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SUPREME COURT  
OF THE STATE OF WASHINGTON

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Cowlitz County Cause No. 08-3-00476-1 and 13-3-00787-2  
Consolidated

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In re the Custody of:  
MASON WADDLE,  
GREG MINIUM and LINDA MINIUM,  
Petitioners,  
and  
PATTI SHMILENKO,  
Respondent.

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JOHN SHMILENKO,  
Respondent,  
PATTI SHMILENKO,  
Respondent,  
and  
GREG and LINDA MINIUM,  
Petitioners.

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APPEAL FROM THE SUPERIOR COURT  
FOR COWLITZ COUNTY  
THE HONORABLE STEPHEN M. WARNING

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MOTION FOR DISCRETIONARY REVIEW

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SMITH GOODFRIEND, P.S.

NOELLE A. McLEAN, P.S.

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Valerie A. Villacin  
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**A. Identity of Moving Parties.**

Petitioners Linda and Greg Minium are the third party custodians and maternal grandparents of Mason Waddle, age 6, whose parents were killed in an automobile accident when Mason was less than a year old. Patti Shmilenko, Mason's paternal grandmother, has visitation rights pursuant to an agreed third party custody order with the Miniums. Her husband, respondent John Shmilenko, has had no rights to visitation or custody with Mason.

**B. Decision Below.**

Petitioners ask this Court to grant discretionary review of the trial court's order finding adequate cause for respondent's petition to establish himself as a *de facto* parent of the petitioners' grandchild, over whom they have third party custody, which would place respondent in "legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise." *Parentage of L.B.*, 155 Wn.2d 679, 708, ¶ 41, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). It is undisputed that respondent has only had a "grandparent-grandchild relationship" with the child; the child's presence in the respondent's home has only been for the child's court-ordered visitation with respondent's wife, the child's paternal grandmother; and the only financial support provided for the child

is during the child's limited presence in respondent's home. Despite the respondent's tenuous connection to the child as a "parent," the trial court found there was adequate cause for a hearing on respondent's petition for *de facto* parentage because there was no statute that otherwise permitted third party visitation and the child has no living parents whose rights can be measured against respondent's claim. (DR 29)

In making its decision, the trial court recognized that it was "swimming well away from any established channel markers, legally" (DR 33), and certified its decision for immediate review under RAP 2.3(b)(4), acknowledging that its decision "involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review by the Court of Appeals may materially advance the ultimate termination of the litigation." (DR 5) Petitioners also seek discretionary review under RAP 2.3(b)(2) because the trial court's order constitutes probable error that substantially alters the status quo.

**C. Statement of Facts.**

Mason Waddle was born on August 20, 2007 to Libby Minium and Zach Waddle. (DR 79) Mason lived with his parents in Longview, Washington, until Libby and Zach were killed by a

drunk driver on August 9, 2008, 11 days before Mason turned 1 year old. (DR 79, 199) The Miniums, who are Mason's maternal grandparents, had been very close to the family before Libby and Zach's deaths, and they saw Mason and Libby frequently. (DR 81) The Shmilenkos were less involved with Mason and his parents, due in part to the fact that the Shmilenkos lived and worked primarily in Portland, Oregon, and frequently traveled. (DR 81)

Mason has lived primarily with the Miniums since his parents' tragic deaths in August 2008. (DR 79-80) He calls his maternal grandparents "pa" or "dad" and "ma" or "mom." (DR 80) In September 2008, the Miniums filed a petition for third party custody of Mason. (DR 195-201) Patti Shmilenko, but not her husband John, responded to the petition, seeking visitation. (See DR 175, 181) Mason's biological paternal grandfather, Richard Miller, also did not respond to the petition; Richard and the Miniums have informally agreed on visitation that allows Richard to continue a relationship with Mason without court orders. (DR 81) There is nothing in the record that suggests that Patti could not have had visitation with Mason without a court order as well.

On March 23, 2010, an agreed order designated the Miniums as the third party custodians of Mason, who was then age 2. (DR

181) The Miniums were granted sole decision-making for Mason. (DR 190) Patti was granted two mid-week afternoon visits and alternating weekends. (DR 185) The parties agreed that they would revisit the residential schedule when Mason turned age 5 and would be entering school. (DR 175, 185) No child support was ordered. (DR 175) Instead, the order provided that the Miniums "shall continue to receive the Social Security Death Benefits to help in raising Mason Waddle." (DR 175)

On August 30, 2013, Patti filed a petition to modify the parenting plan, because Mason was now age 5 and was about to start school. (DR 163-70) In her petition, Patti sought to add her husband, respondent John Shmilenko, as a party, stating that he "has had a close and loving grandparent relationship to the child." (DR 168)

