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No. 63919-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Interest of:
A.F.J., Child,

MARY FRANKLIN,
Appellant/Cross-Respondent,

v.

JACKIE JOHNSTON,
Respondent/Cross-Appellant.

**BRIEF OF AMICUS CURIAE
LEGAL VOICE**

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INTRODUCTION

This case illustrates the need to maintain a flexible, child-centered *de facto* parent doctrine in Washington – one which is based on the facts and equities of each case, and which relies on a functional analysis to determine whether a person is a child's *de facto* parent, rather than on rigid labels or categorical exclusions.

This case centers on A.F.J., a five-year old boy. Mary Franklin has been one of his mothers for his entire life. While they did not plan to have A.F.J. together, Ms. Franklin and his biological mother Jackie Johnston agreed to raise him together. For the first months of his life, Ms. Franklin co-parented A.F.J. with Ms. Johnston. After Ms. Johnston's drug abuse resulted in A.F.J. being found dependent, Ms. Franklin became licensed to serve as his foster mother and did so for several years while Ms. Johnston took steps to address her drug addiction and stabilize her life. The trial court held Ms. Franklin is A.F.J.'s *de facto* parent. The court also denied her request for nonparental custody, finding that Ms. Johnston is not unfit and that Ms. Franklin cannot meet the nonparental custody standard.

This case comes with a complicated history and deeply held feelings on both sides. But the most important facts cannot reasonably be disputed, including the following findings of fact by the trial court:

- A.F.J. “loves both his mommies: Mary Franklin and Jackie Johnston.” CP 707 (FOF 2.12(A)).
- “It is absolutely clear that Ms. Franklin has been one of [A.F.J.]’s mommies since his birth.” CP 711 (FOF 2.12(R)).
- A.F.J. “is attached to Ms. Franklin, thinks of her home as his home and thinks of her as ‘mommy.’” *Id.*
- A.F.J. “would suffer detriment and would in fact be traumatized if he was cut off from contact with Ms. Franklin.” CP 709 (FOF 2.12(H)).
- “Ms. Franklin acted in every way as a parent and Ms. Johnston treated her in every way as a parent.” CP 710 (FOF 2.12(L)).

These facts go to the heart of the case. Regardless of the labels or categories that may be applied to Ms. Franklin, there is no question that she is one of A.F.J.’s mothers – the crux of the *de facto* parent doctrine as articulated by the Washington State Supreme Court in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).

The fact that Ms. Franklin also served as A.F.J.’s foster parent should not preclude the application of the *de facto* parent doctrine in this case. To be sure, a foster parent will rarely be able to satisfy the *de facto* parent test. But this is an unusual case because Ms. Franklin assumed obligations as A.F.J.’s parent, with the consent and agreement of Ms. Johnston, before becoming his foster parent. Under these circumstances, Ms. Franklin and A.F.J. must be able to rely on the *de facto* parent doctrine to preserve their parent-child relationship.

I. IDENTITY AND INTEREST OF AMICUS

Legal Voice, formerly known as the Northwest Women's Law Center, is a non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, education, legislation and the provision of legal information and referral services. Legal Voice has long worked to ensure that the law recognizes and respects the broad range of family relationships. Of particular relevance to this case, Legal Voice served as co-counsel for the petitioner in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), which recognized the status of *de facto* parents.

II. STATEMENT OF THE CASE¹

A.F.J. is a 5-year old boy born on November 20, 2005. A.F.J.'s biological mother is Jackie Johnston. The trial court held that Mary Franklin is A.F.J.'s *de facto* parent.

Ms. Franklin and Ms. Johnston were in a turbulent relationship for several years before Ms. Johnston became pregnant with A.F.J. Ms. Johnston's pregnancy was not intended by either her or Ms. Franklin. However, when Ms. Johnston discovered that she was pregnant with

¹ Legal Voice's statement of the case is drawn largely from the findings of fact and conclusions of law entered by Superior Court Judge Kimberly Prochnau.

A.F.J., she came to Washington to be with Ms. Franklin. CP 709 (FOF 2.12(J)).

