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COURT OF APPEALS
DIVISION II

No. 41211-0

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY W
DEPUTY

In re the Custody of:

BENJAMIN MATTHEW HOLT, A minor child,

MICHAEL J. HOLT,

Respondent\Cross-Appellant,

vs.

LAURIE L. HOLT

Appellant\Cross-Respondent.

PM 6-6-11

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE SCOTT COLLIER

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT'S BRIEF

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I. REPLY TO “STATEMENT OF THE CASE”

Michael’s “Statement of the Case” exemplifies why former spouses (in the vast majority of cases, ex-husbands) with no legal relationship to a child should not be allowed to drag the child’s legal parent into court, as the ensuing litigation is typically misused as a means to continue to control the mother long after the relationship between the adults has ended. This action, for instance, was commenced only after the mother started a new relationship and decided to move less than an hour away from Michael – a move that would make it harder for Michael to micromanage his former wife’s life. Also typical of these cases, Michael spends nearly as much time in his “Statement of the Case” disparaging the mother for her alleged “serial relationships” as he does in glorifying his purported “bond” with her son.

Michael cannot show any evidence of any bad parenting by the mother or any evidence that her home is “detrimental” to her son. Instead, in what can only be an effort to discredit the mother in the eyes of the court, Michael faults her for being raped and beaten by her ex-husband – a relationship that she ended immediately after the brutal attack. (See Cross-App. Br. 8, CP 82-

83) There is no evidence that the mother's son was harmed by this relationship. In fact, the mother protected her son from learning of the assault – something that he may have been entirely shielded from but for Michael's heedless and cruel decision to expose it in court pleadings, including in his brief in this court. "[T]he poor choice of a partner is not a reason for the State to interfere in the life of a family." *Dependency of M.S.D.*, 144 Wn. App. 468, 482, ¶ 31, 182 P.3d 978 (2008). Nor was it a basis for the trial court's determination that adequate cause existed for Michael's third party custody action in this case. (CP 142) That Michael relies on this attack on the mother in his briefing is further proof of the hollowness of his claims of "detriment."

When not disparaging the mother for being the victim of a vicious assault, Michael touts himself as a "super dad," and boasts of the "bond" between him and his former stepson. (Cross-App. Br. 10) Regardless how great Michael's parenting skills are, without evidence that "placing the child with [his mother] would result in actual detriment to the child's growth and development," his third party custody action must fail. *Custody of E.A.T.W.*, 168 Wn.2d 335, 348, ¶ 24, 227 P.3d 1284 (2010). Furthermore, the bond

between a child and former stepparent, while important, cannot elevate the stepparent's rights to those of the child's legal parent, and the trial court thus properly dismissed his *de facto* parentage action. ***Parentage of M.F.***, 168 Wn.2d 528, 534-35, ¶ 17, 228 P.3d 1270 (2010).

The mother's "Statement of the Case" in her opening brief provides this court with the necessary and relevant facts to reverse the trial court's adequate cause determination for Michael's third party custody petition, because there is no evidence that placement of the child in his mother's home would be detrimental to him. The mother's "Statement of the Case" also provides the necessary and relevant facts for this court to affirm the trial court's ruling dismissing Michael's *de facto* parentage petition, because such an action is not available under these circumstances.

II. REPLY ARGUMENT

A. **Michael's Third Party Custody Action Cannot Proceed Without Evidence That The Mother's Home Is Detrimental To Her Child.**

Before adequate cause can be found for a third party custody petition, there must be evidence that "placing the child with the parent would result in actual detriment to the child's growth and development." ***Custody of E.A.T.W.***, 168 Wn.2d 335, 348, ¶ 24,

227 P.3d 1284 (2010). Adequate cause requires "something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change." **Marriage of Mangiola**, 46 Wn. App. 574, 577, 732 P.2d 163 (1987).¹ "Vague and general" allegations are insufficient to warrant a finding that adequate cause is established to support a third party custody action. See **Mangiola**, 46 Wn. App. at 578.

