Ad Litem When Appellant Had Not Yet Established A Prima Facie Showing That He Was A De Facto Parent.

The trial court did not abuse its discretion in refusing to appoint a guardian ad litem before appellant had made a prima facie showing that he was a *de facto* parent. While the trial court properly dismissed this action as a matter of law under CR 56, it could have, if not should have, dismissed the action after a threshold hearing, where appellant would have been required to make a prima facie showing that he was a *de facto* parent.

The purpose of a threshold hearing is to prevent a parent from unnecessarily having to defend in court against a third party seeking parental rights without there first being a determination that the third party could establish that he was a *de facto* parent.

This would be similar to a threshold hearing under RCW 26.09.270 for parenting plan modifications or RCW 26.10.032 for third party custody actions. “The primary purpose of this threshold requirement for adequate cause in both statutes is, among other things, to prevent a useless hearing.” ***Custody of E.A.T.W.***, 168 Wn.2d 335, ¶ 23, 227 P.3d 1284 (2010). As the Supreme Court stated most recently, court actions are “by its very nature disruptive to families, including parents and children. A useless hearing is thus an unnecessary disruption and an evil to be avoided.” ***E.A.T.W.***, 168 Wn.2d 335, ¶ 23. An adequate cause determination “must be satisfied before the courthouse doors will open to the third party petitioner.” ***E.A.T.W.***, 168 Wn.2d 335, ¶ 20.

The need for a threshold adequate cause procedure was best described in ***Custody of Nunn***, 103 Wn. App. 871, 14 P.3d 175 (2000), in which Judge Kennedy described the dangers of proceeding with a third party custody action without first making an early threshold determination whether the petitioners have “standing” to pursue custody. Judge Kennedy expressed concern that without such an early determination, the mother in that case was subjected to months of irrelevant inquiry by a guardian ad

litem, when in fact, the trial court had not yet even determined whether the third party had standing to pursue an action:

[T]he failure of the parties and the trial court to focus on the question of [the aunt]’s standing to bring this custody proceeding resulted in months of irrelevant inquiry by the guardian ad litem into the relative merits of the mother and aunt as prospective custodians, a five-day trial, an erroneous custody order, and this appeal – not to mention unwarranted disruption of the parent-child relationship of [the mother] and her son, and the resulting heartache to each of the them.

Nunn, 103 Wn. App. at 873-74. The legislature only thereafter enacted RCW 26.10.032 to provide for threshold determination in third party custody cases.

The disruption described by **Nunn** is exactly what the trial court properly sought to avoid here. Without some initial determination that there were sufficient facts and evidence to establish appellant as a *de facto* parent, Mary should not be subject to the invasive inquiry of a guardian ad litem. This court should hold that a threshold hearing should be held “before the courthouse doors will open to the third party petitioner” in a *de facto* parentage action. **E.A.T.W.**, 168 Wn.2d 335, ¶ 20.

De facto parentage is a judicially created common law cause of action. Families must be as protected from the disruption of litigation caused in these actions as they are in statutorily-based

actions like parenting plan modifications and third party custody actions. To that end, the petitioning party must first show adequate cause to proceed to trial on a *de facto* parentage claim, and the trial court "shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits." See RCW 26.09.270; RCW 26.10.032. As in modifications, if sufficient evidence is not provided on each of the relevant factors, the court must dismiss the petition. ***Marriage of Lemke***, 120 Wn. App. 536, 540, 85 P.3d 966, *rev. denied*, 152 Wn.2d 1025 (2004). Parties may only proceed to hearing on a petition for *de facto* parentage if the trial court finds that the moving party has provided sufficient evidence to support a finding on each of the factors. See ***Lemke***, 120 Wn. App. at 540.

Such a threshold hearing would also recognize that the trial court is in a "better position than an appellate judge to decide whether submitted affidavits establish adequate cause" for a full hearing on a petition for *de facto* parentage. See ***Parentage of Jannot***, 149 Wn.2d 123, 126, 65 P.3d 664 (2003). This is because "many local trial judges decide factual domestic relations questions on a regular basis [] and adequate cause determinations at issue here involve facts that are very much in dispute." ***Jannot***,

149 Wn.2d at 126. Therefore, review by the appellate court of an adequate cause determination in *de facto* actions would be for abuse of discretion. As our Supreme Court recognized, “a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge’s day-to-day experience warrants deference upon review.” *Jannot*, 149 Wn.2d at 127.

D. This Court Should Award Attorney Fees To The Mother For Having To Respond To This Appeal.

Mary has been forced at considerable cost to defend against appellant’s claims to parental rights in her daughter, which have had no basis in law or in fact. His appeal of the trial court’s order dismissing his petition is frivolous because it so devoid of merit that there is no possibility of reversal. *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). An award of attorney fees is warranted by the fact that, consistent with his threat below to “break” the mother financially (CP 401), Michael continues to pursue this appeal even after the Supreme Court’s decision in *Parentage of M.F.*, ___ Wn.2d ___, ___ P.3d ___ (April 1, 2010), which was issued while this appeal was pending but before respondent was required to incur any significant

attorney fees to respond to appellant's appeal. Although it should have been clear before, after the Supreme Court issued its decision **M.F.** there could have been no question that appellant has no common law action to pursue *de facto* parental rights over his stepchild from a former marriage. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1; **Marriage of Healy**, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

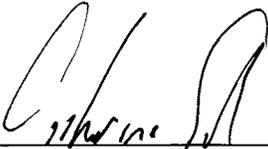
V. CONCLUSION

This court should affirm the trial court's decision dismissing appellant's petition to establish himself as a *de facto* parent of his former stepdaughter and the trial court's decision denying his request for appointment of a guardian ad litem. This court should hold that a threshold adequate cause hearing is required in every *de facto* action. Finally, this court should award attorney fees to respondent for having to respond to this appeal.

Dated this 7th day of May, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 7, 2010, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

| | |
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| Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
| Emily J Tsai Tsai Law Company PLLC 2101 4th Avenue, Suite 1560 Seattle, WA 98121-2347 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
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DATED at Seattle, Washington this 7th day of May, 2010.



Carrie O'Brien