Ms. Johnston and Ms. Franklin jointly agreed to raise A.F.J. as co-parents. Ms. Franklin participated in many decisions regarding the child, such whether to have him circumcised (a procedure that Ms. Franklin paid for) and giving him a name representing each of them. While Ms. Johnston was in treatment at Perinatal Treatment Services (PTS) after A.F.J.'s birth, Ms. Franklin took him home on overnight visits. When Ms. Johnston left PTS, she and A.F.J. went home to live with Ms. Franklin. Ms. Franklin worked and Ms. Johnston planned to be a stay-at-home parent. CP 709 (FOF 2.12(K)).

In late January, 2006, Ms. Franklin called CPS because she discovered that Ms. Johnston had relapsed. A.F.J. was found to be dependent and was placed with Ms. Franklin.

Ms. Franklin had every hope that she and Ms. Johnston would parent together. Ms. Franklin did not want or expect A.F.J. to be removed from the home when she called CPS, and she only became licensed as a foster parent because the Department of Social and Health Services (DSHS) required her to do so in order for A.F.J. to remain with her. Ms. Franklin's relationship with, and commitment to, A.F.J. formed before she

became licensed as a foster parent, and she did not assume his care with an expectation of compensation. CP 710 (FOF 2.12(N)).

Ms. Franklin acted in every way as a parent and Ms. Johnston treated her in every way as a parent. A.F.J. has lived in the same household with Ms. Franklin for 99% of his life. CP 710 (FOF 2.12(L)).

It is absolutely clear that Ms. Franklin has been one of A.F.J.'s mothers since his birth. He is attached to Ms. Franklin, thinks of her home as his home, and thinks of her as "mommy." Ms. Franklin has been devoted to him and has fully and unequivocally assumed a parental role. CP 711 (FOF 2.12(R)).

At trial, Ms. Johnston testified that A.F.J. has "got two mommies and I want him to have two mommies." VRP (Johnston 4/9/09) 15:19-20. She also stated that she and Ms. Franklin "both deserve just to have the same amount of time with him," (*id.* at 18:6-7), and that she wanted Ms. Franklin to participate in decisions involving A.F.J.'s upbringing. *Id.* at 19:5-10. She agreed that it would be actually detrimental to A.F.J. if Mary Franklin were not in his life. *Id.* at 23:21-24.

III. ARGUMENT

Washington's *de facto* parent test is rigorous, and there will be few cases where a foster parent meets its exacting requirements. However,

there should not be a categorical exclusion that prevents any foster parent from ever seeking *de facto* parent status – particularly where, as here, the petitioner acted as a child’s parent before becoming a foster parent.

I. Washington’s *De Facto* Parent Doctrine Is A Functional, Child-Centered Test

In *In re Parentage of L.B.*, 155 Wn.2d 691, 122 P.3d 161 (2005), the Washington Supreme Court recognized that, from a child’s perspective, parent-child relationships do not only arise from biology or legal adoption, but also arise when a person “in all respects functions as a child’s actual parent.” *L.B.*, 155 Wn.2d at 691 n.7. The Court noted “inevitably, in the field of familial relations, factual scenarios arise, which even after a strict statutory analysis remain unresolved, leaving deserving parties without any appropriate remedies, often where demonstrated public policy is in favor of redress.” *Id.* at 687. In those situations, “Washington courts have consistently invoked their equity powers and common law responsibilities to respond to the needs of children and families in the face of changing realities.” *Id.* at 689.

The Court established the following criteria to determine whether a person has standing to seek recognition as a child’s *de facto* parent:

- (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;
- (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. The Court also created a fifth prong to the test, indicating that “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.’” *Id.* (quoting *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004)).

The *de facto* analysis set forth in *L.B.* is functional in nature. It rejects a focus on labels and categories, and instead requires trial courts to make an inquiry into whether a parent-child relationship exists and, if so, whether it was fostered and encouraged by the otherwise legal parent.

