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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE CUSTODY OF A.F.J.;

MARY FRANKLIN,

Respondent,

v.

JACKIE JOHNSTON,

Petitioner.

JACKIE JOHNSTON'S ANSWER
TO BRIEF OF AMICI CURIAE LEGAL VOICE AND
CENTER FOR CHILDREN & YOUTH JUSTICE

Dennis J. McGlothin, WSBA No. 28177
Robert J. Cadranel, WSBA No. 41773
Attorneys for Petitioner

OLYMPIC LAW GROUP, PLLP
2815 Eastlake Ave. E., Suite 170
Seattle, Washington 98102
(206) 527-2500

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I. ARGUMENT

A. All Families Should Be Treated Equally.

This case is not about gay and lesbian rights. This case is about civil rights, and in particular the fundamental right of parents to the care, custody, and nurture of their children.¹ Washington law should treat all families equally; whether the parents in those families are gay, straight, or lesbian; and whether those parents are married, in a state-registered domestic partnership, or neither.

The Alaska Supreme Court addressed the issue of unmarried heterosexual couples in *Osterkamp v. Stiles*,² agreeing with the court below that no parental rights accrue during a fostering relationship, even though Osterkamp and Stiles had a pre-existing relationship with each other and considered themselves to be domestic partners long before the child entered their lives.

Key to the *Osterkamp* decision was determining the relevant period for the custody action, which the court said ran from the time Stiles adopted the child until Osterkamp filed suit for custody.³ The court ruled that the time as a foster parent, which was prior to the adoption, could not be included for several reasons: because policy favors protecting families

¹ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

² 235 P.3d 178 (Alaska 2010).

³ *Id.* at 186.

from disruption by foster parents; because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary care for children; because the ultimate goal of foster care is for the child either to be returned to the biological parents or adopted, either by the foster parents or another third party; and because of the difficulty of ascertaining whether a foster parent has become a psychological parent or is serving the child's needs in another capacity.⁴

Protecting the state-run child welfare system, as well as the biological parent's expectations when the state suspends and usurps their decision-making authority over their child until they are fit to resume that decision-making authority, requires this Court to define the relevant time period for *de facto* parentage consideration as the period between the time the petitioning parent enters the child's life after birth and the time the state files for dependency and makes the placement decisions for the child. Here, that period would be after A.F.J.'s birth in November 2005, and until his removal by CPS in January of 2006, which is a total of time less than two months. In both *Osterkamp* and this case the child was bonded to the petitioning parent, but the bond was created primarily by the state. The bond created by the parties' private action was insufficient in duration to establish the long-term, deeply bonded relationship required

⁴ *Id.* at 187.

under *L.B.* for recognition of *de facto* parent status.⁵ The major difference between this case and *Osterkamp* is this case involves former same gender partners and *Osterkamp* former heterosexual partners. This is not a valid basis to distinguish this case from *Osterkamp*.

Similarly, whether a couple is married or not should not make a difference. In *M.F.*,⁶ this Court considered the case of a married heterosexual couple and ruled that the *de facto* parentage doctrine did not extend to a stepparent/stepchild relationship because the child had two existing parents when the stepparent entered the stepchild's life.⁷

Like *M.F.*, there should be no different treatment for a same gender couple that, at the time, could not marry. Had Franklin married Johnston, she would have been a stepparent to a child with two existing parents. Even if the Court of Appeals is correct that A.F.J.'s biological father's

⁵ "To establish standing as a *de facto* parent we adopt the following criteria... (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the 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. In addition, recognition of a *de facto* parent is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." *In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005) (internal citations and quotation marks omitted).

⁶ *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010).

⁷ *Id.* at 532.

parental rights were terminated by court order, this did not occur until July 26, 2007 well after the state involvement.⁸

B. Constitutional Analysis is Required.

Amici Curiae Legal Voice and the Center for Children & Youth Justice incorrectly assume that Franklin enjoyed *de facto* parent status since A.F.J.'s birth, or very shortly after, stating, "She [Franklin] was his [A.F.J.'s] mother before he entered the child welfare system."⁹

1. Under Both the Duration Requirement of *L.B.* and the ruling in *State ex rel. D.R.M. v. Wood*, Franklin was not a *De facto* Parent at the Child's Birth or When Dependency Commenced.

