

No. 63919-6-I

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STATE OF WASHINGTON COURT OF APPEALS  
DIVISION ONE

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MARY FRANKLIN,

Appellant / Cross-Respondent,

and

JACKIE JOHNSTON,

Respondent / Cross-Appellant

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Brief of Respondent / Cross-Appellant

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### **A. Cross-Assignments of Error**

1. The trial court erred in concluding Appellant was A.F.J.'s mommy as set forth in Additional Findings 2.12(A).

2. The trial court erred in concluding Appellant had shown by clear, cogent and convincing evidence that she is A.F.J.'s *de facto* parent (Additional Finding 2.12(I)).

3. The trial court erred in finding Ms. Johnston and Appellant jointly agreed to raise A.F.J. as co-parents and that he went to live with Appellant after Ms. Johnston left PTS in Tacoma (Additional Finding 2.12(K)).

4. The trial court erred in finding A.F.J.'s placement with Appellant is not the same as a traditional foster home placement, that Appellant had every hope that she and Ms. Johnston would parent together, and that she did not assume A.F.J.'s care with an expectation of compensation (Additional Findings 2.12(N)).

5. The trial court erred in concluding that the third prong of *In re Parentage of L.B.*, 155 Wn.2d 679 (2005), was met because Appellant assumed the obligation of parenthood for A.F.J. without an expectation of compensation (Additional Findings 2.12(Q)).

6. The trial court erred in concluding that Appellant has been one of A.F.J.'s mommies since his birth and that Appellant had fully and unequivocally assumed a parental role (Additional Findings 2.12(R))

7. The trial court erred when it concluded Appellant had demonstrated by clear, cogent and convincing evidence that she is a *de facto* parent of A.F.J. per the requirements set forth in *In re Parentage of L.B.* (Conclusion of Law 3.3).

8. The trial court erred in adjudicating Appellant as A.F.J.'s parent.

**B. Statement of Issues**

1. Issues related to Appellant's Appeal

A. Whether the trial court violated Appellant's due process rights.

B. Whether ineffective assistance of counsel is cause for reversal.

C. Whether Appellant may raise bad faith, collateral estoppel, and common benefit for the first time on appeal.

D. Whether the trial court properly awarded attorney's fees and costs to Ms. Johnston.

E. Whether the trial court properly awarded child support.

F. Whether the trial court properly exercised its broad discretion in fashioning an appropriate parenting plan.

2. Issues related to Ms. Johnston's cross-appeal:

A. Whether the trial court's failure and complete inability to find Appellant undertook a permanent parental role in A.F.J.'s life precludes Appellant from being A.F.J.'s *de facto* parent.

B. Whether a foster parent cannot meet *L.B.*'s first prong because the State has legal custody and makes the ultimate custody decision.

C. Whether a foster parent cannot meet *L.B.*'s third prong because they are paid for their caretaking services.

D. Whether a foster parent cannot meet *L.B.*'s permanency requirement because a foster home is temporary, transitional, and is supposed to support reunification with the biological parent.

E. Whether Appellant's time as a foster parent should be precluded when considering the *de facto* parent factors.

F. Whether Appellant cannot be A.F.J.'s *de facto* parent because Appellant had a statutory remedy to become a child's custodian.

G. Whether the trial court erred in determining A.F.J.'s parentage without notice to A.F.J.'s father and without finding him unfit.

### **C. Counterstatement of the Case**

#### **Procedural History**

Appellant appeals the results from her third party custody petition and parentage petition filed on November 7, 2007.<sup>1</sup> Appellant neither named the child's father in either petition nor gave father any notice of these proceedings.<sup>2</sup> Adequate cause on Appellant's non-parent custody petition was

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<sup>1</sup> *See* Petitions filed in cause numbers 07-3-07493-1 UFK and 07-5-02508-2 UFK, referenced in Respondent's Supplemental Designation of Clerk's Papers filed August 2, 2010.

<sup>2</sup> *Id.* and CP 1-14.

established on January 11, 2008.<sup>3</sup> On August 28, 2008 Ms. Johnston moved for an interim attorney fee award pursuant to RC 26.26.140.<sup>4</sup> The trial court awarded \$5,000 interim attorney fees on September 5, 2008.<sup>5</sup>

After a long trial, the trial judge found Ms. Johnston was a fit parent and A.F.J.'s placement with Ms. Johnston would not result in actual detriment and dismissed Appellant's third party custody petition.<sup>6</sup> The trial judge also concluded Appellant, A.F.J.'s foster parent, was A.F.J.'s *de facto* parent despite Appellant having been paid by the State for foster care services for most of A.F.J.'s life.<sup>7</sup> As a result, the trial court entered a parenting plan awarding Appellant and Ms. Johnston substantially equal time with A.F.J.<sup>8</sup> This was supposed to be accomplished in two phases.<sup>9</sup> The trial court also required Appellant to pay Ms. Johnston child support commencing October 1, 2009.<sup>10</sup> The trial court also found: Appellant will need to engage in her own individual counseling.<sup>11</sup>

Last, on the same day, the trial judge found Appellant had greater ability to pay attorney fees, Ms. Johnston had a need for attorney fees, Appel-

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<sup>3</sup> CP 19-21.

<sup>4</sup> CP 1253 – 1271.

<sup>5</sup> CP 1272-1273.

<sup>6</sup> CP 707-709 and 701-703.

<sup>7</sup> CP 709 - 711; and 701-703 and VRP (Franklin's 3/26/09 Testimony) 36:20 – 38:19 and 39:19 – 40:1.

<sup>8</sup> FOF 2.12(T), CP 711; and CP 769-777.

<sup>9</sup> CP 770-771.

<sup>10</sup> CP 756-777.

<sup>11</sup> FOF 2.12(V)(ii), CP 712.

lant kept \$149,000 in proceeds from Ms. Johnston's California home being sold that Appellant had used to pay her attorney fees in this matter, and under these circumstances it was fair and equitable to have Appellant pay \$20,000 toward Ms. Johnston's \$65,000 in attorney fees.<sup>12</sup>

Appellant timely moved to reconsider the trial court's ruling on attorney fees and costs as well as child support.<sup>13</sup> This motion was denied on June 25, 2009.<sup>14</sup> On July 15, 2009, the trial court entered a subsequent final order implementing the contemplated equally shared residential plan.<sup>15</sup>

On July 25, 2009 Appellant timely filed a Notice of Appeal seeking to appeal the judgment that established parentage and awarded attorney fees and costs, the findings of fact and conclusions of law, the child support order, the parenting plan, and the order denying her reconsideration.<sup>16</sup> Ms. Johnston did not initially appeal, but after learning that Appellant appealed this matter, Ms. Johnston timely filed a notice of cross appeal on August 5, 2009 appealing the same judgment and orders that Appellant appealed and also the trial court's July 15, 2009 order that implemented the equally shared residential schedule.<sup>17</sup>

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<sup>12</sup> *FOF 2.9, CP 706; and FOF 2.12 (W), (Y), (Z) and (AA), CP 712; VRP (Franklin's 3/26/09 Testimony) 28:21 – 29:1.*

<sup>13</sup> *CP 176 – 1288.*

<sup>14</sup> *CP 714.*

<sup>15</sup> *CP 1289-1291.*

<sup>16</sup> *See, Appellant's Notice of Appeal designated in Supplemental Clerk's Designation filed August 16, 2010.*

<sup>17</sup> *CP 742-743.*

Because this matter involves a child's parentage and welfare, review was expedited.<sup>18</sup> Despite being expedited, there were myriad problems perfecting the record and Appellant was granted several extensions, but ultimately was to have her brief served by July 6, 2010.<sup>19</sup> While this Court was pursuing Appellant's opening brief, Appellant filed for Chapter 13 bankruptcy protection on May 4, 2010.<sup>20</sup> Despite having filed bankruptcy, Appellant filed her opening brief. Appellant's Opening Brief had a declaration of service showing a July 6, 2010 mailing date, but it was not received by Ms. Johnston's counsel or this Court until July 16, 2010. Appellant's brief rambles and is at times incoherent. It also fails to assign error to key facts that were found by the trial court, fails to appropriately cite to the record to support the purported facts alleged therein, and fails to cite to proper authority for its arguments. On August 6, 2010 the bankruptcy court granted relief from stay to allow this appeal to proceed.<sup>21</sup>

### **Counterstatement of the Facts**

Ms. Johnston and Appellant had a "cross-state dating" relationship, with Ms. Johnston maintaining her home in California and Appellant

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<sup>18</sup> *See Commissioner Neel's December 1, 2009 Notation Ruling.*

<sup>19</sup> *See Notation Rulings and letters dated January 26, 2010; March 24, 2010, April 19, 2010, April 21, 2010 (two rulings); April 27, 2010, May 3, 2010, May 14, 2010, and June 4, 2010.*

<sup>20</sup> *See Respondent's Motion for Bifurcation filed May 26, 2010, Appendix A.*

<sup>21</sup> *This Court has stated that the order from the bankruptcy court is adequate to allow the appeal and cross-appeal to proceed. See Commissioner Verellen's Notation Ruling entered August 11, 2010 and Clerk's letter dated August 12, 2010.*

maintaining her home in Seattle.<sup>22</sup> Their relationship was turbulent.<sup>23</sup> It was also sporadic, chaotic and codependent.<sup>24</sup>

