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No. 86895-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of:

B.M.H.

MICHAEL J. HOLT
Respondent
Cross Appellant

v.

LAURIE L. HOLT
Appellant
Cross Respondent

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STATE OF WASHINGTON
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ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

ANSWER TO PETITION FOR REVIEW

PATRICIA NOVOTNY
Attorney for Respondent/Cross-Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

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A. ISSUES PRESENTED

1. Does the Court of Appeals decision properly add to the development of the common law doctrine of de facto parentage?

2. Was the Court of Appeals correct in upholding the trial court's factual finding of adequate cause for non-parental custody?

3. Should Michael receive his fees?

B. RESTATEMENT OF THE CASE

Laurie Holt is not the “sole parent” to 12-year-old BMH, a claim on which she premises her petition for review. See, e.g., Petition, at 9-10, 14. She is the sole *legal* parent, but, for *all of his life*, BMH has also been parented by Michael Holt. In fact, Michael is the only father BMH Holt has ever known. CP 132-132, 138, 264. BMH's biological father, Benjamin Ensley, died in an accident before BMH was born. CP 82. BMH's mother, Laurie, had previously been involved with Michael, and they had a child together, Chandler. CP 18. After Ensley's death, Michael helped Laurie through the remainder of her pregnancy and was in the room when BMH was born. CP 19. Michael was the first person to hold BMH; he cut BMH's umbilical cord. CP 19, 49 (photo captioned by Laurie: “The first time you met your son, BMH”), 132. BMH carries

Michael's last name. CP 38, 52. As Laurie's father describes it, "in BMH's eyes, Michael is his father here on Earth and always has been." CP 132

Laurie has described Michael and BMH in the same terms, as father and son. In April of 2008, she expressed her desire that Michael formalize the relationship by adopting BMH. CP 72. She said she wanted for "[BMH's] father, Michael Jerome Holt, to legally adopt him." Id. (emphasis added). Michael stood ready to do so. CP 22, 26. Now she claims "Michael could easily have adopted B.M.H. *with only Laurie's consent ...*" Petition, at 3 (emphasis added). But Laurie withheld her consent, rendering this statement nonsensical. (Laurie expressed concerns about consequences to BMH's survivor benefits from Ensley's estate. CP 258.) Michael could not "easily" adopt BMH if Laurie refused consent, as she did.

Adoption or no, as Laurie herself described the relationship between Michael and BMH, "[t]here was no doubt he is your son." CP 51. Even after her divorce from Michael, she changed BMH's name to Holt. CP 19. BMH has no doubts about his relationship to Michael either, calling Michael "Dad" and sending him Father's Day cards and DVDs, for example. CP 55-56, 140.

This father-son relationship continued after the short marriage between Laurie and Michael, with BMH essentially spending residential time with both parents on the same schedule as his brother, Chandler. CP 19-20. Michael has always provided financial support for BMH, voluntarily, including insurance coverage, but also via cash payments to Laurie. CP 21-22.¹ Along with providing basic parental care, Michael has been the most active parent with respect to BMH's schooling, which, according to the school principal, accounts for BMH doing as well as he has in school. CP 29, 139-140, 263. Michael has volunteered at the school, spending a day a week, in a program called "WATCH DOGS." CP 39-41. Michael has signed up BMH for sporting activities and has coached some of his teams and gotten his company to sponsor the teams. CP 22, 29, 37, 45-47, 57. "Michael has been BMH's stability, his father, his mentor and the person he can rely on to always be there for him." CP 134; see, also CP 139.

By contrast, Laurie has a history of serial, short-term romantic relationships, totaling as many as nine since BMH's birth in 1999, including two other marriages. CP 18-22, 30, 133-134.

¹ Laurie states that "Michael has never had a child support obligation for B.M.H." Petition, at 3. She neglects to mention he has provided support voluntarily.

Typically, Laurie's relationships last three to four months. CP 30. These relationships have been confusing and disruptive to both children. CP 22. "This constant shuffling of boyfriends in and out of the household ... has taken its toll on both boys but especially on BMH who sees Michael as his one and only father." CP 30.

When, shortly after the start of yet another of these short-term relationships, Laurie precipitously moved to Castle Rock (from Vancouver), intending to pull B.M.H. out of school mid-year and to distance him from Michael, Chandler, his other family and community, Michael sought court intervention. CP 21-22, 23, 25, 30, 75, 83, 242, 256. The remaining facts can be found in Michael's briefs and the opinion of the Court of Appeals.

C. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED.

1. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *PARENTAGE OF M.F.* AND, MORE PARTICULARLY, ITS HOLDING DOES NOT ABRIDGE LAURIE'S CONSTITUTIONAL RIGHTS.

Common law develops by deciding particular cases as they arise. The decision by the Court of Appeals in this case exemplifies that process, in that it complies with the holding of *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d (2010), while applying the doctrine first articulated in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). This doctrine provides a flexible, equitable

remedy to address those cases which, for whatever reason, fall outside the remedies contemplated by the Legislature. See RCW 26.021 (“applies to determinations of parentage”). The need for this tool was tacitly acknowledged by the Legislature when it revised the declared scope of the UPA (Uniform Parentage Act), substituting the language above for the previous language (i.e., “governs every determination” of parentage). The de facto parent doctrine applies to the compelling facts here, fully protective of Laurie’s constitutional rights, just as it did in *L.B.*

Laurie complains her rights are infringed because she is the sole legal parent. But so was Britain in *L.B.* In fact, the de facto parent doctrine encompasses protections for the constitutional rights of parents, single or otherwise. As this Court court explained in *L.B.*, through operation of the de facto parent doctrine,

the State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family.

155 Wn.2d at 712. From the moment of BMH’s birth, Laurie has voluntarily and actively participated in the formation of the parent-

child relationship between BMH and Michael. She has no constitutional right to sever the fundamental bond she helped to form.

Nor does the fact that Laurie and Michael were briefly married render the de facto parent doctrine inapplicable. This Court in *M.F.* did not declare the doctrine categorically excludes former stepparents, nor would that make any sense. Rather, as is fitting, this Court decided only the case before it, expressly addressing “only a question of law, whether a stepparent may acquire de facto parent status *when the child has two fit parents.*”) (emphasis added). 168 Wn.2d at 531. Because the petitioner was “a third-party to the two already existing parents,” the court held he was “in a very different position than the respondent in *L.B.*” *Id.*, at 534. The existence of these “competing interests,” i.e., the fact of two legal parents with a parenting plan, distinguished the case from *L.B.*, where there was only one legal parent. *Id.* Thus, it was not the fact of the former marriage (and the former “stepparent” status) that mattered in *M.F.*, but the fact of two living legal parents.

By contrast, here, as in *L.B.*, the same two people have parented the child from birth. Michael and Laurie have always been the only living parents to BMH, just as Carvin and Britain were

the only living parents to L.B. By contrast, M.F. was born before Corbin met Reimen, the mother, and M.F. had a second living legal parent, Frazier, whose rights and responsibilities were embodied in a parenting plan, along with Reimen's.

Contrary to the trial court's view here, the brief marriage between Michael and Laurie does not alter the essential likeness between this case and *L.B.*, where the parties could not marry. To hold otherwise not only misreads *M.F.*, but elevates form over substance, making the brief marriage between Michael and Laurie serve a gate-keeping function both arbitrary and capricious and unconstitutional. See Br. Respondent/Cross-Appellant, at 38.

It makes no sense to allow B.M.H. to be exiled from his only living father simply because, for two of his 12 years, Laurie and Michael were married to one another. Laurie consistently acts as if her interests are the only interests at issue here. In fact, a child, too, has a compelling interest in preserving those relationships that embody his family. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 749, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (child and parent share interest in preservation of bond); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (“the relationship between parent and child is constitutionally protected”) (emphasis

added); *In re Custody of Shields*, 157 Wn.2d at 151 (Bridge, J., concurring); *Troxel v. Granville*, 530 U.S. 57, 88, 120 S. Ct. 2054, 2059, 147 L. Ed.2d 49 (2000). Indeed, “[i]t would be ironic to find issues of parent-child ties are of constitutional dimension when the parents' rights are involved but not when the child's are at stake.” *State v. Santos*, 104 Wn.2d 142, 143-144, 702 P.2d 1179 (1985).

In every way but legally, BMH has a father in Michael. Because of the de facto parent doctrine, his right to that relationship can be protected.

2. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S FACTUAL FINDING OF ADEQUATE CAUSE FOR NONPARENTAL CUSTODY.

Nothing in the Court of Appeals decision in this case conflicts in any way with the law on non-parental custody. Michael's standing is not disputed, so there is not the defect at issue *In re Custody of S.C.D.-L.*, 170 Wn.2d 513, 514-515, 243 P.3d 918 (2010) (dismissal is appropriate where the petitioner failed to declare the requisites for standing, i.e., not in physical custody or no suitable custodian). Michael made the claim required by the statute. CP 3 (alleging “[n]either parent is a suitable custodian”).