All other factors aside, *L.B.*'s durational requirement alone precludes Franklin from having been A.F.J.'s *de facto* parent at the time the dependency commenced in January, 2006 because the child had been born for only two months when dependency commenced. *L.B.* requires a *de facto* parent have been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.¹⁰ In this case, A.F.J. and Johnston living part time with Franklin from December 24, 2005 through January 26, 2006 was not sufficient time to develop such a relationship.

⁸ *In re Custody of A.F.J.*, 161 Wn. App. 803, 824 n.10, 260 P.3d 889 (2011).

⁹ Amici Br. at 17.

¹⁰ *L.B.*, 155 Wn.2d at 708.

Moreover, the time a couple spends planning to co-parent prior to a child's birth does not establish *de facto* parentage. In *State ex rel. D.R.M. v. Wood*, two lesbian partners whose living and financial arrangement were consistent with marriage agreed to bring a child into their family; one of the women then made several attempts to become pregnant via artificial insemination.¹¹ Before the women learned that the final attempt had been successful, their relationship began to founder.¹² When they learned of the pregnancy, however, they entered couples' counseling, which was ultimately unsuccessful.¹³ Six months before the birth, one of the women, Wood, had moved out of the home and begun making support payments to her pregnant former partner.¹⁴ Ten months after the birth, the payments ceased, and the child's mother applied for and began receiving public assistance.¹⁵ The state soon filed a petition to establish parentage and a child support obligation on Wood.¹⁶ The state argued that Wood should be held to be a parent because she had been in an intimate relationship with the mother, had intended for a child to be born and be part of the domestic household, her overt actions directly led to the birth

¹¹ *State ex rel. D.R.M. v. Wood*, 109 Wn. App. 182, 186, 34 P.3d 887 (2001).

¹² *Id.* at 186-87.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

of the child, and she financially or otherwise supported the conception.¹⁷ The court, however, ruled that “Wood is not a parent of the child and is not obligated to support the child as a parent.”¹⁸ Additionally, the court flatly declined to create a new cause of action for an “intended parent.”¹⁹ The pre-birth planning did not establish parentage.

2. Franklin Could Not Have Met the L.B. Requirements at the Time the Dependency Commenced.

As of January 25, 2006, the day before the state commenced dependency proceedings, Franklin could not have qualified as a *de facto* parent. She had not been present at the child’s birth²⁰ on November 20, 2005. Prior to December 24, 2005, Franklin had only two overnight visits with the child.²¹ Thereafter, and until A.F.J. was removed on January 26, 2006, he and Johnston lived with Franklin only half of the time.²² There was not enough contact to satisfy either *L.B.*’s durational requirement or its requirement of having fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role. At that time, Franklin had not achieved *de facto* parent status.

¹⁷ *Id.* at 193-94.

¹⁸ *Id.* at 191.

¹⁹ *Id.* at 195.

²⁰ RP 22:15-21 (Johnston, 4/8/2009).

²¹ CP 709, Finding of Fact 2.12(K), ln 23-24; RP 53:17-20 (Johnston 3/30/2009).

²² RP 16:4-16 (Franklin 3/26/09); and RP 24:17-25:4 (Johnston 4/8/2009).

To be sure, in April 2006 the dependency court found and concluded that A.F.J. had no parent capable of caring for him when it entered its dependency order.²³ This order was never appealed and became final. Amici's position that Franklin was A.F.J.'s *de facto* parent prior to the dependency is contrary to the dependency court's final order and is legally incorrect. Franklin must have, therefore, crossed the line, satisfied the *L.B.* duration requirement, and achieved *de facto* parent status during the dependency and, therefore, through state action.

3. Because Amici Incorrectly Assumes Franklin was the Child's *De facto* Parent Since Birth, Its Analysis is Incorrect.

If Amici's assumption is incorrect regarding when Franklin became a *de facto* parent, then Amici's entire analysis is off the mark. Here, the state did not allow Franklin to continue being a *de facto* parent; rather, state action fulfilled and completed the required *L.B.* factors by fostering and encouraging the relationship between A.F.J. and Franklin; placing the child in the same household with Franklin; and putting Franklin in a parental role for a length of time arguably sufficient to establish a bonded, dependent relationship.

