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Court of Appeals
Division II
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No. 53532-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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In re Parentage of L.J.McA.

PHILIP MICHAEL BERGSIEKER
Appellant

and

ADRIANNE KATHLEEN BERGSIEKER
NATHAN JOSEPH MCCALLISTER
Respondents

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ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

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# OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

This case concerns interpretation of the newly enacted de facto parent provision of the Uniform Parentage Act.

## II. ASSIGNMENTS OF ERROR

1. The court erred when it dismissed the de facto parent petition.

2. The trial court erred when it entered the following findings of fact and conclusions of law:

> 4. Petitioner has not alleged sufficient facts to meet the requirements for a finding of de facto parentage. The *Petition for De Facto Parentage* should be dismissed.
>
> …
>
> (c) The court finds the petitioner has undertaken the responsibilities of parenting without expectation of financial compensation since 2014. However, there could be no expectation of permanency on his part as the child's biological father is living.
>
> The Court finds the petitioner <u>has not</u> alleged sufficient facts to meet this requirement.
>
> (d) The holding out of a child as one's own, is the critical, primary difference between pre-2019 Washington State case law concerning de facto parentage and the newly enacted RCW 26.26A.333 [sic] (effective January 1, 2019). It is a legal requirement that cannot be waived or minimalized.
>
> The petitioner alleges he has satisfied this requirement because school staff, medical providers, friends and their community look to he [sic] and his wife for parenting decisions concerning the child and have done so since 2014, and the child calls him "Dad". However, the child

> uses a different last name and school staff, medical providers, friends and their community are all aware of petitioner's role as the child's stepfather. The performance of parenting functions by a stepparent does not satisfy the stringent test of holding a child out as one's own.
>
> The Court finds the petitioner <u>has not</u> alleged sufficient facts to meet this requirement.
>
> …
>
> (f) Although the Court finds the petitioner has alleged sufficient facts to meet this requirement, petitioner's wife, the child's biological mother, fostered or supported the bonded and dependent relationship with the child at the expense of the child's biological Father [sic].

CP 29-30 (emphasis in original).

Issues Pertaining to Assignments of Error

1. Did the trial court err as a matter of law when it determined the fact of a living biological father precluded adjudication of the petitioner as a de facto parent?

2. Is the court's focus on the petitioner's "expectation of permanency" immaterial to the statutory analysis?

3. Was there any evidence to support the court's finding the mother's fostering of the de facto parent relationship was done "at the expense of the child's biological Father"?

4. Is the court's finding the mother fostered the parent-child relationship "at the expense" of the biological father immaterial to the statutory analysis?

5. Did the trial court err as a matter of law when it determined that because the petitioner married the mother (i.e., because he is a stepparent to L.J.McA.) he could not be adjudicated to be a de facto parent?

6. Does the "holding out" requirement mean de facto parent petitioners must claim the child as their biological offspring?

## III. STATEMENT OF THE CASE

This case was brought on the authority of the new de facto parent provision in the Uniform Parentage Act, effective January 1, 2019. The statute is set forth in the appendix. Bergsieker petitioned for de facto parentage in a standard form mandated by law, alleging facts in support of each of the seven statutory provisions comprising the substantive standard for de facto parentage. CP 13-22. No hearing was held. The facts below are derived from the pleadings.

This case involves a child, L.J.McA., who is presently nine-and-a-half-years old. He lives with his mother, Adrianne, who is now married to petitioner, Philip Bergsieker. The parties have been together since 2014 and have lived together, with L.J.McA., since 2015. The parties now also have a two-year-old daughter.

L.J.McA.'s father, Nathan McAllister, is incarcerated. He received the petition and wrote the court explaining he needed additional time to

respond and did not support the petition "without the opportunity to obtain legal counsel of my own." CP 25. Later (after the court had denied the petition), he wrote saying he could not afford an attorney but opposed "relinquishing" his parental rights and otherwise expressing love for his son. CP 52-55. It does not appear there has been a parenting action involving McAllister (e.g., no parenting plan, etc.). The record does not indicate when his incarceration began or the reason for it.

On the pleadings (i.e., without a hearing), the trial court dismissed the de facto parent petition, finding Bergsieker had not alleged sufficient facts to meet the de facto parent requirements. CP 29. Specifically, the court found Bergsieker met five of the seven requirements (including the best interests requirement), but found the petition inadequate on two requirements. CP 30.

