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No. 32062-6-III

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III**

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In re the Custody of: J.E., a Minor Child

Travis and Amy Page Eaton,

Appellants

v.

Luke and Kelly Culver,

Respondents

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APPEAL FROM THE BENTON COUNTY SUPERIOR COURT

THE HONORABLE ROBERT G. SWISHER

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**Reply/Response Brief of Appellants/Cross-Respondents**

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**FILED**

MAR 04 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY: \_\_\_\_\_

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**I. ISSUES PRESENTED ON CROSS-APPEAL**

1. Whether the Court should disregard Petitioners' *de facto* parentage arguments given the procedural lapses present?
2. Whether this Court should grant the requested *de facto* relief where the law firmly establishes that the trial court's determination of inapplicability was correct?

**II. COUNTER-STATEMENT OF THE CASE**

The facts of this case are found in Appellant's initial brief, and adopted herein by reference in their entirety. When necessary, additional citations to the record have been made in the argument portion of this brief. It must be noted however, that, contrary to the statement iterated in the Culver's Cross-Appellant's brief, the Eaton's fitness was neither challenged, nor at issue. This was clarified by the trial court early on. See Clerk's Papers (CP) at 1-5; Verbatim Report of Proceedings (VRP) at 226.

**II. ARGUMENT**

**A. Standard of Review**

A question involving the applicability of the *de facto* parentage doctrine to the facts of a case is a question of law this Court reviews *de novo*. *In re Parentage of M.F.*, 168 Wn.2d 528, 531, 228 P.3d 1270 (2010).

**B. Procedurally Improper Nature of Culvers' Argument Below**

The *de facto* parentage argument was not properly before the Trial Court, and that court erred in considering it.

At the outset, it is critical to observe that the Petitioners in this matter did not seek *de facto* parentage in their petition; on the contrary, their petition expressly states that it is a

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2 non-parental custody action alone, initiated pursuant to Chapter 26.10 RCW. CP at 1-5.  
3 Accordingly, because the issue was not pleaded, because the pleadings were not properly  
4 amended pursuant to Civil Rule (CR) 15, and because trial did not occur on that issue,<sup>1</sup> the  
5 matter was not properly before the trial Court, either procedurally or substantively. *See. e.g.,*  
6 *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 261, 274 P.3d 375  
7 (2012). Thus, consideration of this argument violated due process principles.

8 Indeed, by the Culvers' own admission, they did not broach the topic until after  
9 they had presented their case-in-chief *at trial*. Brief of Cross-Appellants at 41. The trial  
10 court should therefore not have entertained the Petitioner's argument regarding *de facto*  
11 parentage, as it was not tried by consent. However, the lower court's error was harmless,  
12 as it made no findings apparently related to *de facto* parentage, and its determination did not  
13 prejudice the Eatons since it did not infringe further upon their parental rights. However, as  
14 discussed below, even if the lower court properly considered the matter, its conclusion was  
15 correct as matter of law, and this Court should simply affirm.

### 16 ***C. De Facto Parentage***

17 The Court's prior determination that the *de facto* doctrine does not apply to this  
18 case was correct, and neither B.M.H. nor J.B.R. Affect that ruling.

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20 <sup>1</sup> Critically, failure to plead this cause of action prior to trial caused actual  
21 prejudice to the Eatons because they had no reason to believe that the issue was before  
22 the Court, or that any consideration would be given to the argument given the due process  
23 issues. Had they been aware, the Eatons would almost certainly have tailored their  
discovery and trial strategies differently. In any event, the record makes plain: (1) no  
consent to try the *de facto* issue occurred; and (2) the Eatons could not have consented to  
try the issue under CR 15, as it was not raised until *after* the Culvers' case-in-chief,  
thereby prejudicing the Eatons' ability to challenge important evidence in a meaningful  
fashion in violation of due process considerations.

