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In re the Custody of:

B.M.H., a minor child.

MICHAEL J. HOLT,

Respondent,

vs.

LAURIE L. HOLT,

Petitioner.

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ANSWER TO AMICUS CURIAE BRIEF OF AMERICAN CIVIL  
LIBERTIES UNION OF WASHINGTON, CENTER FOR  
CHILDREN & YOUTH JUSTICE, AND LEGAL VOICE

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SMITH GOODFRIEND, P.S.

By: Catherine W. Smith  
WSBA No. 9542  
Valerie A. Villacin  
WSBA No. 34515

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

LAW OFFICE OF ROBERT M.  
VUKANOVICH

By: Robert M. Vukanovich  
WSBA No. 28847

211 E McLoughlin Blvd  
Vancouver, WA 98663  
(360) 993-0389

Attorneys for Petitioner

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**TABLE OF CONTENTS**

A. Michael Holt Has Never Established A Parental Relationship With B.M.H. Thus, The Relationship Between Mr. Holt And B.M.H., Who Is Not A Party To This Case, Is Not Entitled To "Constitutional Protection." .....1

B. There Was No "Statutory Void" To Establishing B.M.H.'s Legal Parents At His Birth..... 4

C. Conclusion. .... 8

TABLE OF AUTHORITIES

STATE CASES

*Custody of B.M.H.*, 165 Wn. App. 361, 267  
P.3d 499 (2011) ..... 3

*Dependency of M.S.R.*, 174 Wn.2d 1, 271  
P.3d 234 (2012) ..... 3

*Marriage of Anderson*, 134 Wn. App. 506,  
141 P.3d 80 (2006) ..... 6

*Moore v. Burdman*, 84 Wn.2d 408, 526  
P.2d 893 (1974) ..... 3

*Parentage of C.A.M.A.*, 154 Wn.2d 52, 109  
P.3d 405 (2005) ..... 6

*Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d  
161 (2005), *cert. denied*, 547 U.S. 1143  
(2006)..... 3-4

*Parentage of M.F.*, 168 Wn.2d 528, 228  
P.3d 1270 (2010) ..... 4-5, 7

STATUTES

Laws of 2011, ch. 283 .....7

RCW 26.09.240 ..... 6-7

RCW 26.26.116.....7

RCW ch. 26.10..... 5-7

## OTHER AUTHORITIES

American Law Institute (ALI) Principles of the Law of Family Dissolution: Analysis and Recommendations (2000).....	4
<a href="http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/439">http://ssa-custhelp.ssa.gov/app/answers/ detail/a_id/439</a> .....	6

Petitioner Laurie Holt incorporates her August 28, 2012 Objection to Amici's motion to file an amicus curiae brief as part of this Answer.

**A. Michael Holt Has Never Established A Parental Relationship With B.M.H. Thus, The Relationship Between Mr. Holt And B.M.H., Who Is Not A Party To This Case, Is Not Entitled To "Constitutional Protection."**

Amici purport to provide "arguments and authority to ensure that the rights and interests of the child at the center of this dispute are presented and understood." (Amici Motion 4) But B.M.H., the "child at the center of this dispute," is not a party to this action, nor is he represented by counsel. Amici, including the ACLU, Center for Children & Youth Justice, and Legal Voice, have had no contact with B.M.H. and have no idea what his "interests" are in this litigation, even though they purport to present his interest to this Court. (Amici Motion 4)<sup>1</sup> Further, it is not at all clear that B.M.H. would want "friends of the court" to force his single mother, his sole

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<sup>1</sup> For example, Amici express concern over B.M.H.'s "potential loss" of his relationship with his older brother, who lives with Michael Holt, as if somehow this is related to Ms. Holt's resistance to having the courts establish Mr. Holt as B.M.H.'s *de facto* parent. (Amici Br. 18) In fact, the older brother moved in with Mr. Holt before the *de facto* parentage action was even commenced, when Mr. Holt and Ms. Holt agreed that the high school closer to Mr. Holt was a better school for their son. (CP 83-84) And Amici have no idea how frequently B.M.H. sees his older brother in his mother's home or in Mr. Holt's home.

provider, to incur further attorney fees responding to a brief that is purportedly filed on his behalf. And while Amici may claim they are actually representing the interests of *all* children in *de facto* parentage actions, it is evident from their briefing, in which they spend significant time arguing about the supposed facts of *this* case, that they intend to speak on behalf of B.M.H. (*See e.g.* Amici Br. 1, 5, 6, 17, 18)

Amici assert that the relationship between B.M.H. and Michael Holt must be protected, or B.M.H. faces “potential trauma and long-term devastation.” (Amici Br. 17) There is no evidence that B.M.H., who is now age 13, has sought a surrogate<sup>2</sup> in the lower courts or in this Court to “protect” him or to champion his purported “constitutional right” to create a legal relationship with Michael Holt, or that the failure to create one would cause B.M.H. to suffer “trauma” and “devastation.” At most, the record shows that B.M.H. “enjoyed spending time” with Michael Holt, and would “miss” him if they no longer saw one another. (CP 261, 263) This is not the same as B.M.H. seeking to establish a legal relationship with Michael Holt contrary to the decisions made by his mother.

