

No. 81043-5

SUPERME COURT
OF THE STATE OF WASHINGTON

In re the Parenting of:

MARNITA FRAZIER (DOB: 12/15/1993),

Child,

JOHN CORBIN,

Petitioner,

v.

PATRICIA REIMEN,

Respondent,

EDWARD FRAZIER,

Father.

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STATE OF WASHINGTON

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ANSWER TO PETITION FOR REVIEW

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A. Identity Of Respondent.

The respondent is Patricia Reimen, respondent in the trial court and petitioner in the Court of Appeals.

B. Restatement Of Facts.

The disputed and irrelevant "facts" recited in the petition are not a basis for granting review. The only relevant facts are that the petitioner is a former stepfather who neither sought residential time nor undertook a legal obligation to support the child when his marriage to the mother was dissolved and who seeks residential time, to the exclusion of her biological father, with a child who has two parents and an existing parenting plan.

In his statement of the case, petitioner John Corbin attempts to portray the "loss" of his relationship with his former stepdaughter as harmful to her. (See Petition 3) Leaving aside the factual inaccuracies of these claims,¹ petitioner's *de facto* parentage claim was not based on a claim of harm or detriment to the child. In fact,

¹ Petitioner claims that the mother "abruptly terminated" his contact with his former stepdaughter. (Petition 3) The record in fact shows that the mother voluntarily placed her daughter in counseling to help her deal with her relationship with petitioner before he filed his *de facto* parentage action, after her daughter began to resist visits with the stepfather. (CP 71) Further, while petitioner claims that the rupture in his relationship with his former stepdaughter is detrimental to her (Petition 3), the child's therapist testified that she "could be seriously hurt (psychologically) if forced to see [the stepfather] before there were was some therapeutic effort to address her estrangement from him." (CP 79)

as the Court of Appeals noted, petitioner “does not claim and no court has determined that Reimen is an unfit parent. Moreover, there is no claim and no court determination that there is any detriment to the child.” (Opinion 9) Instead, petitioner sought to avoid the stricter statutory standards of RCW 26.10 by claiming to be a *de facto* parent, with a status identical to that of the child’s biological parents, based on facts that are no different than those in innumerable other “blended” families.

The following undisputed facts, and the only relevant facts, are taken from the Court of Appeals decision in this case:

“Patricia Reimen and Edwin Frazier are the biological parents of M.F., whose date of birth was December 15, 1993. The parental rights and obligations of Reimen and Frazier with respect to M.F., their daughter, are set forth in the parenting plan entered on August 2, 1995, as part of the dissolution of their marriage. (Opinion 2, ¶ 2)

“The parenting plan provides that M.F. will reside primarily with Reimen, with alternating weekend residential time and some holidays with Frazier. The plan also provides that Frazier and Reimen shall have joint decision making power. Frazier, who lives in Wenatchee, has consistently paid his child support obligation to

Reimen, who lives in Monroe. While Reimen and Frazier have not always strictly adhered to the residential schedule, the plan has never been modified by court order. (Opinion 2, ¶ 3)

“Reimen and Corbin were married in October 1995. They are the parents of two sons. Reimen and Corbin separated in 2000. The parental rights and obligations of Reimen and Corbin with respect to their two sons are set forth in the parenting plan entered on December 13, 2002, as part of the dissolution of their marriage. This parenting plan does not apply to M.F. Nevertheless, Corbin continued to have regular contact with M.F. and his two sons with Reimen until August 2005. (Opinion 2-3, ¶ 4)

“In August 2005, Corbin moved to modify the parenting plan governing the two sons he had with Reimen. After this, M.F. abruptly stopped spending time with Corbin. Reimen and Corbin dispute why M.F. stopped seeing him. (Opinion 3, ¶ 5)

“In November 2005, the supreme court decided *In re Parentage of L.B.* In March 2006, Corbin commenced this proceeding, seeking to be declared a *de facto* parent of M.F. and seeking residential time with her based solely on that case. Reimen and Frazier are both named as parties.” (Opinion 3, ¶ 6)

