

No. 86188-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARY FRANKLIN,

Respondent

v.

JACKIE JOHNSTON,

Petitioner.

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MARY FRANKLIN'S ANSWER TO AMICUS CURIAE BRIEF
OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

The Washington Department of Social and Health Services asks this Court to sever the parent-child relationship between A.F.J. and Mary Franklin that has endured since his birth six years ago, arguing that Washington courts should never “permit[] a person with whom a child is placed in a dependency proceeding to petition for recognition as the child’s legal parent.” DSHS Amicus Br. at 19-20. The Court should reject DSHS’s extreme position for three independent reasons:

First, the lower courts did not determine that Franklin was A.F.J.’s *de facto* parent under *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), “merely because a child was placed with her during a dependency proceeding.” DSHS Amicus Br. at 3. Rather, Franklin prepared for A.F.J.’s birth with her then-partner Jackie Johnston, named him, and cared for him in the months before Johnston’s actions brought Child Protective Services into their home. Substantial evidence supports the trial court’s *de facto* parentage determination, irrespective of the fact that when A.F.J. was declared dependent as to Johnston, the court ordered – at Johnston’s request and over DSHS’s objection – that he remain with the person who essentially had been his second parent since birth. Moreover, this Court may also affirm the lower courts’ rulings based solely on the doctrine of judicial estoppel. Because this case may be resolved on its specific facts, it is unnecessary to reach the

general policy issues raised by DSHS regarding other types of foster arrangements.

Second, courts are fully capable of applying the strict but flexible *L.B. de facto* parentage factors on a case-by-case basis, even when the case involves one of the more than 10,000 children who come into contact with the Washington foster system each year. DSHS's position is premised on an incorrect statement of the law: that a biological parent "cannot be deemed to have fostered or consented to" the parent-child relationship with the *de facto* parent pursuant to *L.B.*, because according to DSHS all of the biological "parent's rights are temporarily abridged during a dependency." DSHS Amicus Br. at 13. To the contrary, this Court has held that during dependency "parental wishes *are* appropriate in areas not connected with abuse or neglect." *In re Key*, 119 Wn.2d 600, 607, 836 P.2d 200 (1992) (emphasis added). For example, DSHS "absent good cause, shall follow the wishes of the natural parent regarding the placement of the child." *Id.* (quoting RCW 13.34.260). The lower courts did not err when they considered the corroborating evidence of Johnston's continued consent to and fostering of the parent-child relationship between A.F.J. and Franklin during the dependency.

Finally, categorically denying the benefits of the *de facto* parentage doctrine to children who have been removed from their biological parents is

not necessary to achieve the goals of the foster system, and in fact would thwart those goals. Regardless of whether dependency ends with a child being reunited with the biological parent, as here, or with the termination of that particular parental bond, Washington law should sustain rather than discourage the ongoing parent-child relationship with a *de facto* parent. As DSHS observes, dependent children benefit from being placed with a person they are already attached to. DSHS Amicus Br. at 2-3. As in this case, these include the adult who *a court* might ultimately determine to be a *de facto* parent under *L.B.* DSHS's often triaged placement decisions are no substitute for a careful judicial determination. And courts applying the *L.B.* factors should not have their hands tied by the fact that a child had the good fortune of remaining with a *de facto* parent while the biological parent was cleaning up his or her life.

In this case, Johnston consented to and encouraged the parent-child relationship between Franklin and A.F.J., both before and after A.F.J. was found to be dependent as to his biological mother. As Johnston repeatedly testified, Franklin is A.F.J.'s other mother. This Court should affirm the lower courts' *de facto* parentage determination.

II. ARGUMENT

A. The Court May Affirm The Lower Courts' *De Facto* Parentage Determination Without Reaching The Foster Care Issues Raised By DSHS.

DSHS acknowledges that a person who has cared for a dependent child may be found to be a *de facto* parent based on facts “outside the dependency proceeding.” DSHS Amicus Br. at 5. Because the trial court’s parentage determination is indeed based on such facts, this Court may affirm the judgment without reaching the question of how *L.B.* might apply to the myriad factual scenarios presented by families in the foster system.

First, the Court may conclude that Johnston is judicially estopped by her repeated representations to the trial court that Franklin is A.F.J.’s other mother. *See* Respondent’s Supplemental Brief at 8-13.