4. Because Dependency is a Comprehensive Statutory Scheme, and Because the State Fulfilled the *L.B.* Requirements, There is No Statutory Gap.

²³ CP 909-24.

L.B. is predicated on the existence of a statutory gap having made it necessary for this Court to fashion a common law remedy.²⁴ Here, there is no statutory gap. Dependency itself is a comprehensive statutory scheme with no gaps, in which the state assumes exclusive authority for decision making and placement, the state suspends and usurps a parent's decision making rights. The state decides temporary placement and establishes a fostering relationship while parents receive services. If the parents become fit, then the parents and child are reunified, and the parents have the same parental rights they had when the state became involved. If the parents do not become fit, then the state terminates the parents' parental rights and someone else becomes the child's guardian or adoptive parents.

5. Because the State and not Johnston fulfilled and completed the *L.B.* Factors, Strict Scrutiny Analysis is Required.

This Court determined in *L.B.* that the rights and responsibilities attaching to *de facto* parents do not infringe on the fundamental liberty interests of the other legal parent in the family unit because *de facto* parenthood is "a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children

²⁴ *L.B.*, 155 Wn.2d at 683.

that accompany the family.”²⁵ In other words, there was no state involvement creating the *de facto* parent relationship in *L.B.* State involvement was limited to recognizing what an insular family unit created for itself.²⁶

This is the fundamental difference between this case and *L.B.* Here, the state is doing much more than recognizing a family that private individuals created for themselves. Because Franklin fulfilled and completed all the *L.B.* factors during the state-controlled dependency, state action created Franklin’s *de facto* parent status. Because state action fulfilled the requirements, a strict scrutiny analysis should be required.²⁷ If the state causes the *L.B.* requirements to be completed and fulfilled after state action suspended and usurped the legal parent’s rights, the state is infringing upon that parent’s fundamental liberty interest to make decisions involving her or his child *in the first instance*.²⁸ The state, and not the parent, is creating the familial bond.

Johnston’s fundamental constitutional parental rights were infringed upon by the state. When A.F.J. entered dependency, Johnston had full parental rights, including the right to decide A.F.J.’s access to Franklin.

²⁵ *L.B.*, 155 Wn.2d at 712.

²⁶ *Id.* (“The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents....”)

²⁷ *In re Custody of Smith*, 137 Wn.2d 1, 13-15, 969 P.2d 21 (1998).

²⁸ *Troxel*, 530 U.S. at 70.

When she became fit and emerged from dependency, Johnston had lost the right to determine A.F.J.'s access to Franklin in the first instance. The state decided A.F.J.'s access to Franklin. To make matters worse, Johnston now has to seek state action to change A.F.J.'s access to Franklin as situations change and she has to establish the child's current environment is detrimental.²⁹ Such an outcome occurred as a by-product of state action and Johnston had no reasonable notice that it was occurring, the basic requirements of procedural due process were not met.³⁰ Such an outcome is contrary to a parent's expectation when entering a dependency, and contrary to legislative intent regarding the a dependency's purpose, which is to reunite a child with its legal parent or parents after parenting deficiencies have been addressed and remedied.³¹

C. As a Matter of Policy, State Action Should Not Be Able to Cause a Person to Meet the *De facto* Parentage Requirements During a Dependency, nor Should Common Law Create *De facto* Parents During a Dependency.

Since there is little doubt that Franklin could not have established *de facto* parent status prior to the dependency commencing, the only way for this Court to affirm the Court of Appeals is to tack on the time Franklin spent as a foster parent to the time she spent with the child prior to the

²⁹ RCW 26.09.260(2).