Michael claims that he "satisfied the adequate cause requirement with numerous affidavits showing that Benjamin will suffer actual detrimental if Laurie is permitted to sever the father-son relationship he has with Michael." (Resp. Br. 26) But there was no evidence that Laurie had severed, or ever was planning to "sever," Benjamin's relationship with Michael. The fact that Laurie chose to relocate with her son less than one hour away is not evidence of "severing" Michael's relationship with her son. Yet as a result of Michael's claims of "detriment," the trial court erroneously restrained Benjamin's relocation with Laurie temporarily without any consideration of RCW 26.09.510 or RCW 26.09.520 – a feat that even a legal parent would be unable to achieve, as "disrupting

¹ Overruled on issue of standard of review in **Parentage of Jannot**, 149 Wn.2d 123, 126-27, 65 P.3d 664 (2003).

contact” is only one of eleven factors that the trial court must consider before restraining relocation even temporarily. RCW 26.09.520(3); *see also* RCW 26.09.540 (“A court may not restrict the right of a parent to relocate the child when the sole objection . . . is from a third party” who does not have court-ordered time with the child).

Michael presented no evidence of actual detriment to Benjamin in his mother’s home. Instead, he and third parties speculated about the detriment to Benjamin *if* the mother terminated contact between Michael and Benjamin. For example, Michael alleges that “Benjamin’s older brother, Chandler, believes Benjamin would be ‘devastated’ *if* parted from Michael.” (Resp. Br. 15, emphasis added, citing CP 263) Michael also alleges that Benjamin’s grandfather has pondered that “the thought that Benjamin *could* lose the stability and love of his only father is more than I can comprehend as his grandfather.” (Resp. Br. 16, emphasis added, citing CP 132-33) But neither Michael nor any of the third parties claimed that Laurie had severed the relationship between Benjamin and Michael, or that Benjamin was in fact harmed as a result. (See Resp. Br. 16-17, *citing* CP 30, 132, 133,

138, 139, 263, 264) At best, these “vague and general” allegations were impermissible speculation of what *might* happen *if* Laurie terminated contact between her son and Michael. See e.g. ***Dependency of T.L.G.***, 139 Wn. App. 1, 17, ¶ 24, 156 P.3d 222 (2007) (App. Br. 20); see ***Marriage of Wicklund***, 84 Wn. App. 763, 771, 932 P.2d 652 (1996) (App. Br. 20); see also ***Marriage of Grigsby***, 112 Wn. App. 1, 57 P.3d 1166 (2002) (App. Br. 21).

Michael cites ***Velickoff v. Velickoff***, 95 Wn. App. 346, 968 P.2d 20 (1998) for the proposition that 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 a residential schedule.” (Resp. Br. 27) But ***Velickoff*** was a dispute between two legal parents, not, as here, a dispute between a legal parent and a third party. Further, in ***Velickoff*** there in fact was evidence that the mother was attempting to terminate the father’s relationship with the child by making false sexual abuse allegations, interfering with telephone calls between the father and daughter “continually from May 1995 until the modification trial in 1997,” and by refusing to comply with the residential schedule in the parenting plan. 95 Wn. App. at 350-51.

Unlike here, the trial court in **Velickoff** did not have to speculate as to how interference with the relationship between the parent and child would affect the child because there was evidence of actual interference. As this court stated, “such evidence supports the trial court’s finding that Klink was actively interfering with Velickoff’s parenting relationship with their child. There is no evidence in the record from which the trial court could have reasonably concluded that Klink’s destructive behavior had ceased and would not recur in the future.” **Velickoff**, 95 Wn. App. at 356. Also unlike here, there was actual evidence of harm to the child; the child had been diagnosed with an adjustment disorder and “lived in a fantasy world and had poor boundaries.” **Velickoff**, 95 Wn. App. at 356-57.

Michael’s failure to prove that there would be actual detriment to the child if placed with Laurie – Benjamin’s fit legal parent – was fatal to his third party custody petition. Any evidence of any alleged detriment was merely speculative, as there was no evidence that Laurie had, or even attempted, to sever Benjamin’s contact with Michael before he filed his third party custody petition.

The trial court erred in finding adequate cause for Michael's third party custody petition.

B. The Court's Desire To Protect A Relationship Between A Third Party And A Child Alone Is Not A Basis For Third Party Custody.

Third party custody cannot be based on a trial court's determination that "it would be so much 'better' for the child to have a relationship with the nonparent and her friends and support group, against the wishes of a parent, as to render the objecting parent unfit, simply for objecting to the relationship." *Custody of Nunn*, 103 Wn. App. 871, 888, 14 P.3d 175 (2000).² More is needed than a petitioner's desire to protect his relationship with a child with whom the petitioner has had a significant relationship to meet the threshold for third party custody. See *Custody of S.C.D.-L.*, 170 Wn.2d 513, 243 P.3d 918 (2010).