Second, facts outside the dependency support the trial court’s determination that Franklin satisfies each *L.B.* factor.¹ As the Court of Appeals observed in addressing identical arguments by DSHS below, “The

¹ This Court recently denied Ms. Franklin’s motion pursuant to RAP 9.10 to include additional materials that were before the trial court but not designated as part of the appellate record. *See In re Parentage & Custody of A.F.J.*, 161 Wn. App. 803, 806 n.2, 260 P.3d 889 (2011) (observing that the record was “incomplete” and the court had “been provided with none of the exhibits admitted at trial”). However, the information in each of these exhibits is corroborated elsewhere in the appeal record. *See, e.g.*, CP 286 (text of handwritten note from Johnston); CP 499 (Johnston acknowledges that Franklin is one of A.F.J.’s mothers); CP 646-47 (Johnston referred to Franklin at a co-parent); CP 1089 (Johnston agreed that Franklin would be the primary caregiver while she addressed her addictions).

policy concerns raised by DSHS are not implicated where, as here, the parent-child relationship was nurtured prior to any fostering relationship.” 161 Wn. App. at 896. Thus, “an individual who served in a parental role to a child prior to becoming a foster parent to that child would likely qualify as a *de facto* parent.” *Id.* (citing Am. Law Inst., Principles of the Law of Family Dissolution: Analysis & Recommendations, § 2.03 cmt. (c)(ii), ill. 21, at p. 121 (2003)).²

As the trial court found, Franklin undertook a permanent, unequivocal, parental role – even before A.F.J.’s birth, as well as during the months between his birth and DSHS’s intervention in response to Johnston’s neglect. CP 315, 748-49, 1088. Likewise, as the trial court found, Johnston consented to and encouraged the parent-child relationship between A.F.J. and Franklin even before she consented to his placement with Franklin in the dependency order. CP 748-49, 573-75, 1088. Irrespective of their relationship to DSHS, both Franklin and Johnston had a parental relationship with A.F.J. This Court may therefore affirm the lower courts’ *de facto*

²As DSHS notes, a separate comment to the American Law Institute Principles of the Law of Family Dissolution suggests that a “significant period of time” for purposes of *de facto* parentage determinations is at least two years. DSHS Amicus Br. at 9. But no Washington court has adopted such a rigid time deadline, which would be inconsistent with the flexible case-by-case approach under *L.B.* The ALI comment also does not address the situation of young children who have spent their entire life with a *de facto* parent, or the interplay between the “significant time” determination and the partial limbo created by the dependency process.

parentage determination without reaching either the impact of Franklin's obtaining a foster license as ordered by the trial court, or the general foster care issues raised by the Department.

B. The Trial Court Properly Exercised Its Discretion In Applying The *De Facto* Parentage Doctrine To A.F.J. And Franklin's Relationship.

Even if the Court chooses to reach the role of the foster care system generally, it should nevertheless affirm the lower courts' *de facto* parentage determination. In asking this Court to adopt a rule categorically excluding any person who serves as foster care provider from consideration as a *de facto* parent, DSHS identifies "three reasons":

First, a placement in a dependency proceeding is intended to be temporary and does not evince a permanent parental role for the caregiver. Second, once the state intervenes and is granted custody of a child, a parent can no longer be considered to have affirmatively fostered and consented to a permanent parenting role for a foster parent. Finally, legislative intent and public policy strongly supporting safe reunification of families does not support finding foster parents to be *de facto* parents.

DSHS Amicus Br. at 9. DSHS's stated concerns do not justify the Department's proposed rule.

1. Franklin fully and completely undertook a permanent parental role.

As this Court recognized in *L.B.*, in addition to the threshold requirement of the other parent's consent, the central inquiry for *de facto*

parentage is whether the petitioner has “fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.” *Id.* at 708. Substantial evidence supports the trial court’s conclusion that Franklin met this requirement – both before and after the dependency was established. *See, e.g.*, CP 573-74 (Franklin desired to care for A.F.J. immediately after his birth); CP 946 (A.F.J. knew Franklin his entire life and received “excellent, loving care”); CP 1121 (Franklin desired that A.F.J. be placed with her long term). As with any dissolution, the fact that the couple eventually separated and now dispute custody should not result in A.F.J. losing one of his parents.

DSHS confuses Franklin’s temporary status as the designated caregiver during Johnston’s dependency proceedings with the separate *familial* role that Franklin has held since A.F.J.’s birth – as the person who has continuously nurtured, raised, and loved him for the entire six years of his life. As the Court of Appeals observed, individuals “who take children into their homes primarily out of family affinity may be de facto parents even if, as a result of taking a child into their home, they are able to qualify for welfare benefits, foster-care payments, or other forms of financial assistance.” 161 Wn. App. at 821 (citing Am. Law Inst., *supra*, § 2.03, cmt. (c)(ii), at p. 120). Like the parties in *L.B.* itself, A.F.J.’s family involves a

same-sex couple.³ But many children who benefit from *de facto* parentage come from other kinds of family configurations. The Court of Appeals pointed to a sadly typical illustration:

Since her birth, three-year-old Simone has lived with and been cared for by her grandmother, Julia, while her mother, Fortune, drifted in and out of her life. Recently, at the suggestion of a social worker, Julia applied for a state foster-parent license. She is now receiving foster-care payments under a relative foster-care program.