Appellant stated on more than one occasion she would not be in a relationship with Ms. Johnston if Ms. Johnston continued to do drugs. Despite this, Ms. Johnston kept using drugs and the relationship was plagued by continuous break ups and reconciliations.<sup>25</sup> These break ups and reunifications happened multiple times since the parties met.<sup>26</sup>

For instance, Ms. Johnston and Appellant reunified for only one day when Ms. Johnston promised to come back to Seattle and go into substance abuse treatment. That treatment lasted for only one day and Ms. Johnston then lived with her father and the parties broke up again. During these break ups and reunifications, Ms. Johnston still maintained her separate California residence.<sup>27</sup>

According to Appellant, the longest the two woman ever stayed in the same residence was 4-5 months, right after A.F.J. was born.<sup>28</sup> She also testified the longest period that the two women ever reconciled would have been between 3-7 months.<sup>29</sup>

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<sup>22</sup> *VRP (Franklin 3/26/09) 10:9-24; 11:7-8.*

<sup>23</sup> *FOF 2.12(J), ln 17-18, CP 709.*

<sup>24</sup> *VRP (Kent Fremont-Smith 3/31/09) 19:15-24; and VRP (Johnston 3/30/09) 82:2-6.*

<sup>25</sup> *VRP (Franklin 3/26/09) 8:23-9:8; and VRP (Johnston 4/8/2009) 31:13-17.*

<sup>26</sup> *VRP (Franklin 3/26/09) 14:8-17.*

<sup>27</sup> *VRP (Franklin 3/26/09) 11:7-18; 13:19-6.*

<sup>28</sup> *VRP (Franklin 3/26/09) 15:9-13.*

<sup>29</sup> *VRP (Franklin 3/26/09) 14:12-17.*

Ms. Johnston and Appellant were estranged in early 2005; according to Appellant, Ms. Johnston was in California and in “dire straits” and called Appellant for help.<sup>30</sup> Appellant flew down to California on January 20, 2005.<sup>31</sup> While Appellant was in California and Appellant knew Ms. Johnston was emotionally unstable, Appellant drafted a document that provided Appellant would get Ms. Johnston’s California home if Ms. Johnston were to relapse and had the document signed and notarized.<sup>32</sup>

After that trip Ms. Johnston relapsed again, the parties broke off their relationship and Ms. Johnston got pregnant while living in California.<sup>33</sup> Ms. Johnston’s pregnancy was not intended by either Ms. Johnston or Appellant.<sup>34</sup> Ms. Johnston and Appellant found out Ms. Johnston was pregnant in March 2005.<sup>35</sup> At that time Ms. Johnston tried to get back together with Appellant.<sup>36</sup> After Ms. Johnston returned to Washington, her and Appellant’s relationship remained “tenuous.”<sup>37</sup>

After Ms Johnston relapsed and became pregnant after Appellant was in California in January 2005 and had Ms. Johnston sign the document regarding her California home, Appellant took title to and control of Ms.

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<sup>30</sup> VRP (Franklin 3/26/09) 18:22-19:16.

<sup>31</sup> VRP (Franklin 3/26/09) 18:22-19:4

<sup>32</sup> VRP (Franklin 3/26/09) 18:10-12; and 19:17-25.

<sup>33</sup> VRP (Franklin 3/26/09) 22:2-9 and 23:1-3; VRP (Johnston 4/8/2009) 16:21-17:5.

<sup>34</sup> FOF No. 2.12(J); and VRP (Franklin 3/26/09) 8:19-22.

<sup>35</sup> VRP (Franklin 3/26/09) 23:21-24.

<sup>36</sup> FOF 2.12(J). ln 16-17, CP 709.

<sup>37</sup> VRP (Franklin 3/26/09) 42:8-10.

Johnston's California home, rented it, eventually sold it and received \$149,000 in net proceeds.<sup>38</sup> Appellant acknowledges she and Ms. Johnston had an agreement that the net proceeds were for the child's benefit.<sup>39</sup>

Appellant used the California home proceeds to reimburse herself for the costs of bringing the loan on the home current, keeping the house out of foreclosure, preparing the house for sale, paying the closing and other sale costs, Ms. Johnston's treatment costs, and for damages Ms. Johnston caused Appellant.<sup>40</sup> Appellant used \$80,000 of the proceeds to pay for her trial court attorney and GAL fees in this matter.<sup>41</sup>

After Ms. Johnston and Appellant found out that Ms. Johnston was pregnant and Ms. Johnston came back to Seattle, Ms. Johnston had two residential treatment stays at Swedish in Ballard: one for 21-days and one for 40-days.<sup>42</sup> After Ms. Johnston was released from Swedish Ballard after the 40-day treatment, Appellant let Ms. Johnston, who had been sober for just 6 weeks, stay at her house while Appellant went to Thailand with her parents. At Appellant's home, Ms. Johnston relapsed again.<sup>43</sup>

Because Ms. Johnston relapsed, Ms. Johnston left Appellant's home and the two women never had contact with each other again until after

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<sup>38</sup> VRP (Franklin 3/26/09) 23:10-16; 23:25-25:23; 28:5-6; and 28:21-1.

<sup>39</sup> VRP (Franklin 3/26/09) 29:25-30:6.

<sup>40</sup> FOF 2.12(P), CP 710-711.

<sup>41</sup> VRP (Franklin 3/26/09) 28:23-29:14.

<sup>42</sup> VRP (Franklin 3/26/09) 31:9-17.

<sup>43</sup> VRP (Franklin 3/26/09) 31:1-25.

A.F.J. was born.<sup>44</sup> Appellant admits the romantic relationship was very fractured.<sup>45</sup> Ms. Johnston believed they had broken up.<sup>46</sup>

A.F.J. was born November 20, 2005.<sup>47</sup> Ms. Johnston was in treatment at PTS when he was born.<sup>48</sup> Appellant was not present when A.F.J. was born.<sup>49</sup> She was done with Ms. Johnston and was not at the child's birth.<sup>50</sup> Appellant had 2 overnight visits with the child while Ms. Johnston was in PTS.<sup>51</sup> Ms. Johnston left PTS on December 24, 2005.<sup>52</sup> Then Ms. Johnston had clean and sober housing in Tacoma, where Ms. Johnston would live half the time and visit with Appellant half the time for about a month until DSHS intervened and removed the child from Ms Johnston's care.<sup>53</sup>

Ms. Johnston relapsed again in late January 2006 while A.F.J. was in her care and while she and A.F.J. were staying with Appellant. DSHS removed the child a few days after Ms. Johnston relapsed.<sup>54</sup> The State filed a dependency proceeding on January 26, 2006.<sup>55</sup> A.F.J. had not been in Ms.

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<sup>44</sup> *VRP (Franklin 3/26/09) 33:22-24:2; and VRP (Johnston 4/8/2009)22:2-9.*

<sup>45</sup> *VRP (Franklin 3/26/09) 41:13-14.*

<sup>46</sup> *VRP (Johnston 3/30/2009) 63:13-21.*

<sup>47</sup> *FOF 2.12(A), CP 707.*

<sup>48</sup> *FOF 2.12(K), ln 23, CP 709; and VRP (Franklin 3/26/09) 16:1-2.*

<sup>49</sup> *VRP (Johnston 3/30/2009) 64:20-24.*

<sup>50</sup> *VRP (Johnston 4/8/2009) 22:15-21.*

<sup>51</sup> *FOF 2.12(K), ln 23; VRP (Johnston 3/30/2009) 53:17-20.*

<sup>52</sup> *VRP (Johnston 4/8/2009) 24:3-5.*

<sup>53</sup> *VRP (Franklin 3/26/09) 16:4-16; and VRP (Johnston 4/8/2009) 24:17-25:4.*

<sup>54</sup> *VRP (Franklin 3/26/09) 34:10-25.*

<sup>55</sup> *VRP (Johnston 3/30/2009) 56:10-12.*

Johnston's physical custody since January 26, 2006,<sup>56</sup> which was less than 2 months between the child's birth and intervention by DSHS.<sup>57</sup>

Appellant understood the State had custody over A.F.J. once it took him from Ms. Johnston.<sup>58</sup> Even the trial court found Appellant had status as a foster parent and DSHS had the right, at any time, to come in and remove the child from her home with little or no notice.<sup>59</sup>

In February 2006, Appellant made clear to Ms. Johnston that she had enough and whatever their relationship may have been in the past, they were just going to be friends in future.<sup>60</sup> They never reconciled after that.

In June 2006, Ms. Johnston entered Seadrunar residential treatment center.<sup>61</sup> Johnston and Appellant were clearly not together at that time.<sup>62</sup> Johnston left Seadrunar about 3 months later and lived in various places including briefly with Appellant before a final relapse on Nov. 9, 2006.<sup>63</sup>

When Ms. Johnston relapsed she was arrested and spent the next 6 weeks in jail without having contact with Appellant.<sup>64</sup> Then, she went to

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<sup>56</sup> FOF No. 2.7, CP 706.

<sup>57</sup> FOF No. 2.12(L), In 4.

<sup>58</sup> VRP (Franklin 3/26/09) 46:2-7.

<sup>59</sup> FOF 2.12(O), CP 710.

<sup>60</sup> VRP (Franklin 3/26/09) 44:6-10; 48:19-23; VRP (Johnston 3/30/2009) 65:3-9; and VRP (Kent Fremont-Smith 3/31/09) 26:1-28:3.