In *S.C.D.-L.*, the Supreme Court vacated a third party custody order because the trial court had erred in finding adequate cause for the grandmother's third party custody petition. 170 Wn.2d at 517, ¶ 8. The grandmother and child in *S.C.D.-L.* clearly had a "significant relationship;" the child had resided almost

² Abrogated on the issue of standing in *Custody of Shields*, 157 Wn.2d 126, 138, ¶ 29, 136 P.3d 117 (2006).

exclusively with the grandmother for five years before the petition was filed with the agreement of the father, who had sent the child to live with the grandmother because of the daughter's mental health issues and the commencement of a child services investigation of the father in California. During this five-year period, the father had limited physical contact with the child. Regardless of the relationship between the child and the grandmother, however, the Court held that third party custody was not warranted because there was no allegation that the father was an unsuitable parent. ***Custody of S.C.D.-L.***, 170 Wn.2d at 516, ¶ 7.

In fact, none of the cases cited by Michael resulted in a third party custody adequate cause determination based solely on the professed need to protect a relationship between the child and third party. ***Marriage of Anderson***, 134 Wn. App. 506, 512, ¶ 12, 141 P.3d 80 (2006) (Resp. Br. 27) (holding that a previously agreed third party visitation order was not invalid due to the Supreme Court's ruling in a different case that the third party visitation statute on which the agreed order had been based was unconstitutional); ***Custody of Shields***, 157 Wn.2d 126, 149-50, ¶ 58, 136 P.3d 117 (2006) (Resp. Br. 28) (reversing a third party custody order placing

the child with his former stepmother because the trial court's decision was based on the child's best interests and not on whether placement with the biological mother would cause actual detriment to the child); see also **Custody of Smith**, 137 Wn.2d 1, 969 P.2d 21 (1998) (Resp. Br. 27), *aff'd sub. nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000).

In one of three cases considered in **Smith**, the state Supreme Court rejected a live-in boyfriend's attempt to obtain visitation with his former girlfriend's child. The mother's former boyfriend had begun a relationship with the mother shortly after her son's birth, and lived with the mother and her son for four years. **Smith**, 137 Wn.2d at 5. The mother allowed visitation for over a year after the relationship ended, and the boyfriend sought to formally establish a residential schedule after the mother began a new relationship with a man she eventually married and stopped letting the ex-boyfriend see her son. See **Visitation of Wolcott**, 85 Wn. App. 468, 470, 474, 933 P.2d 1066 (1997), *dismissal affirmed*, **Smith**, 137 Wn.2d at 5. The Court in **Smith** recognized "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,” but nevertheless held that there must be a “threshold requirement of a finding of harm to the child as result of the discontinuation of visitation” before a court can constitutionally interfere with a fit parent’s fundamental right. **Smith**, 137 Wn.2d at 20.

Michael is correct that there is no “cookie cutter’ for the fact-intensive inquiry structured by the nonparental custody statute.” (Resp. Br. 34) But in those cases where third party custody has been granted, the facts were far more compelling than those presented here, and were for reasons beyond protecting an existing relationship between the child and third party. For example, the Court of Appeals affirmed an award of third party custody of a deaf child to his former stepmother in **Marriage of Allen**, 28 Wn. App. 637, 626 P.2d 16 (1981) (Resp. Br. 34). The court concluded that while the father was fit, placement with the father would be detrimental to the child. **Allen**, 28 Wn. App. at 647-48. The court noted that unlike the stepmother, the father had limited signing ability, creating a “lack of opportunities for interaction and communication [that] would set back [the child]’s intellectual development.” **Allen**, 28 Wn. App. at 647.

Similarly, the Court of Appeals reversed an order denying third party custody to the child's aunt with whom the child resided for 18 months before the aunt filed the petition in ***Custody of Stell***, 56 Wn. App. 356, 783 P.2d 615 (1989) (Resp. Br. 34). There, the court held that the trial court abused its discretion in denying third party custody to the aunt and awarding custody to the father with whom the child had never resided except for the first eight months of his life. ***Stell***, 56 Wn. App. at 369. The court noted that the undisputed evidence was that the child, who had been physically and sexually abused while in his mother's care, needed a stable environment and "special care" that the father has never historically provided the child, but that had been provided by the aunt. ***Stell***, 56 Wn. App. at 368. The court held that there was no evidence to support the trial court's determination that the father could now provide the child with a stable home environment, after failing to do so throughout the child's life. ***Stell***, 56 Wn. App. at 369.