Likewise, Michael's pleadings do not have the defect present in *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 348, 227 P.3d 1284 (2010), where the petitioners claimed adequate cause was satisfied merely by the children not being in the custody of either parent. By contrast, here, Michael satisfied the statutory requirement for adequate cause providing affidavits that "set[] forth facts" showing actual detriment to BMH if Laurie was permitted to disrupt the father-son relationship. RCW 26.10.032(1); *E.A.T.W.*, 168 Wn.2d at 348. These assertions of fact must then be proved at a trial on the merits. *E.A.T.W.*, 168 Wn.2d at 348 n.5. As this Court describes, the alleged facts must simply be of a kind that, "*if true*, will establish a prima facie case supporting the requested order." *E.A.T.W.*, 168 Wn.2d at 346 (emphasis added).

Michael provided numerous affidavits satisfying the adequate cause threshold. The facts showed the existence of a father-son relationship, which, if severed, will cause detriment. See *Velickoff v. Velickoff*, 95 Wn. App. 346, 355, 968 P.2d 20 (1998) ("An effort by one parent to terminate the other parent's relationship with a child can be considered detrimental to the child" justifying modification of residential schedule). Certainly, the effect on children of losing a parent figure is widely acknowledged. See,

e.g., *In re Custody of Skyanne Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998) (“We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child.”); *In re Marriage of Anderson*, 134 Wn. App. 506, 512, 141 P.3d 80 (2006) (the “fundamental right to a stable and healthy family life ... include[s] independently valued protections of a *child's* relationship with siblings and with adults other than his or her biological parents with whom the child has formed a critical bond,” citing *In re Custody of Shields*, 157 Wn.2d 126, 159, 136 P.2d 117 (2006) (Bridge, J., concurring)). Indeed, the importance to a child, and to the child’s actual emotional health, of the attachment to a parent is hard to overstate. Even Laurie has described Michael as BMH’s father. Losing a father is a traumatic event for a child. Evidence of this bond is an aspect of the adequate cause showing.

But Michael did not rely solely on this simple and sensible truth, that severing a child from a parent will produce harm to both. Rather, he provided a great deal of additional evidence in the form of written testimony from those who know BMH best and from the guardian *ad litem* appointed to investigate BMH’s interests.

Altogether, these facts demonstrated both that Laurie would sever the bond, if she could, and that doing so would be detrimental to BMH. Certainly, Michael's affidavits amply satisfy adequate cause, which is a mechanism for eliminating meritless cases, not for impeding the progress of meritorious ones.

Laurie tries to cast this case as a relocation case. Petition, at 12. Actually, it is a dislocation case, and its focus is BMH and how he is harmed by dislocating him from his father and brother and destabilizing his life. Laurie is not being punished for having relationships or making poor choices in her partners. Petition, at 12. This is not about Laurie. Nor is this about Michael trying to protect his "ideal relationship" with BMH. Petition, at 13. This case is about BMH and about preventing harm to him. By her conduct, Laurie has demonstrated a willingness and ability to separate BMH from Michael, without a concern for the effect on BMH. According to the testimony of those in a position to know, BMH will be harmed if Laurie is permitted to sever his relationship from Michael. The nonparental custody statute, with the procedural protections strictly complied with in this case, protects the parent's rights, while also protecting a child from the harm threatened here. The Court of Appeals was correct to set this matter for trial.

D. MOTION FOR ATTORNEY FEES

Laurie's argument on fees simply does not match up with the facts. Petition, at 14-15. Michael repeatedly sought to resolve their dispute through negotiation and resume co-parenting cooperatively, as had mainly been the case for all of BMH's life. He pursued this litigation as a last resort, out of concern for Benjamin, and has had to go heavily into debt to pay his fees. CP 336. Meanwhile, Laurie's last boyfriend gave her \$45,000 to spend on litigation. CP 358. Laurie may also be using BMH's trust funds in this effort. CP 134. Certainly, Laurie has not been underfunded in this litigation. Based on this disparity, her ability and Michael's need, and on the authority of RCW 26.10.080, Michael requests his fees.

E. CONCLUSION

For the foregoing reasons, Michael Holt respectfully asks this Court to deny review of Laurie Holt's petition and to allow this matter to proceed to trial as ordered by the Court of Appeals.

Dated this 3rd day of February 2012.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY
WSBA #13604
Attorney for Respondent/
Cross-Appellant