The *de facto* parent doctrine is also equitable in nature, in service to the compelling need to protect parent-child relationships formed through function and not law. As a result, it must remain flexible and available to those who can satisfy the doctrine on a fact-specific basis. *See In re Parentage of J.A.B.*, 146 Wn. App. 417, 425 (2008) (rejecting the distinction between *de facto* parents married to the legal parent and those who are not married as “differences in the legal relationships of the adults.

We are unable to see their relevance to the question here: whether a person who is not the legal parent of a child is in fact the child's parent, and should be recognized as such by a court of equity.”).

2. Foster Parents Should Not Be Categorically Excluded From Seeking *De Facto* Parent Status

In the vast majority of cases, the *L.B.* test would prevent a foster parent from obtaining *de facto* parent status. However, each case must be resolved on the specific facts. There must not be categorical exclusions barring foster parents as a class from ever seeking *de facto* parent status.

By itself, the first *L.B.* factor will prevent many foster parents becoming *de facto* parents. This factor requires the petitioner to prove that the natural or legal parent consented to and fostered the parent-like relationship. Obviously, this requirement cannot be met in cases where a child is placed in the care of foster parents who are not known to the child's biological parent. In cases where a child is placed with a relative or responsible adult known to the legal parent, this requirement could only be satisfied if the natural parent affirmatively consented to and fostered the parent-like relationship.

L.B. also provides that a person seeking *de facto* parent status must assume obligations of parenthood without expectation of financial compensation. This requirement will effectively bar most foster parents

from obtaining *de facto* status because foster parents receive payments for their services. However, in cases where, as here, an adult assumes parental obligations before a child is found dependant and before receiving payments to serve as a foster parent, there is no reason why this requirement cannot be satisfied.

Third, *de facto* parent status is limited to those adults who fully and completely undertake a permanent, unequivocal, committed, and responsible parental role in the child's life. Few foster parents would be able to satisfy this prong, which requires a permanent commitment to be the child's parent in every respect.

3. The Trial Court Properly Held That Ms. Franklin Is A.F.J.'s De Facto Parent Under Washington Law

The trial court entered extensive findings of fact and conclusions of law holding that Ms. Franklin satisfied all five factors of the *de facto* parent test. On cross-appeal, Ms. Johnston challenges the trial court's determinations on three of the five factors.

To begin, Ms. Johnston suggests that Ms. Franklin cannot satisfy the first *L.B.* factor, which requires the petitioner to demonstrate that the natural or legal parent consented to and fostered a parent-like relationship between the child and the *de facto* parent. However, the trial court entered

careful and appropriate findings to support its determination that Ms.

Franklin met this requirement. Among other things, the court found:

- Ms. Johnston and Ms. Franklin jointly agreed to raise A.F.J. as co-parents.
- Ms. Franklin assisted in protecting the unborn child during pregnancy.
- Ms. Franklin participated in the decision regarding whether to have A.F.J. circumcised, and paid for the procedure.
- At Ms. Johnston's request, she and Ms. Franklin gave A.F.J. names representing each of them.
- Ms. Johnston agreed to name him "[A]," which was Ms. Franklin's idea.
- Ms. Franklin took A.F.J. home on overnight visits while Ms. Johnston was in treatment at PTS, and when Ms. Johnston left PTS, she and A.F.J. went home to live with Ms. Franklin.
- Ms. Franklin worked and Ms. Johnston planned to be the stay-at-home parent.

CP 709-10 (FOF 2.12(K)). These findings are sufficient to demonstrate that Ms. Johnston fostered and consented to Ms. Franklin's parent-like relationship with A.F.J. before he was found dependent and entered foster care.² And even at trial, Ms. Johnston continued to maintain that she wanted A.F.J. to have two mothers. As a result, the first *L.B.* factor is met.

The *L.B.* test also requires a petitioner to demonstrate that she assumed obligations of parenthood without expectation of financial

² This key fact was not present in cases cited by Ms. Johnston in which Washington courts have suggested that foster parents cannot satisfy the *de facto* parent test. See *In re Custody of A.C.*, 137 Wn. App. 245, 261, 153 P.3d 203 (2007), *rev'd on other grounds* 165 Wn.2d 568, 200 P.3d 689 (2009); *Blackwell v. State Dep't of Social & Health Servs.*, 131 Wn. App. 372, 379, 127 P.3d 752 (2006).

compensation. Ms. Johnston argues that because Ms. Franklin received payments as a foster payment, she cannot satisfy this requirement.