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Even if the Eatons' argument as to the lower court's consideration of the Culvers' *de facto* parentage argument is not well-taken, the doctrine should nonetheless be rejected on appeal as a basis for overcoming the Eatons' privacy rights to the custody of their biological child. In the case *In re Parentage of L.B.*, the Washington Supreme Court adopted the *de facto* parentage doctrine in recognition that Washington Courts have always exercised their equitable powers in child custody cases, and that where the statutory scheme fails to provide an adequate remedy, the *de facto* parentage doctrine fills that need on a case-by-case basis. 155 Wn.2d 679, 122 P.3d 161 (2005). That doctrine was discussed at length in the recent cases *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013) and *In re Custody of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (2014). Contrary to the Culvers' argument, these cases did not expand the class of persons to whom the doctrine applies, nor alleviate the heavy burden associated therewith; rather, the cases merely clarified that certain classes of persons are not *prohibited* from seeking *de facto* parentage under particular circumstances.<sup>2</sup> Accordingly, the equitable doctrine remained intact, and applies only where there are not two fit legal parents, as set forth by *In the Matter of the Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270. As discussed below, the trial court's

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<sup>2</sup> Indeed, had they done so, they would have run afoul of *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000). In *Troxel*, the United States Supreme Court struck down a Washington State statute that permitted any third party to petition for visitation with a child as against the contrary decision of a child's parents. In reaching its conclusion that court noted that a visitation order grounded in that statute was an unconstitutional infringement on a fit biological parent's right to determine what is in his or her child's best interest. *Id.* at 74.

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determination that *de facto* parentage did not apply to this case should be affirmed, if indeed it is considered.<sup>3</sup>

*The Existence of an Adequate Statutory Remedy Precludes Application of the De Facto Parentage Doctrine in this Case.*

In *de facto* parent cases, the equitable touchstone of the doctrine’s applicability is the lack of available statutory remedies. *M.F.*, 168 Wn.2d at 531. Importantly, while the lack of statutory remedies is not an element of *de facto* parentage to be proven, it is nonetheless an important equitable consideration. *J.B.R.*, 336 P.3d at 652.

Here, there is a statutory mechanism available for the relief sought in the form of a non-parental custody action pursuant to Chapter 26.10 RCW. It is manifest that the Plaintiffs are aware of this remedy, since they initiated action in the lower court pursuant solely to that statute. Further, the Petitioners have, at both levels, failed to argue, let alone demonstrate *why*, the need for *de facto* parentage in this case exists – at all times they have merely sought *custody* of J.E. – not parental rights. Indeed, rather than demonstrate the need for such a remedy, the Petitioners rely upon *de facto* parentage as an alternative theory of relief to maintain partial custody<sup>4</sup> – this is plainly not the purpose of the doctrine,<sup>5</sup> and should not be given credence by the Court in light of the statutory

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<sup>3</sup> Contrary to the Culvers’ stated position, the trial court did not make plain why it declined to consider the *de facto* parentage arguments raised below. As this Court may affirm the trial court on any grounds found within the record, multiple grounds for affirmation are discussed in this brief. *Allstot v. Edwards*, 116 Wn.App. 424, 430, 65 P.3d 696 (2003)

<sup>4</sup> See Brief of Cross-Appellants at 43.

<sup>5</sup>The purpose of *de facto* parentage is to confer a particular right upon an individual where equitable considerations merit such a right, and no adequate statutory

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2 remedy at hand. Accordingly, as the trial court concluded, the *de facto* doctrine does not  
3 apply to this case, and the Court should simply affirm the lower court on this basis alone.

4 *Even if this Court Determines that an adequate statutory remedy does not exist in*  
5 *this case, the de facto doctrine must nonetheless be found inapplicable under L.B.,*  
*B.M.H., and the existence of two fit parents under M.F. and J.B.R.*