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<sup>2</sup> B.M.H. was appointed a guardian ad litem in the superior court. (CP 101) The guardian ad litem has not joined Amici’s brief in this Court.

In any event, Amici's argument regarding B.M.H.'s purported constitutional rights is circular.<sup>3</sup> Ignoring the indisputable fact that Michael Holt is neither a biological nor legal parent to B.M.H., Amici state: "as this Court has long recognized, children like B.M.H. have an interest in having the affection and care of their *parents*." (Amici Br. 3, citing *Moore v. Burdman*, 84 Wn.2d 408, 411, 526 P.2d 893 (1974)) (emphasis added). Amici then claim that "as the *de facto* parent of B.M.H., Mr. Holt would share the same 'fundamental liberty' in the 'care, custody, and control' of B.M.H. as Ms. Holt and be entitled to the same constitutional protections with respect to maintaining this relationship." (Amici Br. 4-5, citing *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006))

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<sup>3</sup> Amici's constitutional argument is derivative of the argument it made in the Court of Appeals that B.M.H. should have been appointed counsel in the superior court as a procedural protection to his constitutional rights. In the Court of Appeals, Amici argued that "in any action that either creates or severs a parental relationship with a child, the child should be joined as a necessary party and represented by independent counsel." (Amici COA Br.17) The Court of Appeals rejected this argument on procedural grounds, noting that "this issue was not discussed at any of the hearings that have been transcribed for this appeal, and the record contains no evidence that the trial court considered or decided this issue. . . . Because this issue was not properly raised at the trial level, we decline to reach it." *Custody of B.M.H.*, 165 Wn. App. 361, 383-84, ¶ 46, 267 P.3d 499 (2011). This Court recently rejected an identical argument on substantive grounds in *Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012).

But no court has ever concluded that Michael Holt is a *de facto* parent. Even if one had, the rights afforded *de facto* parents are not the same as those of legal parents. *See L.B.*, 155 Wn.2d at 708-09, ¶ 41 (“A *de facto* parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child at the center of any such dispute.”)<sup>4</sup> Michael Holt has no “constitutional right to the care, custody, and control” of B.M.H., and B.M.H. has no “reciprocal” constitutional right in “having the affection and care” of Mr. Holt. (Amici Br. 3, 4)

**B. There Was No “Statutory Void” To Establishing B.M.H.’s Legal Parents At His Birth.**

Amici argue that this Court’s decision in *Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010) should not be read as “creating a categorical ban on any stepparent from ever having standing as a *de facto* parent without examining the circumstances present in the case.” (Amici Br. 8-9) But in *M.F.*, this Court recognized that the reasons for creating the common law *de facto* parentage cause of action in *L.B.* – a statutory void that prevented a non-biological parent from having her parental rights established

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<sup>4</sup> *See also* American Law Institute (ALI) Principles of the Law of Family Dissolution: Analysis and Recommendations (2000), §2.18 (giving priority to legal parents over *de facto* parents).

at birth - were not present in cases where a former stepparent seeks a custodial or legal relationship with a former stepchild. *M.F.*, 168 Wn.2d at 532, ¶¶ 9, 10.

Ignoring that the status of B.M.H.'s parents was established by law at his birth, Amici argue that "it is not possible for the legislature to have contemplated all scenarios that may arise in cases involving former stepparents." (Amici Br. 9) But this Court in *M.F.* recognized that the legislature and courts have in fact already contemplated the situation that arises when a blended family results from consecutive marriages, in which a stepparent accepts a parenting role with the child of his or her spouse. 168 Wn.2d at 532, 534, ¶¶ 11, 16. This Court noted that in the case of stepparents, "an avenue already exists for a stepparent seeking a legal, custodial relationship with a child. The legislature has created and refined a statutory scheme by which a stepparent may obtain custody of a stepchild." *M.F.*, 168 Wn.2d at 532, ¶ 11. Relying on RCW ch. 26.10 and case law applying this statute, this Court held that "this intertwined judicial and statutory history illustrates the legislature's ongoing intent to create laws accommodating stepparents who seek custody on or following dissolution." *M.F.*, 168 Wn.2d at 532-33, ¶¶ 11-14.