However, Ms. Franklin assumed parental obligations for A.F.J. before she ever received payments as a foster parent. The trial court correctly held that Ms. Franklin's "relationship with, and commitment to, [A.F.J.] formed before she became licensed as a foster parent and she did not assume his care with an expectation of compensation." CP 710 (FOF 2.12(N)). As a result, the trial court properly found that Ms. Franklin satisfied the third prong of the *L.B.* test.

The fifth *L.B.* factor limits the *de facto* parent status to those adults who have "fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role." Here, the trial court held that Ms. Franklin "has been devoted to [A.F.J.] and has fully and unequivocally assumed a parental role" and that the "fifth prong[]" of the *L.B.* test was met.³ CP 711 (FOF 2.12(R)).

The fact that Ms. Franklin was a foster parent does not preclude a finding that she has satisfied the fifth *L.B.* factor. Ms. Johnston disputes

³ Ms. Johnston suggests that the Court's findings are insufficiently specific to meet the fifth requirement of the *L.B.* test. Resp./Cross-App. Br. at 39. However, the trial court explicitly stated that the fifth prong of the *L.B.* test was satisfied. This can only be construed as an express finding on the issue.

that Ms. Franklin can meet this requirement by pointing to a footnote from the *L.B.* decision, where the court observed that “because the very nature of a foster placement is ‘temporary, transitional and for the purpose of supporting reunification with the legal parents,’ the law does not ‘establish a *right* on the part of a foster parent’ to continue the relationship.” *L.B.*, 155 Wn.2d at 691 n.7 (quoting *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991)). However, in this case Ms. Franklin assumed a parental role before she was a foster parent. Unlike a typical foster care situation, Ms. Franklin was not simply a “transitory step” in the process of attempting to reunify A.F.J. with Ms. Johnston. Resp./Cross-App. Br. at 40. Ms. Franklin was A.F.J.’s mother before becoming a foster parent and consistently maintained that role.

4. The *De Facto* Parent Doctrine Is Needed To Fill A Statutory Gap To Preserve The Parent-Child Relationship Between A.F.J. And Ms. Franklin

Ms. Johnston argues that the *de facto* parent doctrine should not apply here because the Legislature has created statutory avenues for Ms. Franklin to become A.F.J.’s parent or custodian, such as adoption or a non-parental custody action under RCW 26.10. However, the same statutory remedies were also theoretically available to the petitioner in *L.B.*, yet did not preclude the Court from finding she could seek status as a

de facto parent. Indeed, if adoption or a non-parental custody action is a sufficient statutory remedy, then no one could obtain *de facto* parent status in Washington and *L.B.* would be effectively overruled.

a. Ms. Franklin's Theoretical Ability To Adopt Does Not Preclude *De Facto* Parent Status

First, Ms. Johnston suggests that Ms. Franklin should not be able to seek recognition as a *de facto* parent because she was not prevented by statute from adopting A.F.J. However, adoption was also a potential option available to the petitioner in the *L.B.* case. *See L.B.*, 155 Wn.2d at 719 n.36. As a result, the fact that she did not adopt A.F.J. cannot mean that the *de facto* parent doctrine is unavailable.

In any event, the trial court found that it would be disingenuous to say that Ms. Franklin should have started an adoption proceeding in the months between his birth and the invention of DSHS. FOF 2.12(L). This finding has not been challenged on appeal.⁴

b. The Non-Parental Custody Statute Is Not An Adequate Remedy

Ms. Johnston also argues that Ms. Franklin cannot seek *de facto* parent status because she had the opportunity to seek relief under Washington's non-parental custody statute (RCW 26.10). But as before,

the petitioner in *L.B.* theoretically had the same statutory remedy to seek non-parental custody. Nonetheless, the availability of that remedy did not preclude the Supreme Court from holding that the petitioner in *L.B.* had standing to petition for parental rights under the *de facto* parent doctrine.

