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COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE DE FACTO PARENTAGE OF:

MASON COTTON MILLER, a minor child,
and
RUSS FULTON, Respondent
vs.
FRANK MILLER, Father/Appellant,
and
MEGHAN COTTON, Mother/Appellant.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
AMICUS BRIEF

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I. Statement of the Case

The following facts are not in dispute.

The biological mother, Ms. Colton, allowed Mr. Fulton to sign both the birth certificate and the acknowledgment of paternity, and encouraged Mr. Fulton's parentage by living with him, calling him the father's baby, holding him out to be Mason's father, and encouraging him to raise the child as his father from birth. RP 5-6.

Mr. Miller also consented to and fostered the parent-like relationship and knew that Fulton was raising Mason as his father without questioning it until shortly before trial on Fulton's action (RP 9, 10).

Mr. Fulton cared for Mason in all respects as the biological father: bathed him, fed him, purchased supplies for him; attended to his medical concerns, helped put him to bed at night and supported him financially in all respects (RP 11). A temporary parenting plan order was entered giving him primary residential care in his parentage action. (RP 13). The trial court found that "Indeed now at the age of 3 and a half years, he [Fulton] is the only adult who has been a consistent and true parenting presence in the child's life throughout his lifetime." RP 14.

II. Argument

A. Introduction

On behalf of the American Academy of Matrimonial Lawyers, Washington Chapter, hereinafter, “AAML”, in this amicus brief we do not argue policy. This brief deals strictly with what we believe is an accurate summary of the law, which differs from the arguments urged by the appellant in this matter. The appellant incorrectly analyzes the law, and the trial court should be affirmed.

B. Unchallenged Findings of Fact Are Verities On This Appeal

The appellant’s brief concedes that Mr. Fulton was a *de facto* parent to the child Mason, but only by virtue of having signed the acknowledgment of paternity. At page 20 appellant argues that this acknowledgment “presumes” that he intended to be an “active participant in the child’s life or a part of a nuclear family.” The brief cites no authority for this presumption. Different men might sign an acknowledgment to accept responsibility for a child they believe to have helped bring in to the world without necessarily committing to any kind of active relationship with the child. Thus one cannot draw any legal conclusions from the signing of the

acknowledgment other than what it is; an acknowledgment of a legal status: biological father until proven otherwise.

The appellant does not challenge the findings made by the trial court that constitute fulfillment of the factors that are required to establish *de facto* parent status as set forth in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). Unchallenged findings are treated as verities on appeal. *In re Dependency of MSR*, ____ Wn.2d ____, 271 P.3d 234 (2012).

Appellant does challenge the finding that both biological parents severed all ties between Mason and Fulton at some point after Fulton was dismissed from Miller's parentage action (assignment of error #8) but does not support that assignment with citation or argument. It is therefore abandoned because contentions that are not supported by argument or authority will not be considered by an appellate court. *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974).

C. Neither The Holding in M.F. Nor The Uniform Parentage Act Preclude a *De Facto* Parentage Common Law Action

1. *In Re Parentage of M.F. Is Inapposite*

The gravamen of appellant's argument is that the UPA is the sole governing law in this case. See section C.2., below. He also

suggests that the holding of *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010) is a bar to this *de facto* parentage action.

See, Brief of Appellant at p. 25:

“Our Supreme Court has determined that such remedies [presumably such as nonparental custody actions under RCW Chapter 26.10] constitute suitable alternatives to *de facto* parent status in the stepparent context, where the child already has two legal parents.”

From this oversimplified conclusion appellant deduces that Mr. Miller and Ms. Cotton are like the parents in *M.F.*, without any analysis or review of the particular factual differences in the cases. Appellant has not, therefore, met the burden of persuasion to show that the trial court’s findings of fact and conclusions of law were erroneous.

a. “Two Legal Parents”

The question is not only whether there are two legal parents, but also whether two fit parents were – with the child – a constituent family *at the outset and before* the alleged *de facto* parent came on the scene. This was the case in *M.F.*, *supra*. A married couple had children, got divorced, and shared residential time – with the mother having the majority of the time. Mother remarried, new husband naturally became the children’s

stepfather, and he apparently developed a good relationship with the children, parental in nature. When mother and stepfather were divorced, former stepfather sought *de facto* parent status and resultant visitation with the children. The Supreme Court held, *under the facts of the particular case* (168 Wn.2d at 529 and 535), that no statutory void existed “in this case,” and declined to “extend the *de facto* parentage doctrine to the facts presented.” *Id.*, 535.

The trial court in this case made this analysis very clearly. See Exhibit A, Additional Findings of Fact and Conclusions of Law, pp. 1 - 4. After concisely summarizing the import of *In re the Parentage of L.B.*, *supra*, and *M.F.*, in this context the court says:

“The important distinction between *L.B.* and *M.F.* appears to be whether or not the petitioner came into the relationship with the child as one of the parents in the original family unit and before any other biological parent outside that unit had established a relationship and rights to the child.

The petitioner in *L.B.* and the biological mother formed their relationship with the child at a time when no other second biological parent had any relationship or established visitation rights with the child. It was the parties’ intent that the petitioner take the role of the other biological parent. She was not intended as just a girlfriend, babysitter, or even just a stepparent. While the petitioner in *L.B.* could

file a third party custody action, such action could not confer the true parental rights she had. She had a statutory cause of action available, but no statutory cause of action that could provide this remedy. The petitioner in *L.B.* was not a third party coming after the original parenting unit was formed; she was part of the original unit. The third party custody statutes were only intended to limit the circumstances under which third parties could seek custody against established legal parents' rights. They were not intended to address the circumstances of *de facto* parents who are not third parties, but original parents who gained full parental rights not in derogation of any established biological parent's rights and with the consent of the other biological parent."