A temporary order was entered reducing Patti's residential time to alternating months of one weekend per month and two weekends per month and one mid-week telephone call. (DR 158) On October 28, 2013, Cowlitz County Superior Court Judge Stephen Warning ("trial court") denied Patti's request to make John an additional party. (DR 155-56) Instead, the trial court permitted

John to file his own petition for third party custody or *de facto* parentage. (DR 156)

Apparently realizing that there was no basis for him to bring a petition as a *de facto* parent, John filed a “nonparental custody petition” without raising any claim as a *de facto* parent. (See DR 147-52) In his petition, John claimed that he had “maintained a grandparent-grandchild relationship with Mason.” (DR 150) John also stated that he “has no other children or grandchildren and treats Mason as if they were biologically related.” (DR 150) John claimed that Mason is his “grandchild in every way except by birth.” (DR 151) John also alleged that it “is in Mason’s best interest that John Shmilenko have established visitation that will continue even in the event Patti Shmilenko no longer is able to exercise visitation.” (DR 151)

On January 13, 2014, a hearing was held to determine whether there was adequate cause for John’s third party custody petition. The trial court ruled that John could not pursue third party visitation, as there is no statutory basis for third party visitation<sup>1</sup> as the statute had been ruled unconstitutional. (DR 132)

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<sup>1</sup> The court had previously determined that Patti could continue to pursue third party visitation because of the parties’ prior agreed order allowing visitation.

However, the trial court once again encouraged John to pursue a claim for *de facto* parentage and granted him leave to amend his petition. (DR 132-33)

On January 31, 2014, John filed an amended petition to establish himself as Mason's *de facto* parent. (DR 107-17) Patti joined in John's petition. (DR 117) John admitted that "the *de facto* parent analysis is a rough fit for the facts of this case." (DR 77) John acknowledged that Mason's parents had not "consent[ed] and foster[ed] a parent-like relationship" between him and Mason prior to their deaths. (DR 113) John also acknowledged that Mason only lived in his household during Mason's visitation with Patti. (DR 113)

Nevertheless, John alleged that he "has assumed the obligations of parenthood without expectation of financial compensation." (DR 113) In support of this claim, John described purchasing "outdoor" clothing for Mason (gloves, boots, rain gear), age 6, for their activities together, which John described as walking on the beach and "digging holes and trenches together" on John's property. (DR 69)

John also alleged that he had "fully and completely undertaken a permanent, unequivocal, committed and responsible

parental role in the child's life." (DR 113) In support of this claim, John described teaching Mason how to fish, play piano, barbecue, and brine salmon. (DR 69)

At the Shmilenkos' request, the trial court consolidated the Miniums' third party custody action and John's action for *de facto* parentage. (DR 105-06)

On February 24, 2014, the parties were once again before the trial court, this time to determine whether there was adequate cause for John's petition for *de facto* parentage. The trial court stated that the one thing that differentiated this case from other *de facto* parentage cases was there was no living parent against whom John's rights could be measured:

Unlike every case that I've read, there is no parent to judge anybody else's rights against. And that's the basis of all this *de facto* parent and third party custody and everything else. The starting point is we measure anybody else's claim of right against the right of the parents.

(DR 29) The court then went on to say that by "virtue" of the third party custody order, "there are three people [the Miniums and Patti Shmilenko] who are considered *de facto* parents." (DR 30)

Taking what might charitably be described as a “flexible” approach to determining that John Shmilenko met the “stringent”<sup>2</sup> four-factor test<sup>3</sup> to establish himself as Mason’s *de facto* parent, the trial court analogized the parties’ circumstances to one where John Shmilenko was the equivalent of a non-residential biological parent:

**Factor 1.** Ignoring that it had previously considered the Miniums and Patti Shmilenko to be Mason’s *de facto* parents, the trial court found that whether “the natural or legal parent consented to and fostered the parent-like relationship” did “not apply” “because nobody here amounts to a natural or legal parent.” (DR 32)

**Factor 2.** In determining whether John and Mason “lived together in the same household,” the trial court found that even if

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<sup>2</sup> “Under the common law, a person who meets certain *stringent* criteria may be recognized as a *de facto* parent.” *Parentage of J.A.B.*, 146 Wn. App. 417, 423, ¶ 16, 191 P.3d 71 (2008) (emphasis added).

<sup>3</sup> This Court has warned that meeting this test should be “no easy task,” as it requires the petitioner to show: 1) the natural or legal parent consented to and fostered the parent-like relationship; 2) the petitioner and 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. *Parentage of L.B.*, 155 Wn.2d 679, 711, ¶ 47, 122 P.3d 161 (2005).