³⁰ *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

³¹ See *L.B.*, 155 Wn.2d at 692 n.7, citing *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991).

dependency when determining *de facto* parent status. For reasons more fully explored in the DSHS' Amicus Brief, if licensed or unlicensed foster parents who cared for a dependent child prior to dependency were allowed to tack on the time they spent caring for the child during the fostering relationship, then the legislative intent and public policy behind dependency—reuniting the parent with the child and fully and completely restoring the parent's parental rights to the same level there were before the dependency—would be undermined. With a stepparent who cared for a child prior to the child being adjudicated dependent, such a result would also conflict with the holding in *M.F.*

D. This Case is Distinguishable From *L.B.*

This case is not *L.B.* Other than both cases involve former lesbian partners and a child, the two cases have little else in common.

1. A.F.J.'s sufficiently bonded relationship for a sufficient duration with Franklin resulted from State action.

First, *L.B.* involved a parent-child relationship created by private action. In *L.B.*, the natural parent consented to and fostered a parent-like relationship and lived with her child and the *de facto* parent in the same household for a length of time sufficient for the *de facto* parent to establish with the child a bonded, dependent relationship, parental in nature. A.F.J.'s dependency commenced when was about 10 weeks old.

The state action suspended and usurped Johnston's right to make placement and other decisions for A.F.J. and, therefore, precluded Johnston from consenting to any living arrangement for her child. All determinations regarding the child's living arrangements rest with the state. When the state commences a dependency action, the action is not intended to be permanent. In fact, the trial court never found the fostering relationship between Franklin and A.F.J. was permanent. Because the child was only two months old when the dependency began, state action determined his caregiver for 98% of his life.

State action cannot fulfill and complete the *L.B.* factors and, thereby, reduce a parent's parental rights while a child is in dependency without due process of law. State action cannot create the family unit glowingly described in *L.B.* as resulting from "the active encouragement of the biological or adoptive parent... affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family."³² Such state action would require constitutional analysis using the strict scrutiny standard because such action infringes on the fundamental liberty interest of parents in making decisions about raising their children. Here, it was the state's partnership with Franklin and not Johnston's partnership with Franklin that created 98% of the care-giving

³² 155 Wn.2d at 712.

relationship between Franklin and A.F.J. In conclusion, once state action intrudes into a family's private affairs and makes placement and care-giving decisions that are necessary to complete and fulfill the *L.B.* factors, strict scrutiny constitutional analysis is required.

2. *L.B.*'s requisite element of intent was not present here.

The *L.B.* test includes a clear element of intent. Under *L.B.*, the natural or legal parent must "consent[] to and foster[] the parent-like relationship"³³ and "affirmatively establish[] a family unit with the *de facto* parent and child or children that accompany the family."³⁴

Amici argues that it does not matter to A.F.J. what his biological mother intended because he just wants to be loved and protected.³⁵ But the issue here is not whether A.F.J. will continue to be loved and protected. Because Johnston was found to be a fit parent, who presumptively acts and will continue to act in his best interests, the presumption is that A.F.J. will be loved and protected. The issue is whether Franklin is to be afforded *de facto* parent status, a status that "stands in legal parity with an otherwise legal parent."³⁶ Under *L.B.*, the relationship must have resulted from the legal parent's intent. The state cannot provide that ongoing intent through placement decisions.

³³ 155 Wn.2d at 708.

³⁴ *Id.* at 712.

³⁵ Amici Br. at 9.

³⁶ *L.B.*, 155 Wn.2d at 708.

3. Franklin had an expectation of compensation.

Black's Law Dictionary defines compensation as "Remuneration and other benefits received in return for services rendered."³⁷ The foster care payments Franklin received were in return for the services she rendered the state in caring for A.F.J. during the dependency. She expected to receive, and did receive, such payments. These payments defrayed her child rearing costs. In addition, the state provides for daycare, counseling, and medical care. Finally, Franklin did not have to pay any child support. Because she received foster care payments from the state, Franklin cannot be said to have met the L.B. requirement of "fully and completely undertak[ing] a permanent, unequivocal, committed, and responsible parental role in the child's life."³⁸ She might have provided care-giving, but she did not bear the full financial burden associated with being a parent. To be sure, when the trial court ordered Franklin to pay \$215 a month in child support for the benefit of her newly adjudicated *de facto* child, she promptly appealed. This alone militates against her having fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.

4. *L.B.*'s Duration Element Was Not Met.