<sup>61</sup> VRP (Johnston 4/8/2009) 27:4-7.

<sup>62</sup> VRP (Johnston 4/8/2009) 27:22-24.

<sup>63</sup> VRP (Johnston 4/8/2009) 27: 15-16 and 28:6-20.

<sup>64</sup> VRP (Johnston 4/8/2009) 29:12-23.

Genesis House for one month and still had no contact with Appellant.<sup>65</sup>

Ms. Johnston then went back to Seadrunar for a second time in February 2007 and remained there for 9 months.<sup>66</sup> During this time, Ms. Johnston and Appellant had not reconciled and were not a couple.<sup>67</sup>

Despite this, Appellant, now a paid foster parent, did bring A.F.J. to Seadrunar so Ms. Johnston could visit with him.<sup>68</sup> To be sure these visits were nothing more than a foster parent taking the child to visit the biological parent, Appellant herself testified that when she filed her petitions for third party custody and to be adjudicated a *de facto* parent in May 2007 she clearly understood her and Ms. Johnston's romantic relationship was over.<sup>69</sup> Appellant's last visit to Seadrunar, also the last time she and Ms. Johnston had substantive communication, was August 2007.<sup>70</sup> Ms. Johnston was discharged from Seadrunar November 2007.

Ms. Johnston went to live with her sister for four days, then found clean and sober housing near her sister's home.<sup>71</sup> She lived there for over a year until December 6, 2008 when she and A.F.J. moved in with her mom and her mom's life companion, Col. (Ret.) D. Baker and their dog Joey.<sup>72</sup>

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<sup>65</sup> VRP (Johnston 4/8/2009) 29:24-30:3 and 30:24-31:3.

<sup>66</sup> VRP (Johnston 4/8/2009) 30:16:21.

<sup>67</sup> VRP (Johnston 4/8/2009) 31:6-9.

<sup>68</sup> VRP (Johnston 4/8/2009) 33:8-10.

<sup>69</sup> VRP (Franklin 3/26/09) 39:19-20 and 48:19-23.

<sup>70</sup> VRP (Johnston 3/30/2009) 76:24-77:6; 80:5-15.

<sup>71</sup> VRP (Johnston 4/9/2009) 4:10-19.

<sup>72</sup> VRP (Johnston 4/9/2009) 5:7-20.

At the 72-hour shelter care hearing in the dependency, at the end of January 2006, Appellant was told the only way she could have A.F.J.'s temporary custody during the dependency proceedings was to become a foster parent.<sup>73</sup> Appellant agreed and immediately took foster parent training.<sup>74</sup> In April 2006 Appellant knew she would be paid for her foster care services.<sup>75</sup> Appellant admitted receiving checks for her foster care services from Sept. 2006 – April 2008 and that she cashed the checks.<sup>76</sup>

The foster care payment stopped in May 2008.<sup>77</sup> Appellant sent DSHS a letter notifying DSHS that the foster care payments had stopped and that there may have been mail theft.<sup>78</sup> After Appellant sent the letter, the payments resumed and Appellant did not return the checks to DSHS.<sup>79</sup>

Despite her past transgressions, when trial began Ms. Johnston had made a remarkable recovery, so much so that the trial court found Ms. Johnston is a fit parent,<sup>80</sup> she is a remarkably dedicated parent – shown a deep commitment to the child;<sup>81</sup> she is well on her way to recovery;<sup>82</sup> and

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<sup>73</sup> *VRP (Franklin 3/26/09) 36:20-23.*

<sup>74</sup> *VRP (Franklin 3/26/09) 36: 24-25.*

<sup>75</sup> *VRP (Franklin 3/26/09) 37:5-16; and 39:22-40:1.*

<sup>76</sup> *VRP (Franklin 3/26/09) 37:17-38:2.*

<sup>77</sup> *VRP (Franklin 3/26/09) 38:2-4.*

<sup>78</sup> *VRP (Franklin 3/26/09) 38:5-9.*

<sup>79</sup> *VRP (Franklin 3/26/09) 38:10-16.*

<sup>80</sup> *FOF 2.12(B), CP 707-708.*

<sup>81</sup> *Id.*

<sup>82</sup> *FOF No 2.12.(F), CP 708-709.*

there would be no actual detriment to A.F.J. if Ms. Johnston were his custodial parent.<sup>83</sup> These findings have not been challenged.

## **D. Argument to Appellant's Opening Brief**

### **1. Standards of Review**

A trial court's findings of fact and conclusions of law following a bench trial are reviewed to determine whether substantial evidence supports the findings of fact and, in turn, whether the findings of fact support the conclusions of law.<sup>84</sup> Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.<sup>85</sup> Conclusions of law are reviewed *de novo*.<sup>86</sup> Matters within the discretion of the trial court will not be disturbed in the absence of a manifest abuse of discretion.<sup>87</sup> A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds.<sup>88</sup>

A conclusion of law is one that follows, through legal reasoning, when the law is applied to the facts as found by the court.<sup>89</sup> Findings of fact that appear in the conclusions of law, and *vice versa*, are mislabeled and will

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<sup>83</sup> FOF 2.12(H), CP 709.

<sup>84</sup> *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003), *rev'd*, 148 Wn.2d 701, 64 P.3d 1 (2002).

<sup>85</sup> *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

<sup>86</sup> *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

<sup>87</sup> *State v. Braxton*, 20 Wn. App. 489, 491, 580 P.2d 1116 (1978), *review denied*, 91 Wn.2d 1018 (1979).

<sup>88</sup> *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

<sup>89</sup> *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986) ("If the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.")

be analyzed under the substantial evidence standard.<sup>90</sup> Findings of fact with legal ramifications are conclusions of law and reviewed *de novo*.<sup>91</sup>

**2. Appellant’s Brief did not Follow the Required Procedural Requirements**

**a. All Findings of Fact by the Trial Court That Were not Specifically Challenged are Verities on Appeal.**

RAP 10.3(g) requires parties to refer to the findings of fact by number when assigning error to them. The appellate court will only review a claimed error that is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.<sup>92</sup> Parties must demonstrate why specific findings of the trial court are not supported by the evidence and must cite to the record in support of that argument.<sup>93</sup> This Court can waive some technical violations of the rules where the briefing makes the nature of the challenge perfectly clear,<sup>94</sup> but otherwise the defects should not be waived.<sup>95</sup>

Here, Appellant, in her Assignment of Errors, challenged only four specific findings of fact – 2.9, 2.12(X), 2.12(Z), and 2.12 (AA).<sup>96</sup> Ab-

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<sup>90</sup> *Winans v. Ross*, 35 Wn. App. 238, 240 n.1, 666 P.2d 908 (1983).

<sup>91</sup> *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

<sup>92</sup> RAP 10.3(g).

<sup>93</sup> *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

<sup>94</sup> *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979).

<sup>95</sup> *Lint*, 135 Wn.2d at 532.

<sup>96</sup> CP 704-13.

sent Appellant's clear challenge to all but four findings of fact, this court must treat all other findings of fact as verities on appeal.<sup>97</sup>

**b. A party must provide argument, citation to authority and citation to the record to support each assignment of error.**

A party's failure to provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3(a), precludes appellate consideration of an alleged error.<sup>98</sup> RAP 10.3(a)(5) requires parties to cite to the record for every factual statement in an appellant's brief.<sup>99</sup> When citations are lacking, Washington appellate courts generally will not consider arguments subject to such deficiencies.<sup>100</sup>

**i. Appellant Failed to Provide Appropriate Legal and Record Cites to Support her Assignments of Error Relating to the Trial Court's Findings.**

Although Appellant has assigned error to four specific findings of fact, she has failed to provide argument or citation to the record to support her assigned error.

*Finding of Fact 2.9.* First, Appellant failed to provide appropriate legal and record cites to support her assigned error regarding FOF 2.9 related to the \$20,000 attorney fee award.<sup>101</sup> Despite having assigned error to this finding, Appellant has neither argued nor cited record support that Ms.

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<sup>97</sup> *Lint*, 135 Wn.2d at 533.

<sup>98</sup> *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003).

<sup>99</sup> RAP 10.3(a)(5).

<sup>100</sup> *Perry v. Rado*, 155 Wn. App. 626, 637 n.1, 230 P.3d 203 (2010).

<sup>101</sup> CP 706.

Johnston did not incur fees and costs in the amount of \$65,000, or that such fees were not reasonable. Instead, Appellant argued that the trial court should not have taken the California home proceeds into account when awarding fees, not that Appellant never received the proceeds from the sale. Therefore, these findings must stand on appeal.

Moreover, Appellant did not assign error to, or dispute, Finding 2.12(W). It is, thus, a verity on appeal and reads “Ms. Franklin has higher earning capacity and earns more wages than Ms. Johnston.”

Appellant argues “the financial declarations on record did not support the conclusion of ‘need v ability to pay.’” Appellant’s argument itself contains no citations to the portion of the record containing the financial declarations in question. Therefore this Court should not consider the argument about the financial declarations.