Finally, the Supreme Court affirmed the award of custody of children to their grandmother in ***In re Mahaney***, 146 Wn.2d 878, 51 P.3d 776 (2002) (Resp. Br. 34). There, the parents had previously agreed that their children could reside with the paternal

grandmother. It was alleged that the parents abused alcohol and illegal drugs during the nine years that the children lived with the grandmother. Although the mother claimed at trial that she was now able to provide her children with a stable environment, the trial court found that “there was overwhelming testimony at the trial, absolutely overwhelming, that these children would be emotionally traumatized, if not completely suicidal, if they were transferred [to the mother] – if their custody was transferred.” ***Mahaney***, 146 Wn.2d at 896. The Court held that “even where there is no showing of present parental unfitness, in determining the best interests of the child the court may take into consideration emotional and psychological damage from prior unfitness of a parent and the child's current special needs for treatment and care.” ***Mahaney***, 146 Wn.2d at 894.

Here, unlike in ***Allen***, ***Stell***, and ***Mahaney***, there are no compelling circumstances to warrant the state's interference with the mother's constitutional right to parent her child. The trial court erred in finding adequate cause for Michael's non-parental custody action.

C. This Court Should Deny Attorney Fees To Michael And Award Attorney Fees To Laurie.

Michael assumed that he could “outspend” Laurie in court, forcing her to concede her rights. He is clearly disappointed that his ruse failed and that she intends to fight to protect the integrity of her family. There is no basis for an award of attorney fees to Michael. The fact that Laurie has been able to borrow funds to defend the integrity of her family is no reason to award attorney fees to Michael, who commenced this litigation.

Instead, this court should award attorney fees to Laurie, a single mother without the substantial income available to her that Michael has. RCW 26.10.080. (See App. Br. 22-23) “[T]he burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.’” *Troxel v. Granville*, 530 U.S. at 75 (plurality, quoting favorably Justice Kennedy’s dissent). An award of attorney fees is also warranted because Michael had unnecessarily increased the cost of this litigation in the appellate court by resisting at every step having this action heard on the merits in a timely matter. RAP 18.9. The mother should not be

required to impoverish herself to defend her right to parent her child as she chooses when Michael's tactics have made litigation in this court more difficult and expensive. ***Marriage of Dalthorp***, 23 Wn. App. 904, 912-13, 598 P.2d 788 (1979).

III. CROSS-RESPONSE ARGUMENT

A. **De Facto Parentage Is Not Available To Michael Because There Was No "Statutory Void" To Establishing The Child's Legal Parents At His Birth.**

Michael's attempt to establish himself as a *de facto* parent of his former stepson, with all of the same rights and privileges as the child's legal parent, is based entirely on his claim that he could meet the factors set forth in ***Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006) (Cross-App. Br. 37-38). The trial court properly rejected Michael's claim under ***Parentage of M.F.***, 168 Wn.2d 528, 534-35, ¶ 17, 228 P.3d 1270 (2010) (CP 300), in which the Supreme Court limited its holding in ***L.B.*** and declined to extend the *de facto* doctrine to petitioners who seek a custodial and legal relationship with a former stepchild.

1. When The Child Was Born There Was No “Statutory Void” To Prevent The Legal Establishment Of The Child’s Parents.

It is not solely the parties’ former marriage that serves the “gate keeping function” to a claim for *de facto* parentage (Cross-App. Br. 37-38), but that the child already had two legal parents, established by our state’s statutory scheme. As a consequence, there was no “statutory void” to establish the child’s legal parents, and no need for an equitable remedy. *M.F.*, 168 Wn.2d at 532, ¶ 9. Michael is not, as he claims, being treated any differently because he married Laurie. (Cross-App. Br. 38) The result would likely be no different had the parties never been married.

