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Court of Appeals  
Division III  
State of Washington  
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COA No. 35055-0-III

COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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In re C. S., Child.

WAYNE JANKE and DORIS STRAND,

Appellants,

v.

RONALD SIMON AND TERESA SIMON,

Respondents.

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BRIEF OF RESPONDENTS

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## I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

A. The trial court's findings of fact are verities on appeal as they are unchallenged and are supported by substantial evidence in any event.

B. The trial court did not abuse its discretion by requiring Doris Strand and Wayne Janke (collectively Strand) to prove de facto parentage by clear, cogent, and convincing evidence.

C. Because it applied the correct standard of proof, *i.e.*, clear, cogent, and convincing evidence, to this de facto parentage petition, the trial court did not err and its decision dismissing the petition should be affirmed.

## II. COUNTER-STATEMENT OF THE CASE

Strand has not assigned error to the trial court's findings of fact, which are thus verities on appeal. (See RAP 17.4(g)). These facts and the conclusions of law flowing from them support the court's order denying and dismissing the petition for establishment of de facto status. (CP 634-647). Strand appealed from the order. (CP 658).

She raises only one issue and claims the trial court applied the incorrect standard of proof to the de facto parentage petition when it required clear, cogent, and convincing evidence rather than

proof by a preponderance. But the trial court applied the correct standard and did not err.

### III. ARGUMENT

A. The trial court applied the correct standard of proof by requiring clear, cogent, and convincing evidence to prove the de facto parentage petition.

Questions of law are reviewed de novo. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007). Strand contends the court made a legal error by incorrectly applying the clear, cogent, and convincing evidence standard of proof rather than proof by a preponderance. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). An error of law is itself an abuse of discretion. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001). Here, however, the court applied the correct standard and did not abuse its discretion.

De facto parentage is a flexible, equitable remedy complementing legislative enactments where parent-child relationships arise in ways not contemplated in the statutory scheme. *In re Parentage of L.B.*, 155 Wn.2d 679, 701, 706, 122 P.3d 161 (2005). Establishing de facto parentage requires a showing that (1) the natural or legal parent consent to and fostered

the parent-like relationship; (2) the petitioner and child lived together in the same household; (3) the petitioner assumed obligations of a parenthood without expectation of financial compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. *Id.* at 708.

De facto parenthood status is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life. *L.B.*, 155 Wn.2d at 708. Attaining de facto parent status is no easy task. *Id.* Indeed, deference is given to the natural parents. *In re Custody of B.M.H.*, 179 Wn.2d 224, 244, 315 P.3d 470 (2013).

As noted in *In re Parentage of J.A.B.*, 146 Wn. App. 417, 426, 191 P.3d 71 (2008), involving a de facto parentage petition, the court stated:

More fundamentally, residential placement is not equivalent to parental status. The nonparent custody statute and de facto 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. 146 Wn. App. at 426.

Citing *State ex rel. McMichael v. Fox*, 132 Wn.2d 346, 352, 937 P.2d 1075 (1997), Strand argues that because of this parity between her and C.S.'s natural parents, her petition is a parentage action where the standard of proof is by a preponderance. But this de facto parentage action, like one for nonparental custody, places a parent's interest in the custody and care of a child at stake and is akin to a termination of parental rights, where the standard of proof is by clear, cogent, and convincing evidence. *In re Welfare of A.B.*, 181 Wn. App. 45, 58-59, 323 P.3d 1062 (2014).

For a nonparental custody action, the standard of proof is clear, cogent, and convincing evidence. *In re Custody of A.L.D.*, 191 Wn. App. 474, 501, 363 P.3d 604 (2015). Although this is a de facto parentage petition, the standard of proof is the same.

In *In re Custody of A.F.J.*, 179 Wn.2d 179, 184, 314 P.3d 373 (2013), a de facto parentage case, the Supreme Court noted the trial court found the party seeking de facto status had

“established by clear, cogent, and convincing evidence that she was [the child’s] de facto parent.” Reviewing the trial judge’s extensive findings of fact as to the elements of a de facto parentage established in *L.B.*, the Supreme Court found sufficient evidence supporting them under the clear, cogent, and convincing evidence standard, which was neither challenged on appeal nor raised as an issue *sua sponte* by the Supreme Court. *A.F.J.* embraced the clear, cogent, and convincing standard for de facto parentage petitions and no case has held to the contrary.

Although RCW 26.26A.440, effective January 1, 2019, codifies the standard of proof for de facto petitions as a preponderance of the evidence, it does not signify codification of the existing standard of proof. Rather, it is an acknowledgement the standard of proof was by clear, cogent, and convincing evidence and the Legislature decided to enact a statute changing that standard to a preponderance starting in 2019. See *State v. Elmore*, 154 Wn. App. 885, 905-06, 228 P.3d 760 (2010). This does not help Strand as the trial was in 2016 and the order dismissing the de facto parentage petition was filed in 2017.

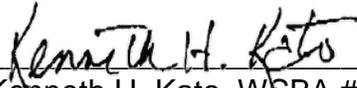
The trial court neither erred by using the clear, cogent, and convincing standard nor thereby abused its discretion by doing so. Its order should be affirmed.

#### IV. CONCLUSION

Based on the foregoing fact and authorities, the Simons respectfully urge this Court to affirm the order dismissing the de facto parentage action.

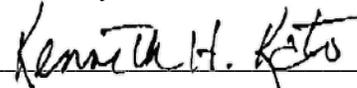
DATED this 5<sup>th</sup> day of December, 2018.

Respectfully submitted,

  
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#### CERTIFICATE OF SERVICE

I certify that on December 5, 2018, I served a copy of the Brief of Respondents by USPS Patricia S. Novotny at her email address.

  
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**December 05, 2018 - 8:17 AM**

**Transmittal Information**

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