Even if the court were to consider the argument on the financial declarations, the findings are supported by substantial evidence. Appellant included one of her and one of Ms. Johnston’s financial declarations in the record.<sup>102</sup> These were before the trial court at trial. Ms. Johnston’s financial declaration shows she earned \$1,565.02 in monthly net income, had incurred \$24,043.09 in attorney fees as of March 3, 2009, and had only

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<sup>102</sup> *See CP 349 – 354 and CP 392 -399.*

paid \$10,565 in attorney fees.<sup>103</sup> Appellant's financial declaration showed she made \$5,535.36 in monthly net income; had \$24,000 in reserve to pay for trial/ongoing legal fees associated with her petitions, \$13,000 in trust for A.F.J., and \$13,000 in stocks and bonds; and showed she had paid \$66,000 in attorney fees, incurred \$72,485.60 in attorney fees, and expected to incur \$40,000 in additional attorney fees. This was ample evidence to support the trial court's findings.

*Finding 2.12(X)*. Second, Appellant assigned error to FOF 2.12(X) relating to *her* paying substantial fees in this case.<sup>104</sup> Nowhere has Appellant argued this is not true or that the record does not support this finding. In fact, in her brief Appellant claimed she has "incurred at least \$205,850 in legal expenses."<sup>105</sup> Lacking argument, this finding must stand.

*Finding 2.12(Z)*. Third, Appellant assigned error to FOF 2.12(Z) relating to Appellant having the California home proceeds.<sup>106</sup> As stated above, although Appellant has argued that the trial court should not have considered the sale proceeds when awarding fees, nowhere has she argued that she did not have the benefit of these proceeds. Lacking argument, this finding must stand. Even if this Court were to review the evidence, it am-

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<sup>103</sup> CP 349-354.

<sup>104</sup> CP 712.

<sup>105</sup> Appellant's Opening Brief Pg. 22.

<sup>106</sup> CP 712.

ply supports the finding.<sup>107</sup> Finding 2.12 (AA) will be substantively discussed in another section.

**ii. Appellant Alleged Several Facts Without Citation to the Record**

Appellant did not comply with RAP 10.3(a)(5) because her references to the record for each factual statement are spotty. There is no citation to the record for any of these facts in Appellant's Statement of the Case:

- Respondent was arrested & convicted for domestic violence (Br. of Appellant 3).
- How the child was conceived and that Appellant and Johnston planned together for his birth (*Id.* at 3).
- The circumstances under which Appellant called CPS and became foster licensed (*Id.* at 4).
- The Juvenile Court's mandate and Johnston's motion (*Id.* at 4-5).
- That Appellant and Johnston continued to live together and co-parent until the child's first birthday (*Id.* at 5).
- That Johnston threatened to sever the child's relationship with Appellant and defamed her character. That Appellee has Borderline Personality Disorder (*Id.* at 5).
- That Johnston was testing positive for marijuana use in 2009, missed required urinalysis tests, and suffered a relapse through November, 2009 (*Id.* at 6).
- That Johnston claimed facts in contradiction to her earlier declarations and that Appellant's attorney filed an amicus brief in response (*Id.* at 7).
- That Appellant sold drugs, squandered large sums of money, and has for years been either unemployed or underemployed (*Id.* at 7).

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<sup>107</sup> *VRP (Franklin's 3/26/09 Testimony) 28:21 – 29:1.*

- That Appellant bragged of a \$90,000 windfall (*Id.* at 7).
- That the TPR action was dismissed when Appellant became the child's adjudicated parent (*Id.* at 9).
- That an ISSP report indicated Appellant's adoption or third-party custody of the child (*Id.* at 10).
- Appellant's counsel was caught off guard, her request to continue was denied, and the court entered an immediate finding (*Id.* at 12).
- Appellant's counsel failed to contemporize her debts (*Id.* at 12).
- That Appellant's debts were twice that of Johnston, and that Appellant's out-of-pocket payments were ten times higher (*Id.* at 12).
- That the court announced its deference to Johnston (*Id.* at 14).
- Appellant's attorneys withdrew the day of a formal fact finding and conclusion of law and dependency review hearing (*Id.* at 15).
- That the JDOEP award was defective, that the award of interim fees was untimely and illegal, and that opposing counsel committed a spurious slight [sic] of hand (*Id.* at 16).
- That the motion for interim fees was filed during Appellant's attorney's vacation, leaving one day to respond (*Id.* at 17).
- All facts relating to the California house (*Id.* at 17-18).
- Appellant's statements of income and living expenses (*Id.* at 19).
- The benefits of counsel that Appellant did not have and that Johnston allegedly had (*Id.* at 19-20).
- That Johnston had "nice housing," transportation, access to health-care providers, public assistance, access to counsel, and never contributed financially to the care of her son (*Id.* at 20).
- The court inflated Appellant's Tukwila home's cost (*Id.* at 21).
- The court's support calculations, assignment of income, division of childcare costs, and allowances (*Id.* at 21).

- That Appellant’s counsel did not enter into her records Johnston’s TPR trial brief, anticipate or adequately defend actions for attorney fees and child support, that Appellant’s counsel threatened to withdraw without payment, the payment Appellant made, that Appellant has exhausted her finances and was forced to file bankruptcy, the total Appellant has incurred in legal expenses, that Appellant’s motion was cast aside after sitting idle for a month, and why there have been delays in Appellant’s appeal (*Id.* at 21-22).
- That Johnston retained a collection attorney who obtained a writ of garnishment, and that funds of Appellant were garnished (*Id.* at 23)
- That opposing counsel filed a motion for contempt, that the court intended child support to begin after the dependency, and that Appellant was assessed a \$500 judgment (*Id.* at 23).

**iii. Appellant Argued Issues Neither in her Assignments of Error nor Issues Related to Assignments of Error.**

Appellant specifically challenges Finding of Fact 2.12(AA) regarding the \$20,000 fee award being fair and equitable.<sup>108</sup> Appellant argued that this award was neither fair nor equitable, that it violated her due process rights, violated the equal protection clause, violated the separation of powers doctrine, and ignored Ms. Johnston’s purported intransigence.

***Due Process Violations:*** Although Appellant’s Argument B, beginning on page 32, includes a subsection headed “Due Process Violations,” there is no such assignment of error among Appellant’s four assignments of error. An unassigned error should be disregarded.

***Equal Protection:*** In Appellant’s due process argument she also seemingly makes an equal protection argument. Specifically, Appellant refer-

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<sup>108</sup> CP 712.

ences equally situated persons having identical constitutionally protected rights.<sup>109</sup> There is no assignment of error for a violation of Equal Protection, thus any Equal Protection arguments must be disregarded.

***Separation of Powers:*** Appellant also makes a separation of powers argument. No separation of powers error has been assigned. Because there is no error assignment related to separation of powers, Appellant's separation of powers argument should be disregarded.

***Intransigence:*** Appellant argues Ms. Johnston was intransigent (p. 44). However, there is no error assigned to the trial court's failure to award fees to Appellant based on Johnston's intransigence. Appellant did not provide any cites to the record to establish intransigence. As with other errors not assigned, the intransigence argument should be disregarded.

#### **iv. Appellant Argues Matters Without Appropriate Citation to the Record or Legal Authority**

***Attorney's Fees Award – Pro Bono Services:*** Appellant also argues that Ms. Johnston should not have received an attorney's fee award because she had pro bono legal services or legal services "provided free or discounted." (p. 42). Appellant's argument does not cite to the record to support this assertion. There is even an unchallenged finding of fact to the contrary: "Ms. Johnston has incurred substantial attorneys' fees in this

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<sup>109</sup> Appellant's Opening Brief, Pg. 40.

case.”<sup>110</sup> Because no error was assigned to this finding of fact, it is a verity on appeal.<sup>111</sup> Moreover, Ms. Johnston’s Financial Declaration clearly showed Ms. Johnston had paid over \$10,000 in attorney fees.<sup>112</sup>

In addition, Appellant cites no legal authority for her argument, and the law is completely to the contrary. Even if Ms. Johnston had received pro bono legal services, unless a statute expressly prohibits fee awards to pro bono attorneys, the fact that representation is pro bono is never justification for denial of fees.<sup>113</sup> Neither chapter 26.10 RCW nor chapter 26.26 RCW includes an express prohibition on fee awards to pro bono attorneys.

***Due Process Violation:*** Appellant, in her Opening Brief, also assigns error to and argues a fifth amendment issue without citation to authority. Appellant’s Assignment of Errors includes a violation of (or in Appellant’s words, “a prohibitive retroactive lien on”) her Fifth Amendment rights “to own and dispense property.”

The Fifth Amendment includes two references to property. One says that private property shall not “be taken for public use, without just compensation,”<sup>114</sup> not at issue here. The other says that no person shall “be

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<sup>110</sup> CP 712, ¶ 2.12 Y.

<sup>111</sup> *Lint*, 135 Wn.2d at 533.

<sup>112</sup> CP 353.

<sup>113</sup> *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 160, 147 P.3d 1305 (2006).

<sup>114</sup> U.S. Const. amend. V.

deprived of life, liberty, or property, without due process of law”<sup>115</sup> (the Due Process Clause). Appellant seems to assert that she has been deprived of property in violation of her due process rights. The Fifth Amendment is applicable to the states through the Fourteenth Amendment.<sup>116</sup> The Washington Constitution provides an additional due process guarantee.<sup>117</sup>

Appellant cites no legal authority to support her argument that a family court’s awarding attorney fees violated her rights to due process. The law is to the contrary. Attorney fee awards may be granted in summary fashion and minimal notice without violating due process.<sup>118</sup> Appellant had adequate notice that Ms. Johnston had a claim for attorney fees. Ms. Johnston received interim attorney fees from the trial court in September 2007 – 6 months prior to trial.<sup>119</sup> Finally, Appellant did not object to the attorney fee award at trial; she only requested additional time to pay the award.<sup>120</sup>

Appellant cited Washington statutes purportedly supporting her claim to having had full title to the California real estate. Ignoring Appellant’s improperly citing Washington statutes to support real property ownership in California, the trial court did not base its attorney fee award on any de-

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<sup>115</sup> *Id.*

<sup>116</sup> *State v. Bryan*, 145 Wn. App. 353, 363, 185 P.3d 1230 (2008).