³⁷ *Black's Law Dictionary* 301 (8th ed. 2004).

³⁸ *L.B.*, 155 Wn.2d at 708 (citation omitted).

Among the criteria for recognition as a *de facto* parent that this Court adopted in *L.B.* is that the petitioner must have “been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.” The *L.B.* decision referenced, but did not adopt, the *ALI Principles*, which define *de facto* parents as individuals who lived with a child for not less than two years and with the agreement of a legal parent performed caretaking functions equal to or greater than the legal parent.³⁹ Even though *L.B.*’s durational standard is more flexible than “not less than two years,” two overnights during the first month of a child’s life and living half-time with the child during the second month of the child’s life is not time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

5. Franklin Had Not Permanently Assumed a Parental Role.

Aside from two earlier overnight visits, Johnston and A.F.J. lived with Franklin only half of the time during approximately one month, at best two weeks of cohabitation with the child. She had not fully and unequivocally assumed a parental role in A.F.J.’s life when dependency commenced. The state, which created the relationship between Franklin and A.F.J. after the dependency, insisted on Franklin becoming a licensed

³⁹ 155 Wn.2d at 706 n.24.

foster parent, which by definition, is not permanent.⁴⁰ This explains why the trial court did not make a finding that Franklin's relationship with A.F.J. was permanent.⁴¹ Division One erred in implying such a finding.⁴²

6. Johnston Never Established a Complete Family Unit Including Herself, Her Child, and a *De facto* Parent.

L.B. expressly states that *de facto* parent status "can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family."⁴³ This paragraph in *L.B.* cites a case from the Massachusetts Supreme Judicial Court, *E.N.O. v. L.M.M.* The *E.N.O.* court stated, "The family that must be accorded respect in this case is the family formed by the plaintiff, the defendant, and the child."⁴⁴

The parties in *E.N.O.* were two women who shared a committed, monogamous relationship for 13 years.⁴⁵ They availed themselves of every legal mechanism for signifying themselves life partners.⁴⁶ They planned to become parents and decided that one of them should become

⁴⁰ *Smith v. Org. of Foster Families for Equal.*, 431 U.S. 816, 855, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (foster families have a lesser constitutional interest in remaining together than does the natural family), and *J.H.*, 117 Wn.2d at 469.

⁴¹ *Baillargeon v. Press*, 11 Wn. App. 59, 67, 521 P.2d 746 (1974), review denied, 84 Wn.2d 1010 (1974). (The failure of a trial judge to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof.)

⁴² *A.F.J.*, 161 Wn. App. at 823.

⁴³ 155 Wn.2d at 712.

⁴⁴ *E.N.O. v. L.M.M.*, 429 Mass. 824, 833, 711 N.E.2d 886 (1999).

⁴⁵ *Id.* at 825.

⁴⁶ *Id.*

pregnant through artificial insemination.⁴⁷ Both attended all the insemination sessions and participated in all medical decisions.⁴⁸ Both were involved in pre-natal care, and they were present together at the birth in February, 1995.⁴⁹ Before the child was born, the parties executed a coparenting agreement, expressing the parties' intent that the non-biological mother retain her parental status even if the parties separated.⁵⁰ After the child was born, the non-biological mother assumed most of the financial responsibility for the family.⁵¹ Later, for approximately seven months, she also assumed primary care for the child.⁵² The couple separated in May, 1998, when the child was age three.⁵³ The biological mother then denied her former partner access to the child.⁵⁴

In *E.N.O.*, just as in *L.B.*, the legal parent affirmatively established a longstanding family unit including all three of herself, her child, and a *de facto* parent. Johnston never affirmatively established a family unit including all three of herself, A.F.J., and Franklin. Even if Johnston could be said to have established a family unit in the few weeks leading up to the dependency, when she and A.F.J. lived with Franklin half the time,

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 826.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

that approximately one-month period cannot by itself meet *L.B.*'s durational requirement. Even if the foster parenting period could be added to the analysis, any so-called "family unit" during that period included only Franklin and A.F.J., without Johnston. The common law remedy fashioned in *L.B.* is intended to preserve a longstanding adult-child relationship, parental in nature, after a *family* dissolves. Here, there was no such longstanding family unit including all three of a biological parent, a *de facto* parent, and a child.