In *M.F.*, the Court recognized that the reasons for creating the common law *de facto* parentage cause of action in *L.B.* were not present in cases where a former stepparent seeks a custodial or legal relationship with a former stepchild. 168 Wn.2d at 532, ¶¶ 9, 10. The *M.F.* Court recognized that in *L.B.* two individuals choose to form a family together but could not have their status as legal parents established from the outset due to a lack of biological

connection.³ 168 Wn.2d at 532, ¶¶ 9, 10; see also *Parentage of A.F.J.*, ___ Wn. App. ___, ¶¶ 4, 10, ___ P.3d ___ (May 16, 2011) (establishing mother’s same sex partner as a *de facto* parent of the child when the biological father was unknown, and the women intended to raise the child together). 168 Wn.2d at 531-32, ¶ 8. In the usual case, as was the case here, however, the status of parents is established at birth and by the time a stepparent enters the child’s life, the child’s legal parents and their respective roles are already established under the statutory scheme. *M.F.*, 168 Wn.2d at 532, ¶ 9.

In this case, the mother and Benjamin Ensley chose to have a child together and form a family. (CP 82) As a result, their son

³ In *L.B.*, the Court considered the parental rights of a woman who could not establish any legal right under the Washington Parentage Act to a child she had raised since birth with the biological mother. Recognizing that “[o]ur legislature has been conspicuously silent when it comes to the rights of children . . . who are *born into* nontraditional families . . .,” *L.B.*, 155 Wn.2d at 694, ¶ 21 (emphasis added), the Court held that a non-biological mother could maintain a common law *de facto* parentage action because there was no other statutory mechanism to allow her to pursue her parental rights over the objection of the child’s only legal parent. 155 Wn.2d at 688-89, 707, ¶¶ 14, 38. The Court adopted this common law cause of action in *L.B.* to “fill the interstices that our current legislative enactment fail[ed] to cover in a manner consistent with our laws and stated legislative policy.” 155 Wn.2d at 707, ¶ 38. Recent amendments to the Uniform Parentage Act, however, now allow a non-biological parent to be a “presumed” parent if the parties are registered as domestic partners. ESHB 1267, Chapter 283, Laws 2011, § 8 (effective date, July 22, 2011).

Benjamin was conceived. (CP 82) Although Mr. Ensley died before Benjamin's birth, there is no dispute that he is both biologically and legally Benjamin's father. (See CP 2, 106) Benjamin receives Social Security benefits and Worker's Compensation benefits as a dependent of Mr. Ensley. (CP 125) Benjamin is also a beneficiary of a trust fund holding the proceeds of a wrongful death suit that was filed on behalf of Mr. Ensley's estate. (CP 125) That Mr. Ensley died before Benjamin's birth makes him no less a legal parent than had he lived to see Benjamin born. See e.g. RCW 11.02.005(4) ("A child conceived prior to the death of a parent but born after the death of the deceased parent is considered to be the surviving issue of the deceased parent for purposes of this title").

Just as in *M.F.*, when Michael "entered" Benjamin's life, Benjamin's "legal parents and their respective roles were already established under our statutory scheme." *M.F.*, 168 Wn.2d at 532, ¶ 9. Accordingly, there is no "statutory void" that would require our courts to resort to equitable measures to establish Michael as a *de facto* parent.

2. The Former Stepfather Had Other Statutory Remedies To Establish A Legal Relationship With The Child.

There is also no need for the courts to resort to equitable measures to establish Michael as a *de facto* parent because he already had statutory remedies available to him to establish a legal relationship with Benjamin, so long as he can meet the evidentiary burden. *M.F.*, 168 Wn.2d at 532, ¶ 11. The *M.F.* Court held that unlike the factual scenario in *L.B.*, the legislature and courts have already contemplated the situation that arises when a blended family results from consecutive marriages in which a stepparent during the marriage accepted a parenting role with the child of his or her spouse. 168 Wn.2d at 532, 534, ¶ 16. The *M.F.* 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.” 168 Wn.2d at 532, ¶ 11. Relying on RCW ch. 26.10 and *Allen, Stell*, and *Shields* (see § II.B, *supra*), the 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.

Michael claims that the existence of “nonparental custody is not a remedy for a claim to parental status... He seeks parental status, the legal reflection of the lived experience, not merely a custody relationship.” (Cross-App. Br. 43) This is the same argument that the majority rejected in *M.F.* The dissent in *M.F.* in arguing against the majority’s decision stated: “Corbin is not asking for custody; he is asking to be allowed to establish that he is M.F.’s parent.” *M.F.*, 168 Wn. App. at 538, ¶ 25 (dissent). The majority rejected that argument because “though our statutory scheme does not permit a stepparent to petition for parental status, this does not equate to a lack of remedy. The legislature has provided a statutory remedy for a stepparent seeking a custodial relationship with a stepchild by enabling stepparents to petition for custody.” *M.F.*, 168 Wn.2d at 533, ¶ 14. Accordingly, the Court held that the equitable doctrine of *de facto* parentage does not extend to stepparents. *M.F.*, 168 Wn.2d at 534-35, ¶¶ 16, 17.

