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Division III  
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No. 35055-0-III

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

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In re C.S., Child

WAYNE JANKE AND DORIS STRAND  
Appellants

and

RONALD SIMON AND TERESA SIMON  
Respondents

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

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REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I. ISSUES IN REPLY ..... 1

II. ARGUMENT ..... 1

    A. APPLICATION OF THE ERRONEOUS BURDEN OF PROOF  
        REQUIRES REVERSAL..... 1

III. CONCLUSION..... 4

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>City of Aberdeen v. Regan</i> , 147 Wn. App. 538, 543, 195 P.3d 1015, 1017 (2008).....	1
<i>Dep't of Labor &amp; Indus. v. Rowley</i> , 185 Wn.2d 186, 378 P.3d 139 (2016)	3
<i>In re Custody of A.F.J.</i> , 179 Wn.2d 179, 314 P.3d 373, 375 (2013). .....	2
<i>In re Parentage of L.B.</i> , 155 Wn.2d 679, 122 P.3d 161 (2005).....	2
<i>Worden v. Smith</i> , 178 Wn. App. 309, 314 P.3d 1125 (2013) .....	2

### **Cases From Other Jurisdictions**

<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) .....	1
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## I. ISSUES IN REPLY

1. The trial court's findings are not verities on appeal if they were made by application of a stricter burden of proof than required by law.

2. Washington's de facto parentage doctrine does not require proof by the stricter clear, cogent, and convincing standard, but by a preponderance of the evidence standard.

## II. ARGUMENT

### A. APPLICATION OF THE ERRONEOUS BURDEN OF PROOF REQUIRES REVERSAL.

The Simons argue the findings are verities on appeal because Strand and Janke did not assign error to them. In fact, quite the opposite is true. Because the court applied a stricter standard of proof, the findings are erroneous as a matter of law. *See City of Aberdeen v. Regan*, 147 Wn. App. 538, 543, 195 P.3d 1015, 1017 (2008), aff'd, 170 Wn.2d 103, 239 P.3d 1102 (2010) (reverse and remand where court applied stricter standard of proof); *see, also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 254, 109 S. Ct. 1775, 1793, 104 L. Ed. 2d 268 (1989) (remand required where trial court used clear and convincing standard instead of the preponderance standard).

The Simons are also wrong when they claim Washington applies the clear, cogent, and convincing burden of proof to de facto parentage

proceedings. No appellate court has so held, including in those cases cited by the Simons.

For example, in one case, as the Simons note, only the trial court used the higher standard and no one made an issue of that on appeal. Br. Respondent, at 4-5, citing *In re Custody of A.F.J.*, 179 Wn.2d 179, 184, 314 P.3d 373, 375 (2013). Just because the trial judge, either mistakenly or in an excess of caution, applied the higher standard does not mean the Supreme Court “embraced” that standard. Contra Br. Respondent, at 5. The court ignored the issue and addressed those raised by the parties. Appellate decisions frequently recite procedural history and other factual matters without embracing principles or facts. Most certainly, the Supreme Court in *A.F.J.* did not adopt the stricter standard for de facto parentage actions. It did not address the issue at all, not even in *dicta*.<sup>1</sup>

Nor did the Supreme Court consider the burden of proof in *In re Parentage of L.B.*, 155 Wn.2d 679, 712, 122 P.3d 161, 179 (2005), a case that turned completely on whether to recognize the de facto parentage doctrine. No fact-finding had even occurred in *L.B.*, since the petition had

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<sup>1</sup> Only in *A.F.J.*, could the erroneous use of the mistaken standard have any possible application, and then by means of the “law of the case” doctrine. See *Worden v. Smith*, 178 Wn. App. 309, 323–24, 314 P.3d 1125, 1132 (2013) (issues that might have been determined on appeal will not be considered on subsequent appeal absent substantial change in evidence) (internal citations omitted). Since no one challenged on appeal the higher standard in *A.F.J.*, the parties might, arguably, have been stuck on remand with the stricter standard. This fact has no bearing on this case whatsoever.

been dismissed for lack of standing. So nowhere was the burden of proof applied so it was never addressed. Indeed, the court remanded the case for an original fact-finding and did so without indicating anything about the burden of proof.

No Washington de facto parentage case has required anything other a proof by a preponderance, which is the evidence standard that generally applies in civil cases. *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 208, 378 P.3d 139, 149 (2016). Moreover, as observed in the opening brief, preponderance is the standard that applies to other parentage actions specifically. When the trial court relied on a case from Maine, rather our state's law, it erred as a matter of law.

The Simons also argue the Legislature's recent addition of a de facto parent provision to the Uniform Parentage Act, with its explicit preponderance standard of proof, does not bear on the standard of proof for the equitable doctrine. With respect, the Legislature's action does seem to reflect the broader understanding of the de facto parent claim as being of the same species as other parentage claims, where the burden of proving parentage is satisfied by a preponderance. Parentage actions are quite distinct from actions by the State to terminate parentage, or private contests over custody between parents and persons who make no claim to parentage, contexts where constitutional considerations require a stricter

burden of proof. A claim of parentage is not a claim against another parent, but a claim for recognition as a parent, whether by biology, operation of law (e.g., presumption), etc. That is, a successful parentage claim does not diminish the rights or status of the already recognized parent, as happens in dependencies, terminations, and nonparental custody proceedings. A successful parentage claim, whether by acknowledgement or adjudication, adds, it does not subtract, and thus furthers our State's concern for the welfare of children, including children whose relationship with one or more parents arises from a life lived together in those roles.

The substantive de facto parentage test is difficult enough. Our court has never seen the need to single out this path to parentage as alone requiring a greater burden of proof. The substantive test, proved by a preponderance of the evidence, adequately protects an acknowledged parent.

### III. CONCLUSION

For the foregoing reasons and those advanced in the opening brief, Doris Strand and Wayne Janke respectfully ask this Court to vacate the order denying their de facto parent petition and to remand for analysis of the facts under the proper burden of proof.

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Respectfully submitted this 4th day of April 2019.

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## Transmittal Information

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