Specifically, the court found Bergsieker failed to meet the requirement of undertaking "full and permanent responsibilities of a parent" because "there could be no expectation of permanency on his part as the child's biological father is living." CP 30. Further, the court found Bergsieker failed the "holding out" requirement because he was a "stepfather," meaning he and the child and others in the community knew L.J.McA. was not his "own," apparently meaning not his biological offspring. CP 30. Finally, the court found the mother had supported the

creation of a "bonded and dependent relationship" but had done so "at the expense of the child's biological Father." CP 31.

## IV. ARGUMENT

### A. THE STANDARD OF REVIEW AND GENERAL PRINCIPLES GOVERNING THE TRIAL COURT'S DECISION.

This case does not involve a dispute about the facts. Rather, it is a dispute about what the law means. Statutory interpretation is an issue of law this Court reviews de novo. *Payseno v. Kitsap Cty.,* 186 Wn. App. 465, 469, 346 P.3d 784, 786 (2015).

### B. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE DE FACTO PARENT PETITION BECAUSE THE BIOLOGICAL FATHER IS LIVING (I.E., BECAUSE THE CHILD HAS TWO LIVING PARENTS).

The Washington Supreme Court created an equitable remedy for "de facto parents" in *In re Parentage of L.B.,* 155 Wn.2d 679, 122 P.3d 161 (2005). In subsequent cases, the court explored the boundaries of the doctrine, recently agreeing with this Court in a case involving a stepparent that "[d]e facto parentage remains a viable equitable doctrine under Washington law" and available to stepparents. *In re Custody of B.M.H.,* 179 Wn.2d 224, 241, 315 P.3d 470, 478 (2013). In so concluding, the court relied on the fact the legislature had revised the UPA since *L.B.* and, in doing so, did not abrogate the common law doctrine. *Id.* In fact, "[t]o the contrary, where the act formerly "govern[ed] every determination of

parentage in this state,' … it now simply 'applies to determinations of parentage' and 'does not create, enlarge, or diminish parental rights or duties under other law of this state'." *B.M.H.,* 179 Wn.2d at 242, 315 P.3d at 478–79. In other words, the Legislature appeared to make room for the equitable doctrine.

This past year, the Legislature went a step further, codifying a de facto parentage action within the Uniform Parentage Act, making it one of numerous statutory "paths" to parentage. RCW 26.26.A.440.

The procedure described in the statute provides for a hearing if facts are disputed. RCW 26.26A.440(3)(c) (decide on the pleadings "[u]nless the court finds a hearing is necessary to determine disputed facts material to the issue of standing …"). If no facts are disputed, the court "shall determine, based on the pleadings," whether the petitioner has "alleged facts sufficient to satisfy by a preponderance of the evidence" the seven substantive requirements for de facto parentage. RCW 26.26A.440(1)(c); RCW 26.26A.440(4)(a-g).

Here, the court did not see a necessity for a hearing (i.e., saw no disputed facts). Rather, the court ruled, as a matter of law, that Bergsieker could not be a de facto parent because the child has a living biological father. CP 30. The court found Bergsieker had undertaken "the responsibilities of parenting without expectation of financial

compensation," but said "there could be no expectation of permanency on his part" given the child has a living biological father. CP 30. In this analysis, the court was mistaken as a matter of law.

An emerging feature of family life in the United States has been the proliferation of parents, as a matter of fact and, increasingly, as a matter of law. *See, e.g., McDaniels v. Carlson*, 108 Wn.2d 299, 313, 738 P.2d 254, 263 (1987) (allowing possibility of child preserving relationship with her two fathers). Simply, a child sometimes does have more than (sometimes less than) two parents. Our statute now explicitly acknowledges and permits this.

> (3) The court may adjudicate a child to have more than two parents under this chapter if the court finds that failure to recognize more than two parents would be detrimental to the child.

RCW 26.26A.460(3). The trial court's ruling here flatly contravenes this unambiguous provision. The fact that L.J.McA. has two living parents is not a barrier to his also having a de facto parent. The statute says precisely that.

Moreover, the court's reading of the permanency provision reads into the statute a meaning not apparent from the text, which provides a petitioner must undertake the "full and permanent responsibilities of a parent of the child without expectation of financial compensation." RCW 26.26A.440(4)(c). "Permanent" modifies "responsibilities" and connotes

the nature of the commitment undertaken by the petitioner, i.e., an enduring one. The "expectation" aspect of this undertaking applies to financial compensation, distinguishing a parent's performance of caregiving from that of those who may perform many of the same tasks for "financial compensation." Here, the trial court seems to have combined these different aspects of this provision to create a wholly new element -- whether the petitioner could expect permanency in the relationship (rather than making a permanent commitment). Even if that was a factor, the existence of the de facto parent doctrine and the de facto parent statute could give rise to an expectation that the petitioner's parental commitment might be recognized as permanent. In any case, the court's reading of the statute is erroneous.