In addition to RCW ch. 26.10, Michael also had a statutory remedy under RCW 26.09.240 to pursue visitation with Benjamin

when the parties divorced in 2001 (CP 298), placing him in a significantly better position than most third parties. 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 had met this evidentiary burden, he could have obtained a residential schedule with Benjamin 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).⁴

⁴ The Supreme Court in ***M.F.*** did not reject the availability of RCW 26.09.240 as a basis for denying a former stepparent *de facto* parentage rights if it had been available to the stepparent at the time the parties divorced, contrary to Michael’s argument. (Cross-App. Br. 43) The Court of Appeals in ***M.F.*** relied on this statute, among other reasons, to hold that the former stepfather had other statutory remedies available to him, ***M.F.***, 141 Wn. App. at 564, 566, ¶¶ 14, 19. Although in affirming the Court of Appeals the majority did not specifically address this statute, RCW 26.09.240 was one of the statutory remedies available to the former stepfather, as pointed out by Justice Chambers in dissent. ***M.F.***, 168 Wn.2d at 538, ¶ 24.

Michael claims that it is only when the child's parents are divorcing that a third party could pursue third party visitation, and that he could not have sought visitation during his own divorce proceeding with Laurie. (Cross-App. Br. 41-42) This is a misreading of RCW 26.09.240, which provides that "a person other than a parent may not petition for visitation under this section unless the child's *parent or parents* have commenced an action under this section." RCW 26.09.240(1) (emphasis added). In other words, so long as at least one parent – in this case Laurie – is involved in a divorce proceeding, a third party – like Michael – could seek third party visitation rights. See **Anderson**, 134 Wn. App. at 407, ¶ 1 (former stepfather obtained visitation rights with stepdaughter at the time of his divorce from her mother).

Further, contrary to Michael's claim, the parties were not prevented from using this remedy to accommodate a legal relationship between Michael and Benjamin because of the survivor benefits that Benjamin was receiving from his father's estate. (Cross-App. Br. 42) While the parties had apparently previously expressed concern that an adoption of Benjamin might jeopardize those benefits, there was no evidence that a third party visitation

order would have had the same effect. And regardless of the parties' concerns about Benjamin's survivor benefits from his father, Michael does not deny that adoption of Benjamin was in fact an option available to establish a legal relationship with Benjamin.

In fact, there were fewer statutory impediments to formalizing Michael's parental status than in the usual stepparent scenario. Since Benjamin's father was deceased, only Laurie would have needed to consent to a stepparent adoption. See e.g. ***Marriage of Allen***, 28 Wn. App. 637, 640, fn. 2, 626 P.2d 16 (1981) (stepmother of child to whom she was a "psychological parent" was prevented from adopting child during the marriage because natural mother refused to consent to adoption); ***Parentage of J.A.B.***, 146 Wn. App. 417, 421, ¶¶ 8-9, 191 P.3d 71 (2008) (third party must obtain the biological father's consent to terminate his parental rights before pursuing adoption of former girlfriend's son; biological father had previously objected to a third party custody order); RCW 26.33.100(1)(c) (a prospective adoptive parent may petition to terminate parental rights of one parent if he or she seeks to adopt the child of his or her spouse).

In a stepparent adoption, the pre-placement report otherwise required by RCW 26.33.190 also is not necessary, making it significantly easier for a spouse to adopt his or her spouse's child. RCW 26.33.220. While not an issue specifically addressed in *L.B.*, it is likely that the intrusiveness of the adoption procedure under the family's circumstances in *L.B.* may have been a hindrance to the non-biological mother's adoption of the child before the parties' relationship ended. Because the parties were two unmarried women, both a pre-placement report and post-placement report would have been required before the adoption could be finalized. RCW 26.33.180; RCW 26.33.200.⁵ As a consequence, the non-biological mother in *L.B.* would have been required to move out of the family home, where she had lived with the biological mother for six years before the child's birth, until the pre-placement investigation and report was completed. None of this would have

⁵ These reports are intrusive, requiring background checks and an investigation of the "home environment, family life, health, facilities, and resources" of the potential adoptive parent. RCW 26.33.190(2), (3); RCW 26.33.200(1). These reports also require a recommendation as to the "fitness of the adoptive parent," and must report "the propriety and advisability of the adoption." RCW 26.33.190(2); RCW 26.33.200(1). A pre-placement report must be filed with the court before the child can even be placed with the prospective adoptive parent. RCW 26.33.180.

been an impediment to stepparent adoption by Michael, had Laurie consented.