Reimen moved to dismiss Corbin's *de facto* parentage petition pursuant to CR 12(b)(6). (CP 218) The trial court denied the motion in an oral decision of June 7, 2006, and entered its written order on August 8, 2006. (Opinion 3, ¶ 8) Following and based upon the trial court's oral decision, a superior court commissioner ordered a "reunification process" between Corbin and his former stepdaughter (CP 26), and appointed a guardian ad litem for M.F., whose "recommendations" the court ordered the mother to follow. (CP 5-6, 26, 30) A superior court judge denied Reimen's motion to revise these orders. (CP 35-36)

Reimen sought, and Division One granted, discretionary review. (Opinion 4, ¶ 16) Division One reversed the trial court's order denying Reimen's motion to dismiss the *de facto* parentage action, holding that this Court's decision in *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 126 S.Ct. 2021 (2006) did "not create a common law cause of action for a former stepparent as a *de facto* parent of a former stepchild where statutory remedies are available." (Opinion 4, ¶ 11)

In its decision, Division One recognized that petitioner could have sought residential time with his stepdaughter at the time of his divorce from her mother under RCW 26.09.240, but failed to do so.

(Opinion 7, ¶ 19) Division One also noted that petitioner could seek custody of his former stepdaughter under RCW 26.10.030. (Opinion 6-7, ¶ 18) Petitioner offered “no persuasive argument why the statutes dealing with this subject matter are inadequate to address his situation.” (Opinion 8, ¶ 20)

Instead, to avoid the constitutional burden of the statutory scheme, petitioner relied on the common law *de facto* parentage cause of action established in *L.B.* (Opinion 8, ¶ 20) But, as Division One pointed out, “there is a statutory framework that is designed to address custody and visitation” in blended families such as this one:

That it may be difficult for Corbin to fulfill the statutory requirements does not persuade us that those requirements are inadequate or incomplete in the sense that requires application of the *de facto* parent doctrine... [T]his is a case of disputes arising in a blended family resulting from consecutive marriages. The legislature contemplated this situation in the existing statutory framework.

(Opinion 12-13, ¶¶ 33, 34) Division One also concluded that, even if petitioner could establish that he is a *de facto* parent, he would still be required to meet the adequate cause threshold to modify the child’s existing parenting plan. (Opinion 13, ¶ 36)

C. Why Review Is Not Warranted.

1. The Court Of Appeals Decision Is Wholly Consistent With *L.B.*

The Court of Appeals properly rejected petitioner's attempt to assert a common law cause of action as *de facto* parent of his former stepdaughter under *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). As this Court held in *L.B.*, obtaining the status of *de facto* parent should be "no easy task," 155 Wn.2d at 712, ¶ 47, and there is nothing in *L.B.* to support petitioner's claim that a stepparent can avoid the statutory standards of RCW 26.10 and assert rights equal to those of the child's natural parents by claiming *de facto* parentage. (Opinion 6, ¶ 17) Division One properly determined that the "correct starting point" is *not* whether a party can allege facts that might meet *L.B.*'s four-part, fact-based, test to establish standing as a *de facto* parent.² As evidenced by this case, that would not be difficult for any involved stepparent. Instead, the threshold issue is "whether *de facto* parenthood may be applied at all to the circumstances of this case." (Opinion 6, ¶

² The *L.B.* test requires that a third party show: 1) the natural or legal parent consented to and fostered the parent-like relationship; 2) the petitioner and child lived together in the same household; 3) the petitioner assumed obligations of 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. 155 Wn.2d at 708, ¶ 40.

17) The Court of Appeals properly concluded that the *de facto* parentage doctrine is simply inapplicable to claims for third party custody by former stepparents.

This Court in *L.B.* adopted the concept of *de facto* parentage where a child was planned and born into a relationship between two parties who could not marry, only one of whom was a legal parent. Intended to “fill the interstices that our current legislative enactment fail[ed] to cover in a manner consistent with our laws and stated legislative policy,” 155 Wn.2d at 707, ¶ 38, this Court’s holding in *L.B.* was driven by the fact that “[o]ur legislature has been conspicuously silent when it comes to the rights of children . . . who are *born into* nontraditional families” 155 Wn.2d at 694, ¶ 21 (emphasis added).