<sup>117</sup> Wash. Const. art. I, § 3: “No person shall be deprived of life, liberty, or property, without due process of law.”

<sup>118</sup> *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314, 553 P.2d 423 (1976).

<sup>119</sup> CP 1272-1273.

<sup>120</sup> CP 698.

fects in or clouds on title, nor did it lien the property in any way. The trial court simply made a finding that Appellant had benefited from the sale proceeds and took this factor into account when evaluating her resources, which is squarely within the trial court's discretion.<sup>121</sup>

**v. Appellant Argues Nine Orders Were Entered in Error, but Appealed Only Four of Them.**

A party seeking review of a trial court decision reviewable as a matter of right must file a notice of appeal of that decision.<sup>122</sup> A notice of appeal must be timely filed.<sup>123</sup> Appellant's Notice of Appeal filed with this Court sought review of only the following:

- Judgment Order on Petition for Establishment of Parentage and Granting Other Relief (JDOEP) signed and dated on May 22, 2009.
- Findings of Fact and Conclusions of Law signed May 26, 2009.
- Child Support Order signed on May 26, 2009.
- Parenting Plan signed on May 26, 2009.

Appellant's opening brief, however, assigns error to all or portions of five more decisions: Order Requiring Interim Attorney Fees and Costs Including Mediation Fees of September 5, 2009; an Order Appointing Guardian ad Litem on Behalf of Minor of September 24, 2009; a Supplemental Judgment and Order Granting Post Judgment Interest of July 27,

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<sup>121</sup> *Pippins*, 110 Wn.2d at 483.

<sup>122</sup> *RAP 5.1(a)*.

<sup>123</sup> *RAP 5.2*.

2009; a Final Order Parenting Plan Reserving Issues of July 14, 2009; and an Order regarding a Motion for Contempt of Child Support. None of these are on appeal; no Notice of Appeal including them has been filed. This Court is unable to review errors assigned to decisions not on appeal.

**vi. Appellant Raises Several Issues for the First Time on Appeal**

A party waives an issue by not raising it before the trial court.<sup>124</sup> If a party so waives an issue, including the issue of bad faith, the appellate court will refrain from reviewing the argument.<sup>125</sup>

**Bad Faith.** Appellant in her assignment of errors #2 says that she was harmed by her counsel's failure to raise the issue of bad faith before the trial court. Because the issue of bad faith was not raised before the trial court, the issue has been waived, and this court should refrain from reviewing Appellant's bad faith argument.

**Collateral Estoppel/Issue Preclusion.** Appellant in her appeal raises the argument of collateral estoppel (issue preclusion) for the first time.<sup>126</sup> Appellant cites no authority for the proposition that she may raise collat-

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<sup>124</sup> *RAP 2.5(a); and Keller v. Allstate Ins. Co., 81 Wn. App. 624, 635, 915 P.2d 1140 (1996).*

<sup>125</sup> *Id.*

<sup>126</sup> *Appellant's Opening Brief pps 30-31.*

eral estoppel for the first time on appeal, and it is doubtful that the issue has been preserved.<sup>127</sup>

Even if the issue has been preserved, it would not lead to a different result. Before the doctrine of issue preclusion may be applied, the party asserting the doctrine must prove: the issue decided in the prior adjudication is identical with the one presented in the second action; the prior adjudication must have ended in a *final* judgment on the merits; the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and application of the doctrine does not work an injustice.<sup>128</sup> Not only was this never raised in the trial court, but Appellant has not argued, much less proven, that the issue decided in the prior adjudication is identical with the one presented in the second action. She simply states her belief that facts elicited in the State's dependency and termination of parental rights action should somehow be given preclusive effect. Appellant has not claimed, much less proven, that the prior adjudication ended in a *final* judgment on the merits. Nor has Appellant claimed, or proven, that application of issue preclusion would not work an injustice.

If Appellant is asserting an issue preclusion argument to prove her parentage (Appellant does argue, "At trials, Johnston instead of categori-

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<sup>127</sup> See *Creech v. Agco Corp.*, 133 Wn. App. 681, 687, 138 P.3d 623 (2006).

<sup>128</sup> *Creech*, 133 Wn. App. at 687-88.

cally refuting my parentage, endorsed its presence”), then her argument fails because a dependency action is not an action to determine parentage.

**Common Fund Doctrine.** Appellant argues for the first time on appeal a right to attorney fees at trial under the common fund doctrine. Not only was this raised for the first time on appeal, but it is also not a valid legal argument. Attorney fees are not awarded unless expressly authorized by contract, statute, or recognized equitable exception.<sup>129</sup> Under the common fund doctrine, a narrow equitable exception, attorney fees will be awarded only when a party creates or preserves a common fund for the benefit of others in addition to themselves.<sup>130</sup> Here, Ms. Johnston was not awarded fees under the common fund doctrine, and Appellant did not create or preserve a common fund, nor has she argued that this is a common fund case. Appellant is not entitled to attorney fees under the common fund doctrine.

**Inadequate Pleadings.** Appellant also raises for the first time on appeal that Ms. Johnston’s pleadings were inadequate, but this error was not preserved for appellate review. Treating a pleading as sufficient waives defects in the pleading other than jurisdictional defects.<sup>131</sup>

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<sup>129</sup> *Pierce County v. State*, 159 Wn.2d 16, 50-51, 148 P.3d 1002 (2006).

<sup>130</sup> *Id.*

<sup>131</sup> *Turner v. Turner*, 33 Wash. 118, 122-23, 74 P. 55 (1903); CR 15 (b).

Appellant argues that the parties' trial briefs did not address attorney fees. First, a trial brief is not a pleading.<sup>132</sup> Second, Appellant did not cite to the record to show a pleading or the trial briefs did not contain a reference to child support or attorney fees. Third, no authority requires a brief identify every issue that is to be tried. Ms. Johnston argued Appellant should not be adjudicated a parent and would *not* argue for child support.

Finally, the verbatim report of proceedings Appellant cites shows only that Appellant's trial counsel argued that child support should not be decided because Appellant was not prepared to address the issue, not knowing her parental status until she was adjudicated. Despite this, both Appellant and Ms. Johnston filed financial declarations just prior to trial.<sup>133</sup> The only plausible reason to file financial declarations is so the trial court can determine financial issues like attorney fees and child support.

**c. The Party Seeking Review has the Burden to Perfect the Record.**

If a party seeking review arranges for less than all of the verbatim report of proceedings, the party should include in the statement of arrangements a statement of the issues the party intends to present on review.<sup>134</sup>

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<sup>132</sup> *CR 7(a)*.

<sup>133</sup> *CP 392-399; and 349-354*.

<sup>134</sup> *RAP 9.2(c); and . Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994)*.

An insufficient record on review precludes review of the alleged errors.<sup>135</sup>

Here, Appellant has stated that “the record should be considered as a whole.” Appellant however has arranged for only a portion of the verbatim report of proceedings. Because Appellant has not provided the entire record, the record cannot be considered as a whole.

**3. The *Pro Se* Appellant is Held to the Same Standard as Other Litigants who Have Counsel.**

Appellant is a *pro se* litigant and argues that *pro se* litigants are held to less stringent standards. In support of this, she cites a U.S. Supreme Court case, *Haines v. Kerner*.<sup>136</sup> However, Appellant is not before the U.S. Supreme Court, and in Washington state courts *pro se* litigants are held to the same standard and same rules of procedure on appeal as attorneys.<sup>137</sup>

**4. There is Sufficient Evidence to Find it was Fair and Equitable to Award Ms. Johnston \$20,000 in Attorney’s Fees.**

Attorney fee awards are authorized under RCW 26.26.140. These awards are committed to the trial court’s discretion.<sup>138</sup> The trial court may base such a fee award on its evaluation of the parties’ resources.<sup>139</sup>

In doing so here, the trial court did not abuse this discretion. There is an unchallenged finding that Appellant had a higher earning capacity and

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<sup>135</sup> *Bulzomi*, 72 Wn.App. at 525.

<sup>136</sup> *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

<sup>137</sup> *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997).

<sup>138</sup> *Pippins v. Jankelson*, 110 Wn.2d 475, 482-83, 754 P.2d 105 (1988).

<sup>139</sup> *Id.* at 482.

earns more than Ms. Johnston. The trial court also took into account the proceeds Appellant received from the California house sale when evaluating her resources and used this as one factor in making its fee award.

Attorney fees are equally awardable under RCW 26.10.080. Attorney fee awards under RCW 26.10.080 are based on financial need and ability to pay.<sup>140</sup> These awards are reviewed under the abuse of discretion standard.<sup>141</sup> Appellant has failed to show the trial court abused its discretion.