Because Michael had statutory remedies available to establish a custodial relationship with his former stepson, he cannot establish himself as a *de facto* parent under the factors set forth in *L.B.* The trial court properly dismissed his petition.

B. The Court's Holding In *M.F.* Is Not Limited To Families With Two Living Parents.

Michael argues that the limitations to the *de facto* doctrine established in the Court's decision in *M.F.* do not apply here because the child in *M.F.* had "two already existing parents," whereas here, the child has only one legal parent – the respondent mother. (Cross-App. Br. 37) First, this claimed distinction is untrue; Benjamin does in fact have two legal parents – Benjamin Ensley and Laurie Holt. Just because Mr. Ensley is now deceased does not mean that he is no longer Benjamin's legal father. (§III.A.1, *supra*)

Second, the *M.F.* Court did not limit its holding to families with two parents, nor could it have. "A child need not have two parents." *State ex rel. D.R.M.*, 109 Wn. App. 182, 190, 34 P.3d 887 (2001). A parent's right to the care, custody, and control of her

child free from interference from third parties and the State is “the oldest of the fundamental liberty interests recognized,” *Troxel v. Granville*, 530 U.S. at 65, and the Court cannot provide less protection to children in families with a single parent than to families with two parents. See e.g. *Gomez v. Perez*, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973) (“Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”)

Our courts have never limited the application of the “heightened standard” that is necessary before the State can interfere with a fit parent's parenting decision to maintain custody of his or her child against a third party to cases when the child has two living parents. In *Shields*, for instance, a stepmother sought custody of her stepson, who had resided primarily with her and the father for nearly half of the child's life, after the death of the child's father. The Court held that the stepmother had standing to seek third party custody under RCW 26.10.030, but that she was still required to show that placement with the mother – the child's only

living parent – would result in actual detriment to the child. ***Shields, Custody of Shields***, 157 Wn.2d 126, 150, ¶¶ 60, 136 P.3d 117 (2006). See also ***Troxel v. Granville***, 530 U.S. at 57 (paternal grandparents and single mother); ***Custody of E.A.T.W., Custody of E.A.T.W.***, 168 Wn.2d 335, 227 P.3d 1284 (2010) (maternal grandparents and single father); ***Custody of Nunn***, 103 Wn. App. 871, 14 P.3d 175 (2000) (paternal aunt and single mother).

Michael argues that Laurie “has no constitutional right to sever the fundamental bond she helped to form.” (Cross-App. Br. 46) But an important component of a parent’s constitutional fundamental rights “entitles biological and adoptive parents to refuse to allow a second-parent adoption. . . even if they have permitted or encouraged another adult to become a virtual parent of the child.” ***Debra H. v. Janice R.***, 14 N.Y.3d 576, 930 N.E.2d 184, 193 (2010), *cert. denied*, 131 S.Ct. 908 (2011). Encouragement of such a relationship does not leave “single biological and adoptive parents and their children” trapped in a “limbo of doubt” simply because “they could not possibly know for sure when another adult’s level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the

unwanted participation of a third party.” *Debra H.*, 930 N.E.2d at 193. Parents must be allowed to make decisions for their children, including allowing the child to form relationships with their spouses or significant others, which they believe are in the child’s best interests, without fear that the effect will be to invest legally cognizable rights in a former spouse or partner where there normally would be none.

Laurie’s constitutional rights are not limited because she is a single parent, and the Supreme Court’s decision in *M.F.* was not limited to actions brought by stepparents who seek parental rights to a stepchild with two living parents. Michael’s *de facto* petition failed as a matter of law. The trial court properly dismissed his petition.