6 As discussed above, the *de facto* doctrine is an equitable doctrine that was  
7 adopted by our Supreme Court in 2005 in *L.B.* In that case, same-sex partners elected to  
8 have a child through artificial insemination of one of the partners. 155 Wn.2d at 683-84.  
9 The couple raised the child for six years together before separating. *Id.* at 684. The  
10 partner who had not physically given birth been restricted by the child's other mother  
11 from visitation with the child. She filed a petition for, among other things, a  
12 determination of *de facto* parentage. *Id.* at 685. Her petition was dismissed by the  
13 superior court commissioner, and the dismissal was affirmed by a superior court judge.  
14 *Id.* The Court of Appeals affirmed in part, and reversed in part. *Id.* On review, our  
15 Supreme Court adopted the *de facto* parentage doctrine, noting that the purpose of the  
16 doctrine, as had been implemented similarly in other states, was to address statutory gaps  
17 that existed at the time. *Id.* at 689. Given the lack of statutory remedy in existence at  
18 the time, and that she met the four adopted criteria, the Supreme Court ruled that the  
19 alienated partner had standing to request *de facto* parentage. Notably, though there  
20 undoubtedly existed another biological parent, the Court did not even consider whether

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23 remedy exists. The conferring of *de facto* parentage upon an individual does not confer  
custody, and as such, should not be relied upon by the Culvers as an alternative theory

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this fact posed an obstacle to *de facto* parentage, likely because he was not involved in the child’s life, and the doctrine is “limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.” *Id.* at 708.

Similarly, in *B.M.H.*, a former stepfather sought *de facto* parentage where he had lived with, and been married to, the birth mother essentially from the child’s birth. 315 P.3d at 472-73. In finding that he lacked adequate cause for a non-parental custody suit, the Supreme Court held that *de facto* parentage could be an appropriate remedy given the death of the child’s biological father and the consent of the birth mother to the relationship. *Id.* at 477-78. Notably, the biological father was deceased, thereby creating, in essence, a parental hole in the child’s life and apparently generating the ability for the stepfather to seek *de facto* parentage. *Id.* at 472. Accordingly, the holding in *B.M.H.* regarding *de facto* parentage does little to support the Petitioners’ position under the facts of this case, since J.E. has two existing, fit parents, as discussed below.

Of critical importance in this Court’s analysis must be the Supreme Court’s holding in *M.F.*, left largely untouched by *B.M.H.* In that case, the court was specifically called upon to consider whether a stepfather could be a *de facto* parent where a child has two fit parents. 168 Wn.2d at 531. Factually, *M.F.*’s parents divorced shortly after she was born, and a parenting plan was entered that gave custody to mother, and weekend visitation to father, who was at all times current on his support. *Id.* at 530. Soon

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under which to sustain the trial court’s custody determination as requested. *See* Brief of

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2 thereafter, M.F.'s mother remarried, and had two more children with her husband, who  
3 treated M.F. as his own daughter. *Id.* Once this relationship dissolved, the stepfather  
4 received weekend visitation with his own children, and M.F. would accompany. *Id.*  
5 Soon after the stepfather remarried, and M.F. stopped accompanying her brothers to their  
6 father's house for visits. *Id.* The stepfather then petitioned to become M.F.'s *de facto*  
7 parent, despite the fact that she already had two fit parents. *Id.* Though the trial court  
8 ruled that the stepfather had presented a *prima facie* case, the Court of Appeals reversed  
9 on discretionary review. *Id.* The Supreme Court accepted review on the question of  
10 whether a stepfather could be a *de facto* parent where a child had two existing parents.  
11 *Id.*

12 In declining to extend the doctrine to cover the stepfather, the Court's analysis  
13 had as its foundation the concept that a child could only have two fit legal parents:

14 The legislature did envision the circumstances before us in this case. The  
15 statutory void confronting us in *L.B.* is absent here. As did the parties in  
16 *L.B.*, [mother] and [father] chose to have children and form a family. But  
17 unlike in *L.B.*, [mother] and [father's] status as legal parents was  
18 established at the outset. In contrast, [stepfather] entered M.F.'s life as a  
19 stepparent, a *third party* to M.F.'s two existing parents. When [stepfather]  
20 entered her life, M.F.'s legal parents and their respective roles were  
21 already established under our statutory scheme. In the case before us, we  
22 perceive no statutory void and cannot apply an equitable remedy that  
23 infringes upon the rights and duties of M.F.'s existing parents.