**5. Ineffective Assistance of Counsel is not Grounds for Reversal in a Parentage and Third Party Custody Case.**

Appellant argues her counsel was ineffective because they did not anticipate the trial court's consideration of attorney fees and child support and failed "to advance the theories of bad faith, estoppel, and common benefit." Ineffective assistance of counsel in this civil case between private parties might give rise to a professional negligence claim against Appellant's counsel, but is not grounds for reversal.<sup>142</sup>

**6. The Trial Court Properly Entered the Child Support Order.**

Appellant has made no specific assignment of error to any findings in the Child Support Order, so they are verities on appeal. Appellant argues a due process violation because the trial court did not allow "facts and full

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<sup>140</sup> *In re Custody of Smith*, 137 Wn.2d 1, 21-22, 969 P.2d 21 (1998).

<sup>141</sup> *Id.* at 22.

<sup>142</sup> See *Nicholson v. Rushen*, 767 F.2d 1426 (9th Cir. 1985); *King v. King*, 162 Wn.2d 378, 394-95, 174 P.3d 659 (2007); and *In re Dependency of Grove*, 127 Wn.2d 221, 237-38, 897 P.2d 1252 (1995).

arguments on the merits of child support be set first in prepared motion, instead it was an untimely afterthought.” (p. 44). Appellant cited no legal authority to support her due process claim. For this reason, alone, her due process argument regarding child support should not be considered.

Even if this Court were to consider Appellant’s due process error, the argument has no merit. Procedural due process requires, at minimum, notice and an opportunity to be heard.<sup>143</sup> The Order of Child Support was dated May 26, 2009.<sup>144</sup> Back in 2007, Appellant herself petitioned for establishment of *de facto* parentage and an order of child support.<sup>145</sup> Additionally, Petitioner filed a financial declaration immediately prior to trial.<sup>146</sup> Finally, Appellant wanted to be a *de facto* parent and that entails not only the right to the child’s companionship, but also responsibilities such as child support.<sup>147</sup>

Appellant next argues that the child support order should be modified on appeal to the date the dependency action was terminated.<sup>148</sup> Appellant does not cite to the record or legal authority to support this argument.

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<sup>143</sup> *Kauzlarich v. Washington State Dept. of Social and Health Services*, 132 Wn. App. 868, 876 n.8, 134 P.3d 1183 (2006), review denied, 159 Wn.2d 1009, 154 P.3d 918 (2007).

<sup>144</sup> CP 762.

<sup>145</sup> *See* Petitions filed in cause numbers 07-3-07493-1 UFK and 07-5-02508-2 UFK, referenced in Respondent’s Supplemental Designation of Clerk’s Papers filed August 2, 2010 and CP 1-14.

<sup>146</sup> CP 392-399.

<sup>147</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005).

<sup>148</sup> Appellant’s Opening Brief, Pg. 46.

Even if the trial court did make such an express statement, Washington law is clear that when statements in a trial court's oral decision are at variance with the findings or judgment, the statements cannot be used to impeach the findings or judgment.<sup>149</sup> The written order of Child Support is clear that the starting date of payments was to have been Oct. 1, 2009.<sup>150</sup>

Appellant points out in her brief that the dependency continued longer than expected (it "survived past its forecasted life"). This may have been an unanticipated change of circumstances justifying the Child Support Order be modified.<sup>151</sup> Accrued installments of support, however, are vested and may not be retrospectively modified.<sup>152</sup> Appellant cannot now argue that she does not owe the payments beginning October 1, 2009.

#### **7. The Trial Court Properly Entered the Parenting Plan.**

Appellant has made no specific assignment of error to any findings in the Parenting Plan. They are verities on appeal. A trial judge is vested with wide discretion in custody matters.<sup>153</sup> Only a manifest abuse of discretion would require reversal.<sup>154</sup>

Here, there has been no showing that the trial court manifestly abused its discretion. Appellant complains about Ms. Johnston's fitness as a par-

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<sup>149</sup> *Rutter v. Rutter's Estate*, 59 Wn.2d 781, 784, 370 P.2d 862 (1962).

<sup>150</sup> CP 759.

<sup>151</sup> See RCW 26.09.170(1).

<sup>152</sup> *Koon v. Koon*, 50 Wn.2d 577, 579, 313 P.2d 369 (1957).

<sup>153</sup> *In re Marriage of Janovich*, 30 Wn. App. 169, 172, 632 P.2d 889 (1981), review denied, 95 Wn.2d 1028 (1981).

<sup>154</sup> *Id.*

ent and wants full custody. Her argument is without cite to the record and does not address the unchallenged finding Ms. Johnston is a fit parent, which is a verity on appeal.<sup>155</sup>

Appellant also states in her argument that Ms. Johnston had a domestic violence history. The trial court made no findings Ms. Johnston was domestically violent and this should preclude Appellant's claim.<sup>156</sup> The Appellant does not cite to the record to support her argument. In fact, the trial court specifically stated in the Parenting Plan that RCW 26.09.191(1), (2) (dealing with domestic violence) did not apply.<sup>157</sup>

The Appellant also alleges Ms. Johnston "freshly relapsed" without citing the record. While it is unclear when the alleged relapse may have occurred, if it was after the Parenting Plan was entered, then it might serve as a basis for modification and not as grounds to reverse the trial court's Parenting Plan that was based on the circumstances presented at trial.

Appellant cites RCW 13.34.020 to support the best interest of the child standard applies to parenting determinations.<sup>158</sup> RCW ch.13.34 applies to dependency actions. But here, the trial court entered a Parenting Plan pur-

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<sup>155</sup> CP 707, ¶ 2.12 B.

<sup>156</sup> *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. Bailargeon v. Press*, 11 Wn. App. 59, 67, 521 P.2d 746 (1974), review denied, 84 Wn.2d 1010 (1974).

<sup>157</sup> CP 769.

<sup>158</sup> *Appellant's Opening brief at page 48.*

suant to RCW Title 26. Appellant has not shown how Title 13 could apply to private parties in a custody or parentage proceeding under RCW Title 26. Appellant was also not a party to the dependency proceedings and did not appeal any decisions made by the dependency court.

This Parenting Plan allows for joint decision making (subject to Appellant obtaining individual counseling)<sup>159</sup> and for the child to reside with each mother approximately half the time.<sup>160</sup> The Plan expressly takes into account the best interests of the child.<sup>161</sup> Such a plan is well within the discretion of the trial judge, and Appellant has not met her burden to show manifest abuse of discretion.

#### **8. Appellant's CR 11 Claims Should be Denied.**

Although Appellant does not assign error regarding the trial court's failure to award her attorney fees under CR 11 and fails to show such sanctions were even requested, Appellant argues CR 11 sanctions were and are warranted. A CR 11 violation occurs when a pleading or motion is not well grounded in fact or is not warranted by existing law.<sup>162</sup>

Here, Ms. Johnston's attorney fee claims were well grounded in both fact and law. Appellant brought a Nonparental Custody Petition under

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<sup>159</sup> CP 775 ¶ 4.2.

<sup>160</sup> CP 770 ¶ 3.1.

<sup>161</sup> CP 770 ¶ 2.2.

<sup>162</sup> CR 11(a).

RCW ch. 26.10.<sup>163</sup> RCW 26.10.080 clearly provides a party is entitled to attorney fees and costs based on need and ability to pay. Similarly, child support was properly requested. Appellant's claim for relief in her Non-parental Custody Petition requested the trial court calculate child support.

Finally, attorney fees and child support were properly requested under RCW ch. 26.26. Appellant filed a separate petition seeking status as a *de facto* parent. In her petition she requested the trial court determine child support.<sup>164</sup> Moreover, *de facto* parent status bestows not only full parental rights, but also full parental responsibilities. Similarly, RCW 26.26.140 allows trial courts to award attorney fees.

Despite her argument to the contrary, it is clear Appellant maintained a UPA action under RCW ch. 26. The UPA, however, expressly allows courts to adjudicate a woman's maternity.<sup>165</sup> Moreover, Appellant, specifically proceeded under chapter 26.26 RCW and even asked to have one of its requirements waived.<sup>166</sup> Finally, Ms. Johnston was awarded \$5,000 in interim attorney fees pursuant to RCW 26.26.140 six months prior to trial.<sup>167</sup>

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<sup>163</sup> See Petition filed in cause number 07-3-07493-1 UFK, referenced in Respondent's Supplemental Designation of Clerk's Papers filed August 2, 2010.

<sup>164</sup> See Petition filed in cause number 07-5-02508-2 UFK, referenced in Respondent's Supplemental Designation of Clerk's Papers filed August 2, 2010.

<sup>165</sup> RCW 26.26.101(1)(b).

<sup>166</sup> See Appellant's Motion to Strike Paternity Test, CP 49-53, in which she acknowledges proceeding under chapter 26.26 RCW.

<sup>167</sup> CP1272-1273.

Finally, even if RCW 26.26.140 could not provide a basis for the \$20,000 fee award, certainly RCW 26.10.180 could provide a legal basis for the award because Appellant clearly filed a third party custody action.

## **E. Cross Appeal Arguments**

### **1. Appellant Cannot be a *De Facto* Parent.**

The Washington Supreme Court recognized the existence of *de facto* parents in *In re Parentage of L.B.*<sup>168</sup> In *L.B.*, two lesbian partners, after having lived together as intimates for five years, agreed to conceive by artificial insemination and raise a child.<sup>169</sup> A baby girl was born in 1995, and both women parented her for the next six years.<sup>170</sup> Then, the women ended their relationship, and litigation over access to the child followed.<sup>171</sup>

The Court determined that the woman who was an intended parent, but neither a biological nor adoptive parent, had standing to petition the courts to be determined a *de facto* parent under Washington's common law.<sup>172</sup> The remedy was fashioned in that case "to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy."<sup>173</sup> Because the Supreme Court found

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<sup>168</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).