Thus, the trial court correctly concluded that "[t]his case falls within the analysis of *L.B.* not *M.F.* Mr. Fulton and Ms. Cotton formed the original family unit when Mason was born."

b. Prior Case Law Is Consistent

Finally, contrary to the protests of the appellant, a decision of this Court is consistent with the trial court holdings, and should be followed in principle here: *In re the Parentage of J.A.B.*, 146 Wn.App. 417, 191 P.3d 71 (2008). As here, a *de facto* parent claim was upheld where petitioner had been a part of the original two-parent family unit well before the biological father had his paternity established and before any parenting plan was made. *Id.*, 427 - 428.

The *J.A.B.* court explained why *M.F.* does not control in such a circumstance as is presented here, at 146 Wn.App. 426:

“[R]esidential placement is not equivalent to parental status. The nonparent custody statute and the defacto parent doctrine have very different purposes. A nonparent custody order confers only a temporary and uncertain right to custody of the child for the present time, because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child.

Parenthood comprises much more than mere custody. A parent has a fundamental liberty interest in the care, custody, and control of his or her child. One who meets the rigorous test that defines a *de facto* parent stands in legal parity to an otherwise legal parent, and therefore is vested with the same parental rights and responsibilities, limited only by the best interests of the child. The nonparent custody statute cannot provide an adequate remedy to one who meets the stringent *de facto* criteria.”

2. Fulton’s Dismissal From The UPA Action Does Not Bar Him From Pursuing A Common Law *De Facto* Parentage Action

The following analysis demonstrates that the UPA actually contemplated that an acknowledged parent proven not to be the biological father had a right to pursue visitation under RCW 26.09.240, before that statute was deemed unconstitutional. Therefore the UPA does not preclude

Mr. Fulton from pursuing his only remedy: a common law action to establish *de facto* parenting status.

Prior to 1989, RCW 26.26.130(3) empowered the superior court to fashion visitation orders. In 1989 the statute was amended to eliminate that authority and replace it with RCW 26.26.130(7) which empowers the court as follows: “*On the same basis as is provided in 26.09 RCW, the court shall make residential provisions with regard to minor children of the parties, . . .*” (See Historical and Statutory Notes page 510 Laws 1989, Ch. 360 Sec. 18). That is still the language of the statute.

Although an order styled “parenting plan order” need not be entered unless requested by a party, the authority and standards of RCW 26.09, have governed parentage proceedings under RCW 26.26. since 1989.

In 1973, the legislature enacted RCW 26.09.240, which provided that “the court may order visitation rights for any person when visitation may serve the best interests of the child. . .” (See Laws 1973, 1st Ex.Sess Ch. 157, Section 24). In 1987, the legislature created a parenting act, which eliminated the concept of “visitation” and substituted the concept of “residential access” (See RCW 26.09.187(3), Laws 1987 Ch. 460 Sec. 9, effective January 1, 1988). During that same legislative session it created

a new third party custody and visitation act, RCW 26.10 et seq. Which included a third party visitation statute, RCW 26.10.160(3).

In 1996 the legislature amended RCW 26.09.240 to require proof of “a significant relationship with the child,” RCW 26.09.240(3), and factors for the trial court to consider under subsection (6).

The constitutionality of the pre-1996 RCW 26.10.160(3) was at issue and held to be unconstitutional on its face by the Washington Supreme Court in consolidated cases under the heading *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), and unconstitutional as applied by the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d. 49 (2000). Thus, when the legislature amended the UPA in 2002 and created the two year window under RCW 26.26.530 (2), RCW 26.09.240(3) and (6) remained a vehicle for acknowledged parents who are proven not be the biological father to establish third party visitation through RCW 26.26.130(7).

The legislature could not know whether the provisions RCW 26.09.240 would pass constitutional muster since the provisions of RCW 26.10 160(3) were not as narrowly tailored as those of RCW 26.09.240. Later, our State Supreme Court struck down RCW 26.09.240 in its entirety

as being unconstitutional in *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005).

In 2004, this Court of Appeals established a common law right of action to establish *de facto* parental status to obtain visitation rights in *In re Parentage of L.B.*, 121 Wn.App. 460, 898 P.3d 271 (2004), *affirmed*, 155 Wn.2d 679, *supra.*

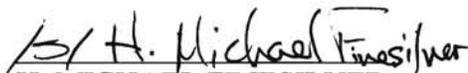
Instead of precluding an acknowledged parent proven not to be the biological father from obtaining rights as a visiting parent, the legislature clearly intended RCW 26.26.130(7) to be a vehicle for such visitation because third party visitation under RCW 26.09.240 was an available statutory remedy when the legislature amended RCW 26.26 in 2002. Thus a determination that an acknowledged parent is not the biological parent under the UPA does not preclude that parent from pursuing a *de facto* parentage action, as established at common law in 2004 and 2005 by the *L.B.*, *supra* decisions.

III. Conclusion

The trial court was correct in its legal analysis to the effect that (1) the decision of *In re the Parentage of M.F.*, *supra*, is not a bar to Mr. Fulton's *de facto* parentage claim, and (2) that the Uniform Parentage Act

was not and is not so exclusive as to preclude a formerly acknowledged parent from pursuing a *de facto* parent claim. Therefore, amicus American Academy of Matrimonial Lawyers, Washington Chapter, respectfully requests the Court to affirm the decision of the trial court.

Dated this 27th day of April, 2012.


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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of an American Academy of Matrimonial Lawyers Amicus Brief, via email and U.S. Mail, except with respect to respondent Russ Fulton, is served by U.S. Mail only:

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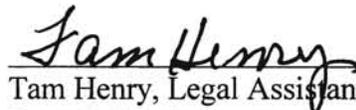
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