24 *Id.* at 532 (emphasis supplied). The Court went on to affirm that its consideration of *de*  
25 *facto* parentage was limited to the existence of two fit parents:

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In L.B., we reasoned that no infringement occurs where there are ‘competing interests of *two parents*’ who are both in ‘equivalent parental positions.’ [Citation omitted]. But in this case, we are faced with the competing interest of parents – with established parental rights and duties, and a stepparent, a third—party who has no parental rights.

*Id.* (Emphasis in original; internal citation omitted). In the remainder of its opinion, the Court once again noted that where there are two existing fit parents at birth, a third party non-parent is in a very different situation from those persons contemplated by the *de facto* parentage doctrine, and that a statutory remedy exists, presumably in the form of a non-parental custody petition pursuant to Chapter 26.10 RCW. *Id.* at 534.<sup>6</sup>

This reasoning was subsequently recognized by this Court in its recent decision *In re Parentage of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (2014). In that case, J.B.R. was born to two teenage parents, who broke off their relationship when the child was two. For the next ten years, the child’s father did not have any contact with her. *Id.* at 650. In the meanwhile, also beginning when the child was two, her mother began dating, and encouraged her new significant other to have a father-child like relationship with J.B.R., who called him her father. *Id.* When the relationship ended four years later, it had produced a child, N.A.Y. Initially, N.A.Y. visited her father sporadically, and J.B.R. accompanied. *Id.* Each party blamed the other for the sporadic nature of the visitation. *Id.* Eventually, visitation normalized, though matters came to a head after a disagreement, and N.A.Y.’s father petitioned for *de facto* recognition of his relationship

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<sup>6</sup> However, as this Court noted in *J.B.R.*, the analysis regarding the adequacy of nonparental custody petitions has somewhat been eroded by subsequent cases. *Id.* at 652.

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2 with J.B.R.. J.B.R.'s biological father responded to the petition, and counter-claimed,  
3 seeking visitation. *Id.*

4 J.B.R.'s mother filed a motion to dismiss the *de facto* claim, however that motion  
5 was denied on the grounds that the petitioner had satisfied the four basic elements of the  
6 doctrine as stated by *L.B.* *Id.* at 650-51. The mother filed an interlocutory appeal with  
7 this Court, challenging the trial court's denial of her motion on the ground that *M.F.* had  
8 essentially set forth a bright line rule precluding a *de facto* petition where a child had two  
9 living biological parents whose legal relationship to the child had been established at  
10 birth. *Id.* at 653. Observing the distinctions drawn in *M.F.* and *L.B.*, this Court held that  
11 a step-parent is not precluded from seeking *de facto* parentage merely because a child has  
12 two living biological parents. *Id.* at 652-53.

13 The Culvers' argument, though sparse, appears to read this Court's holding in  
14 *J.B.R.* as stating that a child can have more than two fit, actively involved parents in  
15 contravention to *M.F.* Brief of Cross-Appellant at 41-42. However, that reading is  
16 overbroad. Properly read, this Court's opinion carefully clarified that which remained  
17 unstated in *M.F.* – namely, that there is room in a child's life for two *fit* parents, and that  
18 the mere existence of an absent biological parent does not preclude the possibility of a fit  
19 *de facto* parent.

20 The situation before the Court here is more akin to that in *M.F.*, rather than  
21 *J.B.R.*, as there exist two involved, fit biological parents whose positions were established  
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23 Nevertheless, said erosion does not detract from the Eaton's position in this matter,

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at J.E.'s birth, and who remain equally situated as to one another. Moreover, the Culvers seek to infringe upon the fit biological parents' rights by gaining *de facto* parent status as an un-pleaded, untried, *alternative* remedy to a non-parental custody petition. This request plainly runs afoul of those due process considerations iterated in *Troxel*.<sup>7</sup> Thus, per the current state of the law, this action cannot succeed, particularly where there exists a statutory remedy in the form of a non-parental custody petition, as was filed at the outset of this case. Accordingly, the holdings in *M.F.* and *J.B.R.* control, and this Court should deny the Petitioners' *de facto* parentage argument and affirm the trial court in this respect.