This Court was rightly concerned in *L.B.* that “in the field of familial relations, factual scenarios arise, which even after a strict statutory analysis remain unresolved, leaving deserving parties without any appropriate remedy.” 155 Wn.2d at 687, ¶ 11. And Division One also rightly distinguished this case because, unlike the “factual scenario” in *L.B.*, the legislature and courts have already contemplated a situation such as this one, arising in a blended family resulting from consecutive marriages. (Opinion 13, ¶ 34)

The Court of Appeals recognized that petitioner could have chosen to protect his "parent-child relationship" with his stepdaughter when the parties divorced, but declined to do so. (Opinion 7-8, ¶ 19) When the parties divorced in 2002, former RCW 26.09.240(3) allowed a third party who could prove by "clear and convincing evidence that a significant relationship exists with the child" to petition for an order granting visitation during a parent's divorce. If he had met this evidentiary burden, the stepfather could have obtained a residential schedule with the child, evidencing his acceptance of a "permanent" role in her life.

Petitioner claims that RCW 26.09.240 was not available to him when the parties' divorced in 2002 because it was struck down three years later in ***Parentage of C.A.M.A.***, 154 Wn.2d 52, 66, ¶ 29, 109 P.3d 405 (2005). (Petition 13) But ***C.A.M.A.*** applies prospectively only, and stepparent visitation ordered under RCW 26.09.240 prior to ***C.A.M.A.*** is still enforceable. ***Marriage of Anderson***, 134 Wn. App. 506, 512, ¶ 13, 141 P.3d 80 (2006).

In any event, Division One did not hold that the availability of RCW 26.09.240 was the only reason petitioner's *de facto* parentage claim was barred. Instead, the Court of Appeals properly recognized that existing statutes – in particular, RCW

26.10.030 – permit a former stepparent to seek residential time with a former stepchild (Opinion 6-7, ¶ 18), and that petitioner “offers no persuasive argument why the statutes dealing with this subject matter are inadequate to address his situation. Rather, he relies solely on *L.B.* to avoid the requirements of these statutes.” (Opinion 8, ¶ 20)³ And to the extent petitioner claims that he is the “psychological parent” of his former stepdaughter in order to avoid the statutory requirements of RCW 26.10 (see Petition 9-10), this Court in *L.B.* rejected the assertion that a “psychological parent” could assert rights over the objection of a fit parent. 155 Wn.2d at 692, fn. 7.

The differing outcomes in this case and in *L.B.* were not because the Court of Appeals “extinguished” the *de facto* parent doctrine (Petition 7), but because the cases present very different “factual scenarios.” Division One’s decision is entirely reconcilable with *L.B.*, and review is not justified under RAP 13.4(b)(1).

³ Similarly, the Court of Appeals’ decision properly recognizes the consequences of allowing an alleged *de facto* parent to pursue his own common law parenting plan without modifying an existing statutory parenting plan would lead to absurd results. Children and their parents cannot be subject to multiple inconsistent parenting plans based on *L.B.*’s *sui generis* “*de facto*” parent analysis. Thus the Court of Appeals concluded that a party who claims to be a *de facto* parent to a child who already has an existing parenting plan must meet the adequate cause threshold of RCW 26.09.260. (Opinion13, ¶ 36)

2. The Court Of Appeals Decision Was Compelled By This Court's Recent Decisions In *Troxel* And *Shields*.

Division One was properly concerned "about the constitutional implications of permitting a former stepparent and the courts to intervene in the decision-making process of a fit parent" in this case. (Opinion 8-9, ¶ 23) The Court of Appeals decision requiring more from a stepparent than fulfilling the four-part fact-based factors of the *de facto* parent doctrine is wholly consistent with and compelled by well-settled law in this state.