C. Benjamin Was Not Entitled As A Matter Of “Right” To The Appointment Of An Attorney.

Without a finding that Laurie was an unfit parent, it was not necessary for the trial court to appoint counsel for Benjamin, because “there is a presumption that fit parents act in the best interests of their children.” *Troxel v. Granville*, 530 U.S. at 68. But whether Benjamin should have been appointed counsel in the *de facto* parentage action is not an issue that was adequately

preserved below in this case. Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. ***Marriage of Studebaker***, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a).

Michael never sought appointment of an attorney on Benjamin's behalf. Instead, he sought appointment of a guardian ad litem to "look into what is best" for Benjamin. (CP 23) The only time the issue of an attorney was apparently raised was *after* the court already ruled on April 29, 2010 that Michael's *de facto* parentage action could not proceed. (CP 249, Cross-App. Br. 46) The issue was not raised by either party, but by the guardian ad litem who was appointed at Michael's request, in a report that was issued more than two weeks after the court's ruling. In that report, the guardian ad litem acknowledged the court already ruled on the *de facto* parentage petition, stating that "given the extent of litigation and pending appeal to determine the appellate court's intention in Parentage of M.F." that she would only address the issue "briefly." (CP 263) The guardian ad litem went on to note that "given the complex legal issues, it might be appropriate for the

Court to appoint an attorney for Benjamin in this matter.” (CP 263) At that stage of the proceeding, when the trial court had already dismissed the *de facto* parentage petition, it was not necessary for the trial court to appoint an attorney for Benjamin even if it had discretion to do so.

Michael claims that Benjamin was a “necessary party,” who should have been joined in the action with a “right to representation.” (Cross-App. Br. 47) But his only authority to support such a claim is a 30-year old paternity case, ***Hayward v. Hansen***, 97 Wn.2d 614, 617, 647 P.2d 1030 (1982), based on former RCW 26.26.090, which required that a child be a party and independently represented in determinations of parentage. The current statute makes a child only a “permissible party” to a parentage action, and the court is not required to appoint counsel for the child. RCW 26.26.555. Instead, it has discretion to appoint a guardian ad litem “if the court finds that the interests of a minor child [] are not adequately represented.” RCW 26.26.555(2).

Even in cases where a child's relationship with a legal parent may be terminated, the child is not entitled to appointment of counsel as a matter of right. Instead, “if the child requests legal

counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court *may* appoint an attorney to represent the child's position." RCW 13.34.100(6)(f) (emphasis added).⁶ There is no basis for this court to hold that a child is entitled as matter of right to an attorney when a third party seeks to establish himself as a *de facto* parent to the child.

And who would pay for this attorney? The mother was already obligated to pay half the cost of the guardian ad litem who was needlessly appointed to second-guess her parenting decisions. (CP 104) The mother represents her child's interests, and should not be ordered to bear yet another expense in order to protect the integrity of her family. Michael's belated demand that Benjamin "lawyer up" is another attempt to burden the mother with even more costs in hopes that he can bankrupt her into submission.

Had the trial court appointed an attorney for Benjamin, his advocate would have explained that Benjamin is not interested in

⁶ The state Supreme Court is currently considering the question whether a child who is the subject of a parental termination proceeding has a constitutional right to appointment of counsel in ***Termination of D.R. and A.R.***, Cause No. 84132-2. http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2011Jan.

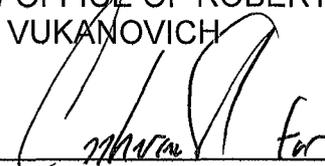
having the court micromanage his time with his mother or with Michael. But the trial court did not abuse its discretion in refusing to appoint independent counsel for Benjamin.

IV. CONCLUSION

This court should reverse the trial court's order finding adequate cause, dismiss the third party custody action, and award the mother her attorney's fees and costs. This court should also affirm the trial court's order dismissing the *de facto* parentage action

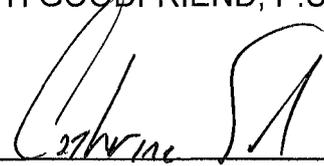
Dated this 6th day of June, 2011.

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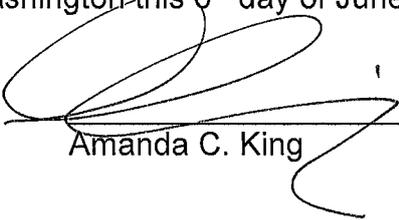
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 6, 2011, I arranged for service of the foregoing Reply Brief of Appellant/Cross-Respondent's Brief, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of June, 2011.



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