The wisdom of this outcome is borne out through the application of a common sense approach as well. Practically speaking, if two divorced, equivalently-placed parents have a difficult time reaching consensus as to decision making, it can only be imagined the difficulties that would arise were J.E. to have four parents attempting to reach a decision by committee. Such difficulties were clearly contemplated by the Supreme Court in *M.F.* when it stated that the doctrine was conceived as applying to two fit, equivalent parents alone. *See* 168 Wn.2d at 532.

In sum, both the Supreme Court and this Court have already answered the question of whether the *de facto* doctrine may be utilized to provide a child with more

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particularly where the Culvers have never sought parentage *per se*, but only custody.  
<sup>7</sup> It is also worth noting that the trial court's award of *partial* nonparental custody which the Culvers seek to maintain itself likely runs afoul of *Troxel* given the apparent fitness of the Eatons as determined by the trial court, and the presumption, as argued in

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2 than two fit, involved parents. As discussed above, the answer is plainly “no.” This Court  
3 should not find the Culvers’ argument regarding *de facto* parentage to be well-taken.

4 **D. Attorney Fees**

5 RAP 18.1 provides that this Court may, in its discretion, award attorney fees  
6 where the law provides that a party may recover. The Culvers, in their argument for  
7 attorney fees, rely upon RCW 26.10.080 to support their request for attorney fees. In  
8 addition, they rely upon allegations that the Eatons have somehow raised bad-faith  
9 arguments, invited error, and failed to argue prejudice. These arguments should not be  
10 well taken, particularly given the procedural irregularities created by the Culvers below  
11 with regard to the nonparental custody petition, the *de facto* parentage issue, and the  
12 errors of law present in the trial court’s determinations regarding nonparental custody.  
13 This Court should deny the request and grant the Eatons attorney fees as requested in  
14 their initial brief.

15 **IV. CONCLUSION**

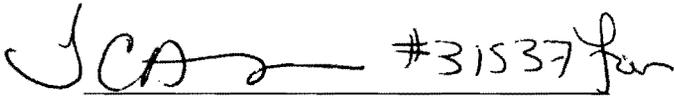
16 The focal point of this inquiry must be what is in J.E.’s best interest. However,  
17 that undertaking must occur within the framework provided by Chapter 26.10 RCW and  
18 the common law. Here, both the applicable statutory scheme and common law provide  
19 that J.E. must be returned to his parents’ custody, where they will provide for him and  
20 maintain a relationship with the Petitioners as is in his best interest. While the Eatons  
21 certainly appreciate that, as of yet, the full spectrum of analysis under *Troxel, B.M.H.*,  
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23 the Eaton’s initial brief, that if J.E.’s relationship with the Culvers is in his best interest,

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L.B., M.F., and J.B.R. has yet to be realized, what is plain under the law as it currently exists is that the Culvers were not entitled to the relief they received from the trial court. Accordingly, the Court should vacate the trial court's grant of partial custody to the Culvers, affirm its determination that *de facto* parentage does not apply in this case, grant the Eatons' full custody of their son, and award reasonable attorney fees.

Respectfully Submitted this <sup>3<sup>RD</sup></sup> day of March, 2015 by:



John C. Julian, WSBA #43214  
Attorney for Appellants/Cross Respondents

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they will maintain that relationship.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be delivered this *Reply/Response Brief of Appellants/Cross Respondents* as follows to the following individuals on this date via U.S Mail postage prepaid:

Mason Pickett, Attorney at Law  
830 N. Columbia Center Blvd. Suite A1  
Kennewick, WA 99336;

Art Klym, Attorney at Law  
600 Swift Blvd, Ste A  
Richland, WA 99352-3560

Further, on this date, I emailed the *Reply/Response Brief of Appellants/Cross Respondents* to the following individuals:

- Art Klym- [aklym@akwalaw.com](mailto:aklym@akwalaw.com)
- Mason Pickett- [mason@defoepickett.com](mailto:mason@defoepickett.com)
- Travis Eaton- [traviseaton3909@gmail.com](mailto:traviseaton3909@gmail.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5 day of March, 2015, at Walla Walla, Washington

sign:   
print name: Morgan Carter