In this case, it is even more apparent that non-parental custody is not an adequate remedy for Ms. Franklin. She was denied non-parental custody, which she sought as an alternative to *de facto* parentage. CP 713 (COL 3.2). By itself, the denial of non-parental custody shows that it is not an adequate remedy to protect her parent-child relationship with A.F.J.

The non-parental custody statute is also inadequate because it does not confer recognition as a parent, but only as a custodian. *See, e.g., In re Parentage of J.A.B.*, 146 Wn. App. 417, 426, 191 P.3d 71 (2008) (noting distinctions between status as a parent and as a non-parental custodian). Ms. Franklin seeks more than a custodial role for A.F.J.: She seeks rights as one of his parents, a role that she has played since his birth.

c. The *M.F.* Decision Does Not Restrict Ms. Franklin's Ability To Seek *De Facto* Parent Status

Ms. Johnston also suggests that the decision in *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010), precludes Ms. Franklin from

⁴ After A.F.J. was found to be dependent, a voluntary adoption plan under RCW 13.34.125 would have required Ms. Johnston to agree to terminate her parental rights.

seeking *de facto* parent status. In *M.F.*, the Supreme Court held that a man who had served as a child's step-parent could not seek *de facto* parent status under the facts of that case. While Legal Voice disagrees with the reasoning of the *M.F.* decision, the decision does not preclude the application of the *de facto* parent doctrine here.

In reaching its decision, the *M.F.* court found that the *de facto* parent doctrine did not apply to a former stepparent because "no statutory gaps exist to fill." *Id.* at 532. The Court found that the Legislature "did envision the circumstances before us in this case," (*id.*) and determined that an "intertwined judicial and statutory history illustrates the legislature's ongoing intent to create laws accommodating stepparents who seek custody on or following dissolution." *Id.* at 533.

The Legislature did not envision the circumstances in this case. The Legislature has not shown an intent to create laws accommodating an adult who serves as a child's co-parent with the natural parent's consent and agreement, and then later serves as a foster parent after the child is found to be dependent. Indeed, the facts in this case are so unique that there do not appear to be any reported cases from Washington (much less any other state) that present a similar fact pattern.

The *M.F.* court also justified its holding by stating that the stepparent seeking *de facto* status in that case was a “third-party” to the child’s “two already existing parents, which places him in a very different position that the respondent in *L.B.*” *Id.* at 534. Here, the only two parents that A.F.J. has ever known are Ms. Franklin and Ms. Johnston. The biological father has never been identified in court proceedings and his parental rights were terminated in 2007, before Ms. Franklin brought this action seeking *de facto* parent status.

Ms. Johnston suggests that the order terminating the biological father’s parental rights was an interlocutory order and became a nullity when the state dismissed a termination petition against Ms. Johnston. However, RAP 2.2(a)(6) explicitly provides that a party may appeal as a matter of right “[a] decision terminating all of a person’s parental rights with respect to a child.” As a result, the decision terminating the biological father’s parental rights was appealable when it was entered in 2007 and was not interlocutory in nature.

The *M.F.* court also expressed concern that “the *de facto* parent test we applied in *L.B.* could not, in the stepparent context, be applied in a meaningful way” because the Court felt the test would be very easily satisfied in most cases. *M.F.*, 168 Wn.2d at 534-35. That concern is not

present here. As discussed above, the *L.B.* test may be applied meaningfully and stringently in cases involving foster parents, and very few people who serve as foster parents will be able to meet the *L.B.* test.

In *M.F.* the court also denied the petitioner because he had nonparental custody available as a remedy. While, as discussed above, the remedy of nonparental custody is available to virtually all *de facto* parents (whether or not they are stepparents), in the present case that remedy is clearly *not* available to Ms. Franklin because the trial court denied her petition for nonparental custody.