Julia may qualify as a *de facto* parent, even though she receives foster-care payments to help support Simone, because the caretaking arrangements arose for familial reasons and not primarily for financial ones.

161 Wn. App. at 821 (citing Am. Law Inst., *supra*, § 2.03, cmt. (c)(ii), ill. 21, at p. 121). Similarly, Franklin is not a traditional foster parent, but rather is the person who had essentially served as A.F.J.’s other parent since birth. As the Court of Appeals recognized, “The distinction between these two types of fostering relationships is of significant consequence in determining whether a foster parent can establish *de facto* parent status.” 161 Wn. App. at 822. The lower courts properly determined that Franklin had “fully and completely

³ DSHS suggests that the *de facto* parentage doctrine should be limited to couples like the women in *L.B.*, with their more stable partnership and planned pregnancy. DSHS Amicus Br. at 13. But children who come from troubled homes and whose lives intersect the foster system also deserve the protection of *L.B.*

undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." *L.B.*, 155 Wn.2d at 708.

2. Johnston continued to consent to the parent-child relationship even after the order of dependency.

DSHS's primary argument is that because a biological "parent's rights are temporarily abridged during a dependency," he or she "cannot be deemed to have affirmatively fostered or consented to a placement made in the dependency." DSHS Amicus Br. at 13; *see also id.* at 13-14 ("Once the state has custody of a child, a natural parent no longer has the right to independently consent to and encourage a family-like relationship between an nonparent and the child"). DSHS offers no legal authority for this proposition. *Id.* To the contrary, this Court has held that "parental wishes *are* appropriate in areas not connected with abuse or neglect." *In re Key*, 119 Wn.2d at 607 (emphasis added). For example, DSHS "absent good cause, shall follow the wishes of the natural parent regarding the placement of the child." *Id.* (quoting RCW 13.34.260).

DSHS's citations for the general proposition that a "parent's placement and decision-making authority is temporarily constrained" during dependency, Br. at 14, actually confirm that a dependency order does not divest a parent of free will, or preclude her from fostering a *de facto* parent-child relationship if it is "not connected with abuse or neglect." *In re Key*,

119 Wn.2d at 607. For example, RCW 13.34.062 requires DSHS to provide notice to any parent involved in dependency proceedings that absent “good cause” the Department “*must* follow the wishes of a natural parent regarding placement of a child. You should tell your lawyer and the court where you wish your child placed immediately, including whether you want your child placed with you, with a relative, or with another suitable person,” including with “*another parent.*” RCW 13.34.062(2)(b) (emphasis added). *See also* RCW 13.34.130(2) (“Absent good cause, the department or supervising agency shall follow the wishes of the natural parent regarding the placement of the child in accordance with RW 13.34.260”).

Tellingly, DSHS fails to provide any citation to the record for its suggestion that Johnston never consented to A.F.J.’s placement with Franklin. DSHS Amicus Br. at 13. In fact, Johnston herself requested that A.F.J. remain with Franklin. *See, e.g.*, CP 17, 845, 983, 1088-89. Moreover, even though the formal foster *placement* was obviously made during the dependency, the parent-child relationship existed separately from the parties’ legal status. Johnston’s own conduct provides substantial evidence supporting the trial court’s determinations under each of the relevant *L.B.* factors. Johnston “consented to and fostered the parent-like relationship” between A.F.J. and Franklin. 155 Wn.2d at 708. *See, e.g.*, CP 1088-89. And

A.F.J. and Franklin “lived together in the same household,” 155 Wn.2d at 708, with Johnston’s explicit blessing. *See, e.g.*, CP 315, 573-75, 1085.

Under *L.B.*, *de facto* parent status “can be achieved *only* through the active encouragement of the biological or adoptive parent.” 155 Wn.2d at 712 (emphasis added). Johnston’s continued encouragement of the parent-child relationship between A.F.J. and Franklin during the dependency proceedings was “not connected with abuse or neglect.” *In re Key*, 119 Wn.2d at 607. In applying *L.B.* to the specific facts of this case, the lower court was permitted to consider Johnston’s conduct both before and after dependency.