In addition to RCW ch. 26.10, Michael had a statutory remedy under RCW 26.09.240 to pursue visitation with B.M.H. when the parties divorced in 2001 (CP 298), placing him in a significantly better position than most third parties.<sup>5</sup> Former RCW 26.09.240(3) allowed a third party who could prove by “clear and convincing evidence that a significant relationship exists with the child” to petition for an order granting visitation during a parent’s divorce. If Michael could have met this evidentiary burden, he could have obtained a residential schedule with B.M.H. when the parties divorced. That order would have remained enforceable even though RCW 26.09.240 was subsequently struck down in *Parentage of C.A.M.A.*, 154 Wn.2d 52, 66, ¶ 29, 109 P.3d 405 (2005). *Marriage of Anderson*, 134 Wn. App. 506, 512, ¶ 13, 141 P.3d 80 (2006) (stepparent visitation ordered under RCW 26.09.240 enforceable after *C.A.M.A.*, which applies prospectively only).

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<sup>5</sup> Although Amici speculate that Laurie Holt did not allow Michael Holt to adopt B.M.H. because she did not want B.M.H. to lose survivor benefits provided to him through his father, Benjamin Ensley, (Amici Br. 1), an adoption would have had no impact on B.M.H.’s survivor benefits. According to the Social Security website, “the adoption of a child already entitled to survivor’s benefits does not terminate the child’s benefits.” ([http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/439](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/439))

Finally, the legislature amended the Uniform Parentage Act in 2011 to allow a party to be “presumed to be the parent of a child if, for the first two years of the child’s life, the person resided in the same household with the child and openly held out the child as his or her own.” RCW 26.26.116(2); *as amended by* Laws of 2011, ch. 283 § 8. (See Supp. Br. 3-6) In other words, a stepparent who has resided in the same household as the child for the first two years of the child’s life and held the child out as his own could establish themselves as a parent. While Amici argue that the 2011 amendments do not apply to this case because Michael Holt filed his action in 2010 (Amici Br. 11), RCW ch. 26.10 has always been available to him, and RCW 26.09.240 had been available to him when he divorced B.M.H.’s mother in 2001.

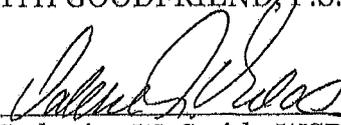
Contrary to Amici’s argument, there are statutory avenues available to stepparents, and in particular to Michael Holt, to establish a legal relationship with a former stepchild that preclude the application of the common law cause of action for *de facto* parentage, just as this court held in *M.F.*

**C. Conclusion.**

Because no legal relationship has ever been established between Michael Holt and B.M.H., their informal relationship is not entitled to constitutional protection. And because there were and are statutory remedies available to Michael Holt to establish a relationship with B.M.H., assuming he can meet the evidentiary burden, the common law cause of action for *de facto* parentage is not available to him.

Dated this 14<sup>th</sup> day of September, 2012.

SMITH GOODFRIEND, P.S.

By: 

\_\_\_\_\_  
Catherine W. Smith, WSBA No. 9542  
Valerie A. Villacin, WSBA No. 34515

Attorneys for Petitioner

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 14, 2012, I arranged for service of the foregoing Answer to Amicus Curiae Brief of American Civil Liberties Union of Washington, Center for Children & Youth Justice, and Legal Voice, to the court and to the parties to this action as follows:

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Patricia Novotny Attorney at Law 3418 NE 65th St Ste A Seattle, WA 98115-7397	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
Robert M. Vukanovich Attorney at Law 211 E McLoughlin Blvd Vancouver, WA 98663-3368	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

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Sarah A. Dunne Nancy L. Talner ACLU of Washington Foundation 901 5th Ave Ste 630 Seattle WA 98164-2008	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
David Ward Legal Voice 907 Pine Street, Suite 500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

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\_\_\_\_\_  
Victoria K. Isaksen

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**To:** Tara Friesen  
**Cc:** novotnylaw@comcast.net; Carolyn@carolynmdrew.com; bob@rmvfamilylaw.com; jwaller@familymatterspllc.com; dunne@aclu-wa.org; talner@aclu-wa.org; ckleiman@ccyj.org; dward@legalvoice.org; SLysons@perkinscoie.com; KBennett@perkinscoie.com; CKim@perkinscoie.com; bjbridge@aol.com; 'Catherine Smith'; valerie@washingtonappeals.com; ntalner@aclu-wa.org  
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Attached for filing in pdf format is the Answer to Amicus Curiae Brief of American Civil Liberties Union of Washington, Center for Children & Youth Justice, and Legal Voice, in *Custody of B.M.H.*, Cause No. 86896-6. The person submitting this document is Catherine W. Smith, WSBA No. 9542, email address [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com).

Tara Friesen  
Legal Assistant  
Smith Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974  
[taraf@washingtonappeals.com](mailto:taraf@washingtonappeals.com)