<sup>169</sup> *Id.* at 682.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 707.

there was a gap in the current statutory schemes, it held “Washington's common law recognizes the status of *de facto* parents.”<sup>174</sup>

The Court adopted these strict criteria to establish standing as a *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, 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.<sup>175</sup> The Court added a fifth factor: 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.”<sup>176</sup> This is purposely a strict test “to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children.”<sup>177</sup>

**a. Appellant Cannot be a *De Facto* Parent Because the Trial Court did not and Could not Find Appellant Undertook a Permanent Parental Role in A.F.J.’s Life.**

Decisions have ramifications. In this case Appellant’s decision to call CPS and have A.F.J. removed from Ms. Johnston’s care together with her

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 708.

<sup>177</sup> *American Law Institute, Principles of the Law of Family Dissolution*, §2.03, cmt c, pg. 130.

decision to become A.F.J.'s foster parent three months after birth precludes her from being A.F.J.'s *de facto* parent.

*L.B.* makes clear a trial court must find the purported *de facto* parent fully and completely undertook a *permanent*, unequivocal, committed, and responsible parental role in the child's life.<sup>178</sup> Here, the trial court did not make this critical finding. The closest it came was to find Appellant "fully and unequivocally assumed a parental role."<sup>179</sup> This critical finding left out the words permanent, committed and responsible. 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.<sup>180</sup> Here, the trial court's failure to make the required findings should be construed to mean they do not exist and, therefore, Appellant cannot be a *de facto* parent.

Not only did the trial court not make the required finding that Appellant's role in A.F.J.'s life was permanent, the trial court also could not make such a finding as a matter of law. By definition a foster parent cannot have a relationship with the foster child that is anything other than

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<sup>178</sup> *L.B.*, 155 Wn.2d at 708.

<sup>179</sup> FOF 2.12(R), ln 6-8, CP 711.

<sup>180</sup> *Baillargeon v. Press*, 11 Wn. App. 59, 67, 521 P.2d 746 (1974), review denied, 84 Wn.2d 1010 (1974).

transitory and not permanent.<sup>181</sup> Because Appellant became A.F.J.’s foster parent in order to become his temporary custodian when he was 3 months old, she could not at that time have assumed the permanent parental role in A.F.J.’s life. The dependency’s goal was to reunify A.F.J. with Ms. Johnston and Appellant was a transitory step in that process.<sup>182</sup>

**b. Appellant Cannot Meet L.B. Factor 1 Because Ms. Johnston did not and Legally Could not Foster, Encourage or Consent to Appellant Being A.F.J.’s Parent due to the Dependency Action.**

Several Washington cases have refused foster parents standing to claim *de facto* parentage because they cannot meet the first *L.B.* factor. In *In Re Custody of A.C.*, the child’s biological mother, Holly, had drug problems and her child was placed with foster parents Anita and David.<sup>183</sup> The court found that because Holly had never consented to Anita and David’s custody of the child, they could not use their status as psychological parents to interfere with Holly’s constitutionally protected parental rights.<sup>184</sup>

A child in foster care “remains a dependent child in the legal custody of the State.”<sup>185</sup> Thus at the time A.F.J. was adjudicated dependent and removed from Ms. Johnston’s care, it was the State, not Ms. Johnston, that

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<sup>181</sup> *In re Parentage of L.B.*, 155 Wash.2d 679, 690, n. 7, 122 P.3d 161 (2005), *citing*, *In re Dependency of J.H.*, 117 Wn.App. 260, 469, 815 P.2d 1380 (1991); and *In re Adoption of Garay*, 75 Wn.2d 184, 185, 449 P.2d 696 (1969).

<sup>182</sup> *In re Dependency of Tyler L.*, 150 Wn. App. 800, 805 208 P.3d 1287 (2009).

<sup>183</sup> *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).

<sup>184</sup> *Id.* at 261.

<sup>185</sup> *Blackwell v. State Dep’t. of Social and Health Services (DSHS)*, 131 Wn. App. 372, 379, 127 P.3d 752 (2006).

fostered and encouraged the relationship between A.F.J. and Appellant. A.F.J.'s dependency precluded Ms. Johnston's ability to foster and encourage the relationship. Appellant<sup>186</sup> and the trial court<sup>187</sup> understood A.F.J. was in the State's custody and only it could make ultimate custody decisions regarding him. Since the child was removed from Ms. Johnston's care and placed into the State's custody when A.F.J. was less than 3 months old, Appellant could not have been A.F.J.'s *de facto* parent at that time. This alone defeats Appellant's claim to be A.F.J.'s *de facto* parent.

**c. Appellant does not Meet L.B. Factor #3 Because she was Paid to be A.F.J.'s Foster Parent.**

Other foster parents who have attempted to claim *de facto* parent status have also been found not to qualify because they fail to meet L.B. factor #3, which is that they must assume the obligations of parenthood without expectation of financial compensation. In *Blackwell*, the Blackwells were foster parents to D.R.<sup>188</sup> An abuse allegation was brought, and following two years of hearings, the Blackwells tried to claim standing as *de facto* parents to pursue a claim against DSHS for negligent investigation of the abuse claim.<sup>189</sup> The court held that the Blackwells could not meet

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<sup>186</sup> VRP (Franklin 3/26/09) 46:2-7.

<sup>187</sup> FOF 2.12(O), CP 710.

<sup>188</sup> *Blackwell v. State Dep't. of Social and Health Services (DSHS)*, 131 Wn. App. 372, 374, 127 P.3d 752 (2006).

<sup>189</sup> *Id.* at 374, 378-79.

the third *L.B.* factor because “they were paid to serve as foster parents” and thus did not qualify as *de facto* parents.<sup>190</sup>

Here, Appellant’s having been paid to serve as a foster parent similarly defeats her claim to *de facto* parent status. Appellant became a foster parent knowing there would be compensation and thus had expectation of receiving it. She did receive and use it. Therefore, the trial court’s finding in Paragraph 2.12(N) that Appellant undertook parental responsibilities without a compensation expectation is not supported by the evidence.

Again, if the Court were to allow Appellant’s claim, then any foster parent could claim to have met the third *L.B.* prong merely by arguing that they accepted compensation only because the State was required to pay them under the foster care statutes, rules and regulations. There is no rational basis to give a member of a former same gender couple who becomes a foster parent disparate treatment from other foster parents.

**d. There are Recognized Sound Policy Considerations to Not Allow Foster Parents to Have Standing to Petition for *De Facto* Parentage Because it is Likely to Interfere With the State-run Foster Care and Adoption System.**

There are recognized policy considerations to not allow foster parents the right to petition to be *de facto* parents or, at the least, to not include their foster parent time in making a *de facto* parent determination. In *Os-*

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<sup>190</sup> *Blackwell v. State Dep’t. of Social and Health Services (DSHS)*, 131 Wn. App. 372, 378, 127 P.3d 752 (2006).

*terkamp v. Stiles*,<sup>191</sup> the Alaska Supreme Court recently refused a domestic partner *de facto* or psychological parent status because the domestic partner was also a foster parent. The time that the domestic partner was also a foster parent was excluded from the relevant time period to determine *de facto* or psychological parent status. In other words, the domestic partner had to establish he met the *de facto* or psychological parent requirements without counting the relationship that he had with the child during the time he was a foster parent.<sup>192</sup> The Alaska Supreme Court specifically held

Allowing [the domestic partner] to establish psychological parent status based upon time he served as a foster parent is also inconsistent with the basic premise of our foster care and adoption programs. Discussing the related concept of “de facto parent” status, the American Law Institute has cautioned, “[r]elationships with foster parents are...generally excluded...because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children.” (citation omitted).<sup>193</sup>

Appellant cannot meet the *L.B.* factors if this Court excludes Appellant’s time as a foster parent. Here, Ms. Johnston and her child moved from the Tacoma Perinatal Treatment Center on December 24, 2005. Ms. Johnston and the child maintained a clean and sober apartment in Tacoma, but visited and stayed with Appellant. The State removed the child from Ms. Johnston’s care in late January 2006,

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<sup>191</sup> \_\_\_\_\_ P.3d \_\_\_\_\_, 2010 WL 2541132 (Alaska 2010).

<sup>192</sup> *Osterkamp*, at 6-7.

<sup>193</sup> *Id.* at 7.

commenced dependency proceedings and Appellant immediately attended foster parent training and became a foster parent between April and September 2006. A.F.J. was less than 3 months old and had only been regularly staying with Appellant for about one month when the State took custody of him and had only lived with him for no more than 8 months before she became a foster parent. If this Court excluded Appellant's time with the child as a foster parent, then it is clear she cannot be a *de facto* parent.