In *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), *aff'd sub. nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000), for instance, this Court rejected a live-in boyfriend's attempt to obtain visitation with his former girlfriend's son without first making a threshold showing of detriment. In one of three cases considered by this Court in *Smith*, the mother's former boyfriend had begun a relationship with the mother shortly after her son's birth and lived with the mother and her son for four years. 137 Wn.2d at 5. The mother allowed visitation for over a year after the relationship ended, but the boyfriend sought to formally establish a residential schedule after the mother impeded visitation with her son. See *Visitation of Wolcott*, 85 Wn. App. 468, 470,

933 P.2d 1066 (1997), *dismissal affirmed*, **Smith**, 137 Wn.2d at 5. This Court recognized “that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child,” but nevertheless held that there must be a “threshold requirement of a finding of harm to the child as result of the discontinuation of visitation” before a court can constitutionally interfere with a fit parent’s fundamental right. **Smith**, 137 Wn.2d at 20.

In **Custody of Shields**, 157 Wn.2d 126, 146, ¶ 50, 136 P.3d 117 (2006), decided seven months after **L.B.**, this Court once again held that a former stepparent can obtain custody only by first showing harm or detriment. In **Shields**, a stepmother sought custody of her stepson, who had resided primarily with her and the father for nearly half of the child’s life, after the father’s death. This Court held that the stepmother had standing to seek third party custody under RCW 26.10.030, but that she was still required to show that placement with the mother would result in actual detriment to the child, because under the “heightened standard” recognized by this Court, “a court can interfere only with a fit parent’s parenting decision to maintain custody of his or her child if

the nonparent demonstrates that the placement of the child with the fit parent will result in actual detriment to the child's growth and development." **Shields**, 157 Wn.2d at 144, ¶ 46.

In fact, this "heightened standard" for stepparent custody has been the law in this state since at least **Marriage of Allen**, 28 Wn. App. 637, 626 P.2d 16 (1981), in which Division Three recognized that "[g]reat deference is accorded to parental rights, based upon constitutionally protected rights to privacy and the goal of protecting the family entity," 28 Wn. App. at 646, and upheld an order granting the stepmother primary residential care of her deaf stepson only because there was substantial evidence that the child's future development would be detrimentally affected by placement with the father. 28 Wn. App. at 647.

Allowing stepparents to instead establish themselves as *de facto* parents under the **L.B.** test would run afoul of established Washington law, and Division One's decision was compelled by this Court's recent decisions in **Shields** and **Smith**. There is no need for this Court to once again revisit this area of the law so soon after its decisions in these cases and **L.B.** Review is not justified under RAP 13.4(b)(3) or (4).

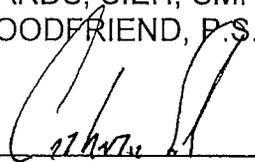
D. Conclusion.

Despite the histrionics of the petition, the Court of Appeals decision did not “extinguish” the *de facto* parent doctrine. Instead, Division One properly recognized the doctrine’s limitations, as clearly articulated by this Court in *L.B.*. This Court intended the *de facto* parent doctrine to close a gap in the statutory framework when a child is born into a non-traditional family, and the Court of Appeals properly recognized that the trial court erred in using the doctrine to give parental status to a former stepparent in a “blended” family created by consecutive marriages. The Court of Appeals decision is consistent with well-settled law and raises no issue of public interest that this Court needs to revisit so soon after its comprehensive decisions in *L.B.* and *Shields*. This Court should deny review.

Dated this 16th day of January, 2008.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

BREWE LAYMAN, P.S.

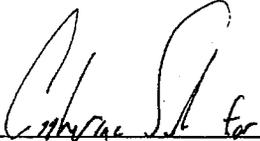
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Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 16, 2008, I arranged for service of the foregoing Answer to Petition for Review, to the Court and the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of January, 2008.



Daniel F. King

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Attached for filing in .pdf format is the Answer to Petition for Review, in *In re the Parenting of Marnita Frazier/Corbin v. Reimen*, Cause No. 81043-5. The attorney filing this Answer is Catherine W. Smith, WSBA No. 9542, e-mail address: cate@washingtonappeals.com

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