3. Preserving *de facto* parent-child relationships is consistent with the State’s foster care goals.

As DSHS observes, “the family unit is a fundamental resource of American life which should be nurtured.” DSHS Amicus Br. at 15 (quoting RCW 13.34.020). But the “family unit that RCW 13.34.020 seeks to nurture is the family in which the child has lived ‘virtually his entire life, and to whom he has ‘psychologically bonded.’” *In re Dependency of J.S.*, 111 Wn. App. 796, 805, 46 P.3d 273 (2002) (quoting *In re Dependency of Ramquist*, 52 Wn. App. 854, 862, 765 P.2d 30 (1988)). DSHS agrees that *de facto* parents “stand in legal parity to an otherwise legal parent.” DSHS Amicus Br. at 16. They are part of the child’s family. Categorically denying the

benefits of the *de facto* parentage doctrine to children who have been removed from their biological parents is not necessary to achieve the goals of the foster system. To the contrary, such a bright-line approach would irreparably injure children like A.F.J., and would hamper courts' ability to resolve disputes on a case-by-case basis.

Only a court can make the legal determination whether a particular individual is indeed a *de facto* parent in a specific case. DSHS expresses concern that judicial resolution of *de facto* parentage might interfere with other proceedings involving a child. DSHS Amicus Br. at 17. But the superior courts have jurisdiction over each of these related disputes, and – as here – are fully capable of managing the sequence and relationship between issues in a manner that serves the best interest of children while preserving judicial resources. Nothing about the *de facto* parentage doctrine expands the rights of foster parents *as foster parents*, regardless of whether the child is placed with a traditional foster parent, a relative as defined by statute, or another suitable adult. In cases where the *de facto* parent also wears a foster “hat” for a time, courts are able to distinguish between the rights and responsibilities of each role.

Every dependency action involves two potential outcomes – the hoped-for reunification with the biological parent, or a permanency plan involving some alternative arrangement. Regardless of which occurs, courts

should sustain rather than discourage the ongoing parent-child relationship with the child's *de facto* parent.

C. Like The Petitioner In *L.B.*, Franklin Has No Statutory Remedy To Protect Her Parent-Child Relationship With A.F.J.

DSHS concludes its amicus brief with a cursory argument that there is “no statutory void triggering application of the *de facto* parent doctrine.” DSHS Amicus Br. at 19. However, as the Court of Appeals correctly determined, “no statutory remedies were available to Franklin.” *In re A.F.J.*, 161 Wn. App. at 816. *See also* Brief of Amici Curiae Legal Voice and Center for Children & Youth Justice at 10-14.

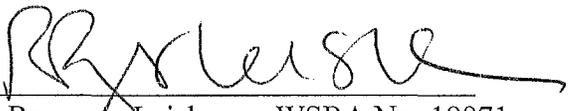
Any person, regardless of whether he or she has received a foster license, may file a third-party custody action – including the petitioner in *L.B. A.F.J.*, 161 Wn. App at 817 n.7. In Franklin’s case, such an approach obviously could not “provide an adequate remedy, given that this remedy was expressly disallowed by the trial court.” *Id.* Likewise, Franklin could not rely on the statutory mechanisms for seeking custody of a legally free child from the foster system – because Johnston successfully avoided termination of her parental rights *by representing to the court that Franklin was A.F.J.’s other mother.* *See, e.g.*, CP 1098; RP (4/24/08) at 6:19-23. The *de facto* parentage doctrine is necessary to protect A.F.J.’s parent-child relationship with Franklin.

III. CONCLUSION

With Johnston's consent, Mary Franklin undertook a permanent, unequivocal, committed and responsible parental role in A.F.J.'s life – before, during, and after the period when she was foster licensed. Franklin agrees with DSHS that under the *L.B.* standard, a petitioner could not establish *de facto* parentage “*merely* because a child was placed with her during a dependency proceeding.” DSHS Amicus Br. at 3 (emphasis supplied). In this case, however, Franklin had already undertaken an unequivocal and permanent parental role before A.F.J. was declared to be dependent as to his biological mother. Johnston actively encouraged that parent-child relationship after the dependency was established. The fact that Franklin continued to parent A.F.J. during dependency proceedings, for his benefit and with his other mother's consent, should not bar Franklin from invoking the equitable *de facto* parentage doctrine. This Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

DAVIS WRIGHT TREMAINE LLP

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CERTIFICATE OF SERVICE

I, Suzette Barber, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct. I am over the age of 18 years and not a party to the within cause. I am employed by the law firm of Davis Wright Tremaine LLP and my business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

On March 2, 2012, I caused to be served the attached document entitled **MARY FRANKLIN'S ANSWER TO AMICUS CURIAE BRIEF OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES** to the following individuals:

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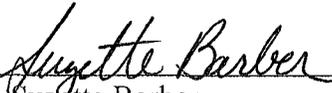
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I certify under penalty of perjury under the laws of the State of
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Executed this 2nd day of March, 2012, at Seattle, Washington.


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