**2. Appellant has no Standing to Raise De Facto Parentage Because she was a Foster Parent with a Statutory Way to Become a Parent.**

Another legal ramification to Appellant's decision to call CPS, have the child removed from Ms. Johnston's care, and then to become a foster parent, is she lost the right to petition to be a *de facto* parent. *L.B.* only provides a common law remedy in those rare instances where the Legislature did not provide a statutory remedy and there was a gap in the statutory schemes that had to be filled by this state's common law.<sup>194</sup>

There is, and always have been, statutory remedies for foster parents to become a child's parent. Foster parents can adopt when a legal parent's rights are terminated.<sup>195</sup> They can file a third-party custody petition.<sup>196</sup>

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<sup>194</sup> *L.B.* 168 *Wn.2d* at 689 and 707; and *In re Parentage of M.F.*, 168 *Wn.2d* 528,531, 228 *P.3d* 1270 (2010).

<sup>195</sup> *RCW* 26.33.100.

<sup>196</sup> *RCW* ch. 26.10.

Appellant, an admitted foster parent, purposely availed herself of a third party custody action. The State also brought a parental rights termination proceeding. Appellant could not meet the burden to establish third party custody and does not challenge the trial court's decision in that regard. The State was unsuccessful in terminating Ms. Johnston's parental rights. Despite this, the trial court applied the common law not to fill a gap in the statutes, but to allow Appellant to meet a lower, best interests of the child standard to become a parent.

The Washington Supreme Court has recently made clear that this was error. In April 2010, the Court decided *In re Parentage of M.F.*<sup>197</sup> It denied a step-parent the ability to petition for *de facto* parentage because statutory remedies, like third-party custody, have historically existed to allow step-parents to obtain custody over a child.<sup>198</sup> Because Appellant had foster parent status and the statutory right to adopt in connection with parental rights being terminated and rights to bring a third party custody action, there is no gap and she cannot rely on Washington's common law.

This case is factually distinguishable from *L.B.* While the parties here, like *L.B.*, are lesbians, the record is clear Appellant and Ms. Johnston had a turbulent, sporadic relationship and were estranged when Ms. Johnston conceived. Appellant was not at the child's birth; the two had become just

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<sup>197</sup> 168 Wn.2d 528.

<sup>198</sup> *M.F.*, 168 Wn.2d at 532-534.

friends. Ms. Johnston asked her friend and former girlfriend to help with her new baby, like many new single mothers ask friends for help. Friendly help, gratuitously given, does not bestow on the helper parental rights.

**3. The Trial Court Erred in Adjudicating Appellant as A.F.J.'s *De Facto* Parent Because He has a Father, His Parental Rights Were not Terminated, and Father was Identifiable but Given no Notice.**

A distinguishing factor between *M.F.* and *L.B.* is that *M.F.* involved an attempt by a third party to become a *de facto* parent when the child already had two parents who were not proven unfit.<sup>199</sup> Here, A.F.J. has a biological father and a biological mother. Only Ms. Johnston, his biological mother, was made a party. Appellant acknowledged Ms. Johnston knew who the father was and had his address.<sup>200</sup> Yet Appellant made no effort to notify A.F.J.'s father before determining parentage. There was no finding or evidence that A.F.J.'s father was unfit. The presumption is he was fit.<sup>201</sup>

**4. The Trial Court Made Several Other Findings That are not Supported by the Evidence.**

**a. The Trial Court Erred in Finding Ms. Johnston and Appellant jointly agreed to raise A.F.J. as co-parents.**

The trial court erred in finding there was an agreement between the parties that they would co-parent the child. First, even if such an agreement were reached, it would not be binding on a biological parent or en-

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<sup>199</sup> *M.F.*, 168 Wn.2d at 532.

<sup>200</sup> *VRP (Franklin 3/29/09)* 40:10-21.

<sup>201</sup> *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

forceable by the non-biological parent because the biological parent has fundamental constitutional liberty interests that must be protected.<sup>202</sup>

The uncontroverted evidence shows there was no such agreement. Appellant admits Ms. Johnston did not consent to her adopting A.F.J. when they discussed the issue. This is significant, but not dispositive.

The best course of action for an individual who expects legal recognition as a *de facto* parent would be formal adoption, if available under applicable state law. Failure to adopt the child when it would have been possible is some evidence, although not dispositive, that the legal parent did not agree to the formation of the *de facto* parent relationship.<sup>203</sup>

Here, Ms. Johnston has consistently and steadfastly maintained she did not want to give Appellant parental rights because she feared Appellant would use them as a weapon and that she could not financially afford to fight Appellant. Appellant's attacks, as evidenced by her opening brief and this appeal, are relentless and expensive. This single mother's cry for help while struggling with recovery should not bestow parental rights that were unintended.

Good policy is for this State to encourage parents to freely ask for help in parenting a child if it would be in the child's best interests, without fear they are giving parental rights to those who may question their fundamental, constitutional right to parent the child.

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<sup>202</sup> See *In re Dependency of T.C.C.B.138 Wn. App. 791, 796, 158 P.3d 1251(2007)* and *WILLSTN-CN § 16:21*.

<sup>203</sup> ALI, *The Law of Family Dissolution*, §2.03, comment c, pg. 130.

**b. The Trial Court Erred in Finding Ms. Johnston and A.F.J. Went to Live With Appellant After Johnston Left PTS.**

The trial court improperly found Ms. Johnston and A.F.J. went to live with Appellant after Ms. Johnston left PTS in Tacoma.<sup>204</sup> The uncontroverted testimony from both Appellant and Ms. Johnston was that Ms. Johnston maintained clean and sober housing in Tacoma after she left PTS.<sup>205</sup> Appellant herself testified that Ms. Johnston and A.F.J. stayed with her only half time for the one month between the time Ms. Johnston left PTS and the time DSHS removed him from Ms. Johnston's care.<sup>206</sup>

**c. The Trial Court Erred in Finding A.F.J.'s placement with Appellant is not the Same as a Traditional Foster Home Placement and that Appellant had Every Hope That she and Ms. Johnston Would Parent Together.**

This finding is inconsistent with the law. By definition a foster parent cannot have a reasonable expectation that the relationship with the child will be anything other than transitory, not permanent.<sup>207</sup> Here, Appellant's subjective and unreasonable expectation should not have legal relevance sufficient to remove the Supreme Court's rigid requirements that anyone claiming *de facto* parent status undertake a permanent and unequivocal role in a child's life and not expect compensation for their services.

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<sup>204</sup> FOF No.21.2(K), Pg. 6, ln 23-24. CP 709.

<sup>205</sup> VRP (Franklin 3/26/09) 16:1-16 and VRP (Johnston 4/8/09) 24:17-25:4.

<sup>206</sup> VRP (Franklin 3/26/09) 16:4-16.

<sup>207</sup> *In re Parentage of L.B.*, 155 Wash.2d 679, 690, n. 7, 122 P.3d 161 (2005), *citing*, *In re Dependency of J.H.*, 117 Wn.App. 260, 469, 815 P.2d 1380 (1991); and *In re Adoption of Garay*, 75 Wn.2d 184, 185, 449 P.2d 696 (1969)

This finding and its legal ramifications, if let stand, will create the proverbial slippery slope. Every foster relationship is different. Creating exceptions that seemingly allow *de facto* parentage in foster situations will greatly expand the narrow reed that *L.B.* was intended to be.

**d. The Trial Court Erred in Finding Appellant had Fully and Unequivocally Assumed a Parental Role.**

The trial court tried to waive its hands through the rigid *L.B.* requirement and find Appellant had fully and unequivocally assumed a parental role. As argued previously, this finding is inadequate. It is also not supported by the record. Appellant did not *fully* undertake parental responsibility. For instance, she did not solely financially support the child; rather, she received State assistance despite earning over \$84,000 per year.

**5. Ms. Johnston Requests Attorney fees and Costs under RAP 18.1, RCW 26.10.080, 26.26.140, 4.84.185; CR 11; and Intransigence.**

RAP 18.1 allows this Court to award attorney fees if they are awardable at trial. Attorneys' fees are awardable under RCW 26.26.140 and RCW 26.10.180 as they were awarded in the trial court and for the arguments above. Attorneys' fees are also awardable under RCW 4.84.185 if the appeal is wholly frivolous. Appellant's appeal was wholly frivolous and fees should be awarded. Even if Appellant's appeal was not wholly frivolous, fees should be awarded under CR 11 because many arguments were without basis in law or fact. For instance, there were no facts sup-

porting the argument Ms. Johnston's attorney services were *pro bono*, and even if they were, there was no argument that she would somehow not be entitled to fees. Appellant's due process, equal protection, and separation of powers arguments were without merit. Intransigence can also justify an attorney fee award.<sup>208</sup> Appellant has been intransigent. Getting her to file her opening brief involved multiple motions and threats for sanctions. Ms. Johnston requests the court award her reasonable attorney's fees and costs.

#### **F. Conclusion**

This Court should reverse the trial court's *de facto* parentage determination with instructions that *de facto* parentage cannot be adjudicated in this case. This Court should then vacate the child support order, permanent parenting plan and final order establishing permanent parenting plan. Finally, this Court should award Ms. Johnston her attorney fees and costs pursuant to RAP 18.1, RCW 26.10.080, RCW 26.26.140, RCW 4.84.185, CR 11, and intransigence.

Dated this 26th day of August 2010.

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Respondent / Cross-Appellant

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<sup>208</sup> *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, 1123 (1992).

**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed or caused delivery of a true copy of the foregoing to

Mary Franklin/R Stewart Bock

at the regular office or residence thereof

Dated this 27<sup>th</sup> day of August, 2010 at  
Seattle, Washington.

Rebecca Lewisa