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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 287289-III
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

In Re the Matter of

SHAWN BEACH
Appellant

v.

RACHELL JOHNSTON
Respondent/Cross-Appellant

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. STATEMENT OF CASE

For the purposes of this reply brief, Rachell Johnston replies upon and incorporates the Statement of Case in her response brief.

II. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT MR. BEACH WAS ANGEL J.'S DE FACTO PARENT BECAUSE MR. BEACH, AS A THIRD PARTY, DOES NOT HAVE STANDING TO CLAIM DE FACTO PARENTAGE WHERE ANOTHER STATUTORY REMEDY IS AVAILABLE.

The common law remedy of de facto parentage was created to fill a specific statutory gap that prevented non-biological parents from establishing a legal parent-child relationship with a child. *In re the Parentage of L.B.*, 155 Wn.2d 679, 707, 122 P.3d 161 (2005); *In re the Parentage of M.F.*, 168 Wn.2d 528, 534, 228 P.3d 1270 (2010). The trial court erred in finding that Mr. Beach was Angel J.'s de facto parent because Mr. Beach is not a non-biological parent but instead a third party. As such, he is precluded from claiming de facto parent status because a statutory remedy is available to him to seek custody of Angel J.

The creation of the de facto parent doctrine arose from a case involving a same sex lesbian couple in a committed relationship. *L.B.* 155 Wn.2d at 683. Given the biological

impossibility of conceiving a child alone, the couple decided to have one partner artificially inseminated. *Id.* at 683-684. The couple shared in the process of conception, birth, and raising of the child and held themselves out as a family. *Id.*

After the relationship ended, the biological mother eventually terminated all contact between the non-biological mother and the child. *L.B.* 155 Wn.2d at 684-685. The non-biological mother moved to have her parentage of the child established. *Id.*

The Washington State Supreme Court found that a statutory gap precluded the non-biological mother from establishing a parent-child relationship. *L.B.*, 155 Wn.2d at 707. To address this statutory gap, the court created the common law remedy of de facto parentage. *Id.* The de facto parentage doctrine allows non-biological parents to claim parentage over a child. *Id.* at 679.

In 2010, the Washington State Supreme Court clarified the scope of the de facto parent doctrine for the first time since the *L.B.* decision. *M.F.*, 168 Wn.2d at 528. In *M.F.*, the court found that a stepparent could not claim de facto parent status over a stepchild because the same statutory gap that existed in *L.B.* did not exist in a stepparent-stepchild relationship. *Id.* at 531-532.

Specifically, the court found that stepparents enter into a relationship with a stepchild as a third party to the child's two parents with legally recognizable rights. *M.F.*, 168 Wn.2d at 532. Because a third party may seek custody of a child through the use of the nonparental custody statute, the court found that the same statutory gap that existed in *L.B.* did not exist here, and a statutory remedy precludes the application of a common law remedy. *Id.* The fact that the nonparental custody statute does not allow a stepparent to obtain parental status that "this does not equate to a lack of remedy." *Id.* at 533. As such, the court could find "no statutory void and [could not] apply an equitable remedy that infringes upon the rights and duties of" the existing parents. *Id.* at 532.

The decision in *M.F.* was significant because for the first time the court clarified the facts upon which the common law remedy of de facto parentage is available. *M.F.* 168 Wn.2d at 531-532. Specifically, as discussed in *M.F.*, the decision in *L.B.* was prefaced on the fact that the non-biological parent was a parent who lacked a statutory remedy to establish a legal parent-child relationship. *M.F.*, 168 Wn.2d at 532. In determining that the non-biological parent was a parent, the court looked to the original intent

and agreement of the parties to conceive and raise the child as their own. *Id.* Like heterosexual couples, the couple in *L.B.* chose to conceive, have children, and start a family. *Id.* at 32. However, unlike heterosexual couples, the couple in *L.B.* lacked the statutory ability to establish the non-biological parent's legal status. *Id.* It was this specific statutory void that the court sought to fill with the *de facto* parent doctrine. *Id.* The court stated:

“. . . we adopted the *de facto* parentage doctrine to correct a specific statutory shortcoming: the lack of remedy available to the respondent in *L.B.*, who was a “parent” in every way but legally. To fill this statutory gap, we created a common law method to establish parentage where, had the respondent been able to participate in traditional family formation would have or could have been established by statutory means.” *M.F.*, 168 Wn.2d at 534.

Mr. Beach argues that the facts of his case “mirror the facts in *L.B.* except that this court is dealing with a heterosexual couple.” He supports his argument by stating that Ms. Johnston and Mr. Beach “planned and raised [Angel J.] together as a unit . . . from shortly after . . . conception.” Mr. Beach also argues that he is not a third party because, although Angel J. has a biological father, he is the only father she has known. Both of these arguments fail.

There are two significant distinctions between the facts of this case and the facts in *L.B.* First is the original intent and

agreement of the parties prior to conception. In *L.B.*, the couple decided together to conceive and raise the child. Here, Mr. Beach did not participate, in any manner, in the decision to conceive Angel J. Rather, Mr. Beach's relationship with Angel J. was coincidental to his relationship with Ms. Johnston. Unlike the couple in *L.B.*, Mr. Beach and Ms. Johnston did not intend or plan on conceiving Angel J. together.

The second distinction between the facts of this case and *L.B.* is that Angel J. has two legal parents where *L.B.* did not.¹ The fact that Angel J.'s father's paternity has not been established does not diminish his legal rights. Because Angel J. has two parents, Mr. Beach, like the stepparent in *M.F.*, is a third party to her two legal parents. As such, his statutory remedy is to seek nonparental custody of Angel J.

Despite Mr. Beach's argument to the contrary, this case more closely mirrors the facts in *M.F.* There was never intent by Mr. Beach or Ms. Johnston to conceive Angel J. together, and Angel J. has two legal parents. This important factual distinction from *L.B.*, and similarity to *M.F.*, precludes the trial court from finding that Mr. Beach is Angel J.'s de facto parent.

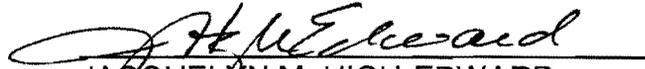
¹ Sperm donors have no parental rights to a child. RCW 26.26.705.

V. CONCLUSION

Based on the Washington State Supreme Court's decision in *M.F.*, Ms. Johnston respectfully asks this court to find that the trial court erred in finding that Mr. Beach is Angel J.'s de facto parent.

Respectfully submitted this 23rd day of August, 2010.

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