Nor would recognition of Bergsieker as L.J.McA.'s de facto parent diminish the biological father's parental status, as the statute explicitly provides.

> A finding of detriment to the child does not require a finding of unfitness of any parent or individual seeking an adjudication of parentage. In determining detriment to the child, the court shall consider all relevant factors, including the harm if the child is removed from a stable placement with an individual who has fulfilled the child's physical needs and psychological needs for care and affection and has assumed the role for a substantial period.

RCW 26.26A.460(3). Here, the court's findings acknowledge the facts described in this provision, that Bergsieker provides for L.J.McA.'s needs

in a stable relationship with the child's mother and his half-sister. The biological father's access to the child is, in part, at least, self-limited, insofar as he is incarcerated. However, his legal rights are not limited by granting Bergsieker's petition and providing continuity for L.J.McA. in his present, stable family environment. Indeed, granting the petition protects L.J.McA. from the potential harms that might arise should something happen to either his mother or Bergsieker. CP 21, 41. Moreover, the record makes plain Bergsieker understood McAllister's continuing role as parent. For example, the remedy he seeks is one that does not depend on the relinquishment or termination of McAllister's status. Indeed, his petition, while seeking a name change for L.J.McA., did so by means of incorporating McAllister's name.

Finally, the court finds the "biological mother, fostered or supported the bonded and dependent relationship with the child at the expense of the child's biological Father [sic]." CP 31 (entered May 14, 2019). No facts support this finding, unless the court means that anytime a parent fosters a parent-child relationship it must be at the expense of the other parent (if there are two parents). This "zero-sum" rationale undergirds the court's ruling in general and it appears this finding may be another aspect of that view – a view at odds with the statute.

The undisputed facts are that Bergsieker has been a parent to L.J.McA., a relationship the child's mother fostered but not necessarily at the expense of McAllister, about whom we know little more than that he is incarcerated.[1] In short, this finding is not supported by substantial evidence and, more significantly, has no bearing on the issue before the court.

In sum, the father's status is not a barrier to recognition of Bergsieker as L.J.McA.'s de facto parent. The court's ruling to the contrary is erroneous.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE DE FACTO PARENT PETITION BECAUSE THE PETITIONER IS A STEPPARENT AND WHEN IT MISCONSTRUED THE "HOLDING OUT" REQUIREMENT.

Decades ago, at state and federal levels, the marital status of parents was declared irrelevant to the treatment of children. *See, e.g.,* RCW 26.26A.105 (replacing former RCW 26.26.106) ("A parent-child relationship extends equally to every child and parent, regardless of the

[1] On June 13, 2019, about a month after the court's ruling and three days after the court denied reconsideration, the court received a letter from McAllister where he states "they have not allowed" him to continue a relationship with L.J.McA. during incarceration and that it would be in the child's "best interests" for there to be communications between him and the child. CP 52, 54. It is not clear who is meant by "they." In any case, by this point, the record was closed and it does not appear this submission was considered by the court. See CP 51 (court denying reconsideration on June 10 and excluding materials Bergsieker submitted with his motion to reconsider).

marital status of the parent"). Here, the court denied Bergsieker's petition, in part, because he married the child's mother.

Our Supreme Court, addressing this issue under the equitable de facto parent doctrine, held the doctrine does not "not preclude all stepparents as a class from being de facto parents." *In re Custody of B.M.H.,* 179 Wn.2d 224, 243, 315 P.3d 470, 479 (2013). The Court recognized that "[t]o do so would be contrary to legislative directive that children not be treated differently based on the marital status of their parents." *Id.,* citing former RCW 26.26.106 and RCW 26.18.030 (child support).

Likewise, here, the fact Bergsieker married L.J.McA.'s mother cannot preclude his adjudication as a de facto parent without running afoul of the same constraints as the court acknowledged in *B.M.H.* Nor does it make sense to discourage marriage, as the trial court's reasoning would, insofar as Bergsieker, in the trial court's view, would be better positioned to seek de facto parent status had he not married L.J.McA.'s mother. It is hard to see what good it does to deprive these parents and their children of "immeasurable advantages" marriage confers on children. *See Andersen v. King Cty.,* 158 Wn.2d 1, 128, 138 P.3d 963, 1043 (2006), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). Certainly, the statute nowhere declares such a categorical and punitive

distinction. The trial court's ruling to the contrary is not only erroneous but contrary to our state's beneficent treatment of children and married persons.