E. This is Not the Case in Which to Delineate the Child's Constitutional Rights.

1. This Issue is Raised for the First Time by Amici and There Is Inadequate Factual Development and Briefing.

Amici invites this Court to consider what constitutional rights A.F.J. himself might have to continue his relationship with Franklin. Neither party briefed or argued the issue of A.F.J.'s constitutional rights. While there is authority to affirm a trial court's judgment on a different theory than the theory relied upon by the trial court, that relief is limited to situations where the "theory was argued by the parties below."⁵⁵ Amici has not shown this was argued below.

Not only has this important issue not been adequately briefed, it has also not been adequately developed factually. The rule that allows

⁵⁵ *Lew v. Seattle School Dist. No. 1*, 37 Wn. App. 575, 579, 736 P.2d 690 (1987) citing *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976).

appellate courts to affirm a trial court's erroneous reasoning on different grounds requires the parties have had a full and fair opportunity to develop facts relevant to the decision.⁵⁶ Here, the record is insufficient to support the factual and legal development of such an important matter.

2. Extant Authority Comparing Parents and Children's Constitutional Rights is Scant.

There is little doubt children have some constitutionally protected liberty interest in maintaining familial relationships. This Court has recently held children have such a liberty interest in dependency proceedings and that this liberty interest is entitled to be protected through due process. Children and their guardians ad litem must be able to request counsel to represent their interests in dependency proceedings.⁵⁷ In its analysis, however, this Court compared the children's and parent's respective rights to due process protection against state action; it did not compare their respective liberty interests against each other. Our state dependency statutes evidence a public policy preference for a parent's fundamental constitutional right to parent their children when compared to a child's right to maintain familial relations. RCW 13.34.090 requires courts to appoint counsel to indigent parents.

⁵⁶ *Bernal*, 87 Wn.2d at 414.

⁵⁷ *In re Dependency of M.S.R.*, ___ Wn.2d ___, 2012 WL 664005, at *10 (March 1, 2012).

RCW 13.34.100(6) gives courts discretion to deny a child's right to appointed counsel. This comports with Justice Stevens' dissent in *Troxel*:

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S., at 130, 109 S.Ct. 2333 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.⁵⁸

However, he added, "This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests."⁵⁹ Similarly, in Justice Bridge's concurrence in *In re Custody of Shields*, she suggested children have a constitutionally protected liberty interest, but never ascribed any weight vis-a-vis the parent's rights.⁶⁰

3. Johnston was Found to Be a Fit Parent, and a Fit Parent is Presumed to Act in Her Child's Best Interests.

Whatever rights A.F.J. might have, there is no evidence that Johnston will harm any of those rights or cut off Franklin's access to him. Johnston was found to be a fit parent. A fit parent is presumed to act in her child's best interests.⁶¹ Johnston testified that she wanted Franklin to be part of

⁵⁸ *Troxel v. Granville*, 530 U.S. 57, 88, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (Stevens, J., dissenting).

⁵⁹ *Id.* at 89.

⁶⁰ 157 Wn.2d 126, 151, 136 P.3d 117 (2006) (Bridge, J., concurring).

⁶¹ *Troxel*, 503 U.S. at 68.

A.F.J.'s life, but that what she did not want was for Franklin to be granted parental rights on a par with her own.⁶² To support the argument, it should be noted Johnston was prepared to accept the state-imposed access between A.F.J. and Franklin. Johnston did not initially appeal within the required 30 days; it was Franklin who appealed her obligation to pay \$215 per month in child support. Johnston then cross-appealed because Franklin wanted the joys of being a parent, but not the financial burden.

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OLYMPIC LAW GROUP, PLLP

Dennis J. McGlothlin, WSBA No. 28177
Robert J. Cadranel, WSBA No. 41773
2815 Eastlake Ave. E. Ste 170
Seattle, WA 98102 · Phone: 206-527-2500
Attorneys for Jackie Johnston

⁶² RP 68:6-70:5 (Johnston, 3/30/2009).