Finally, it should be noted that the *M.F.* court explicitly recognized the need for a common law remedy “to establish parentage where, had the respondent been able to participate in traditional family formation, parentage would have or could have been established by statutory means.” *Id.* at 534. The same need for a common law remedy exists here, although the *de facto* parent doctrine is not limited to cases involving same-sex parents (and cannot be so limited under Equal Protection principles).

5. The *De Facto* Parent Doctrine Is Not Limited To The Facts In *L.B.*

Ms. Johnston suggests that the *de facto* parent doctrine should not apply here because of factual differences between this case and the *L.B.* case. She argues that unlike the same-sex parents in *L.B.*, Ms. Franklin

and Ms. Johnston were not a “marriage-like couple,” or a “family in the traditional sense.” Resp./Cross-App. Reply at 8.

However, the *de facto* parent analysis focuses on the relationship between the child and the adult seeking *de facto* parent status, not on the relationship between the child’s natural parent and the *de facto* parent. None of the *L.B.* factors require a *de facto* parent to have a particular type of relationship with the child’s natural parent. Instead, the key question is whether the natural parent consented to and fostered the parent-like relationship with the *de facto* parent, which is true here.

6. The Time Ms. Franklin Spent As A Foster Parent Should Not Be Excluded When Determining Whether She Satisfies the *De Facto* Parent Test

Finally, Ms. Johnston suggests that the time Ms. Franklin spent as a foster parent should not be considered in evaluating whether Ms. Franklin meets the *de facto* parent test. To support this argument, Ms. Johnston points to the Alaska Supreme Court’s decision in *Osterkamp v. Stiles*, 235 P.3d 178 (Alaska 2010).

In *Osterkamp*, an unmarried couple became a child’s foster parents shortly after the child was born. When the child was sixteen months old, one partner adopted the child by herself, without objection from the other partner. The couple separated three months after the single-parent

adoption. The non-adoptive partner then sought joint custody, arguing that he was the child's psychological parent. The court held that the petitioner could not count his time as a foster parent in determining whether he was a psychological parent.

Osterkamp is readily distinguishable. Unlike Ms. Franklin, the petitioner in *Osterkamp* had no pre-existing relationship with the child or the child's natural parent before becoming a foster parent. By contrast, Ms. Franklin began her relationship with A.F.J. as a co-parent with his natural parent, not as a temporary foster mother.

Under those circumstances, the time spent Ms. Franklin spent as a foster parent should not be excluded in the *de facto* analysis. Although she was forced to become a foster parent to maintain her relationship with A.F.J., her service as a foster mother simply continued her role as the child's co-parent – a role which the biological mother consented to and fostered, and a role which Ms. Franklin assumed without expectation of financial compensation before any finding of dependency.

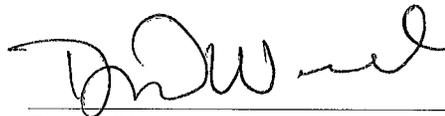
IV. CONCLUSION

The Washington Supreme Court adopted the *de facto* parent doctrine in recognition of the "duty of this court to 'endeavor to administer justice according to the promptings of reason and common sense.'" *L.B.*,

155 Wn.2d at 707 (quoting *Bernot v. Morrison*, 81 Wash. 538, 544 (1914)). Here, reason and common sense strongly support Ms. Franklin's claim for *de facto* parent status. She has been A.F.J.'s mother for his entire life. Ms. Johnston consented to and fostered this relationship and has stated that she wants A.F.J. to continue to have two mothers. A.F.J. would be traumatized if he lost his relationship with Ms. Franklin. Under the circumstances presented in this case, the trial court's determination that Ms. Franklin is A.F.J.'s *de facto* parent should be affirmed.

Respectfully submitted this 13th day of December, 2010.

By:



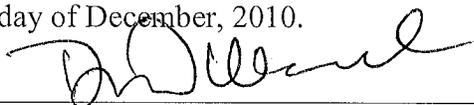
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DECLARATION OF SERVICE

I certify under penalty of perjury that on December 13, 2010, I caused the *Amicus Curiae* Brief of Legal Voice to be served on the following parties listed below as follows:

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Dated at Seattle, Washington this 13th day of December, 2010.



David J. Ward