The trial court reasoned further along lines that suggest it was not merely the fact of marital status, but the related fact that Bergsieker, the child, and others know Bergsieker is not the child's biological father. The court declared the statute's "holding out" requirement (RCW 26.26A.440(4)(d)) to be "the critical, primary difference between pre-2019 Washington State case law concerning de facto parentage and the newly enacted RCW 26.26A.333 [sic] (effective January 1, 2019)."[2] CP 30. The court emphasized this requirement "cannot be waived or minimalized [sic]." CP 30. Finally, the court concluded Bergsieker failed this requirement because, "the child uses a different last name and school staff, medical providers, friends and their community are all aware of petitioner's role as the child's stepfather." CP 30.

The court appears to misunderstand the "holding out" provision. For one thing, if the court means by this reasoning to exclude from parentage all but biological parents, it renders much of the UPA meaningless (e.g., presumed parentage, alternative reproductive

[2] The court's citation appears to be a typographical error, since the statute does not include a provision "RCW 26.26A.333."

technologies), as well as the adoption statute (RCW Chapter 26.33). For a very long time, the parent-child relationship has been formed by many nonbiological means.

For example, commonly, the father's status has turned on a presumption of biology inherent in marriage between different-sex spouses, but without regard to actual biological relatedness. The operation of this presumption has long included a "holding out" alternative, as does the new version of Washington's UPA. RCW 26.26A.115(1)(b) ("openly held out the child as the individual's child"). Joslin, Nurturing Parenthood Through the UPA, 2017 *Yale L. J. Forum* 589 (since UPA's first version in 1973).

Initially, some courts limited the effect of the holding out provision by deeming the presumption arising from it "necessarily rebutted by evidence the man was not the child's biological parent." Joslin, at 601 (cases cited therein). This view gave way to another view, i.e., that "functional, nongenetic parents can be recognized and protected under the holding-out provision." *Id*. This is Washington's view, as well. Indeed, our statute time limits petitions by putative biological parents in favor of the interest in preserving the stable family relationships created through other means, genetics notwithstanding. *See* RCW 26.26A.435 (presumed parent limitation); *see, also,* RCW 26.26A.445 (acknowledged parent

limitation). *See, e.g., In re Parentage of C.S.,* 134 Wn. App. 141, 144, 139 P.3d 366, 368 (2006) (rejecting challenge to presumed parent as barred by statute of limitations).

Now the statute expressly extends the presumption of parentage to married persons regardless of the sex of the parties (i.e., includes same-sex couples), meaning it turns on the relationship not on biology. Likewise, adoption, once disparaged as a "lesser than" parent-child relationship, one formed entirely by a legal mechanism, is now both common and commonly acknowledged. The fact is, most families do not have to dig very deeply before encountering a parent-child relationship formed by means other than biology.

In short, our law recognizes considerable variability in family formation, whereas, here, the court seems to be holding Bergsieker to a family formation model our law long ago ceased to impose on the residents of our state as they go about structuring their family lives. Parents and their children may not share a genetic connection, yet the law recognizes and protects their relationship. Just as certainly, many parents do not share the same last name as their child, as the court seemed to find strange though the practice is fairly common among married and unmarried parents.

The Legislature has declared its intent to assist in the construction of families by all manner of mechanisms, with the overarching goals of expanding the benefits of stable families. The trial court's idea that adults cannot "hold out" children as their own if they are not their biological parent does not comport with the statutory scheme or with the reality of many people's lives. For example, adoptive parents certainly will feel their children to be their "own." This proprietary terminology conveys a different and arguably more critical element – the parents' pride in and commitment to their children, thereby distinguishing them from other kinds of caregivers such as nannies and extended relatives, who, no matter the bonds of affection, do not hold out the child as being their child. Here, the child and the father proclaimed to all the nature of their bond: father and son. Bergsieker asks simply that L.J.McA. enjoy the benefits that flow to him from state recognition of that bond.

## V. CONCLUSION

Because the trial court denied and dismissed the de facto parent petition on the basis of erroneous interpretations of the statute, Philip Bergsieker respectfully asks this court to vacate the court's order and remand for entry of an order adjudicating him to be L.J.McA.'s de facto parent based on the undisputed facts in his petition.

Respectfully submitted this 22nd day of October 2019

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**RCW 26.26A.440**

## Adjudicating claim of de facto parentage of child. *(Effective January 1, 2019.)*

(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.

## NOVOTNY APPEALS

## October 22, 2019 - 4:14 PM

## Transmittal Information

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