Mason's presence in John's home was limited, "the fact that the child doesn't live there as much as in the other household doesn't make a whole lot of difference. I think if we told people who are not the primary parents in most custody proceedings that because you have less overnights than the other the child doesn't live with you, I think they'd be very surprised." (DR 32)

**Factor 3.** Once again analogizing John to a non-residential biological parent, the trial court found that John "assumed the obligation of parenthood without expectation of financial compensation," because "somebody who has a child less than the other side is still assuming aspects of parenthood." (DR 32)

**Factor 4.** In determining whether John 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," the trial court ignored both Patti and John's earlier admissions that John's relationship with Mason was "grandparent-like" in nature and found that it was putting some "basic faith in kind of the fundamental premise of how we divvy kids up among separating parents, that the one whose not primary is still a parent." (DR 33)

In undertaking this analysis of the *de facto* parentage factors the trial court acknowledged it was "swimming well away from any

established channel markers, legally. So I do think it's appropriate to certify this matter immediately." (DR 33)

On March 10, 2014, the trial court entered its order finding adequate cause on John's petition to establish himself as a *de facto* parent. (DR 1-3) The Miniums move for direct discretionary review of this decision in this Court.

**D. Issue Presented for Review.**

Whether a step-grandfather, who describes his relationship with the child as "grandparent-grandchild" and whose contact with the child, whose parents are deceased, is by virtue of a third party visitation order that provides his wife with limited residential time, can pursue an action to establish himself as the child's *de facto* parent?

**E. Argument Why This Court Should Accept Review.**

- 1. This Court should defer to the trial court's determination that immediate review of its order is warranted under RAP 2.3(b)(4).**

This court should defer to the trial court's determination that immediate review of its adequate cause order would advance the ultimate termination of the litigation. The trial court recognized that allowing a step-grandparent to pursue *de facto* parentage "swim[s] well away from any established [legal] channel markers."

(DR 33) The trial court reasoned that absent a third party visitation statute, the step-grandfather was “limited to the *de facto* parent option” (DR 132) and that it was treating this case differently than it would any other *de facto* parentage case because there were no living parents. (See DR 29) And as the trial court noted, “better minds than mine [may] disagree with my legal analysis,” and if that is the case, review should occur “immediately.” (DR 33)

Whether a step-grandparent with a “grandparent-like” relationship with the child, whose only contact with the child is through his spouse’s court-ordered visitation, can establish himself as a *de facto* parent solely because the child has no living parents is a “controlling question of law” that if resolved in the negative will “materially advance the ultimate termination of the litigation,” because it will avoid a trial. As addressed in the accompanying Statement of Grounds for Direct Review, immediate and direct review is warranted because this Court’s decisions in *Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013) and *Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013) have created confusion in the lower courts, leading them to allow third parties, such as the respondent in this case, who do not have a “parent-child” relationship with the child to pursue *de facto* parentage on the basis

that otherwise third party visitation would be prohibited. The parties should not be forced to further litigate the respondent's *de facto* parentage claim when ultimately the trial court's order finding adequate cause should be reversed as a too broad interpretation of this Court's decisions.

**2. The trial court committed probable error by finding that the step-grandfather could meet the test to establish himself as *de facto* parent.**

Even had the trial court not certified this issue under RAP 2.3(b)(4), discretionary review is proper under RAP 2.3(b)(2) because the trial court committed probable error that substantially alters the status quo. Allowing John Shmilenko to pursue his action to establish himself as a *de facto* parent over the objection of Mason's third party custodians the Miniums is the equivalent of denying a motion to dismiss. Our courts have often granted discretionary review of trial court orders denying motions to dismiss when the plaintiff fails to state a cause of action for which relief can be granted. *See, e.g., Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44*, 103 Wn.2d 800, 699 P.2d 217 (1985); *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995); *Long v. Dugan*, 57 Wn. App. 309, 788 P.2d 1, *rev. denied*, 114 Wn.2d 1018 (1990); *Rye v. Seattle Times Co.*, 37

Wn. App. 45, 678 P.2d 1282, *cert. denied*, 469 U.S. 1087 (1984). Orders granting questionable custody rights are also subject to discretionary review. *See, e.g., Welfare of Watson*, 23 Wn. App. 21, 23, 594 P.2d 947 (1979) (granting discretionary review of an order restoring custody of two children to their mother and dismissing the State's petition for continued dependency review under RAP 2.3(b)(2)).

Here, this Court should grant review because the trial court committed probable error by allowing a step-grandfather, whose relationship with the child is “grandparent-like,” to pursue a claim of *de facto* parentage. This Court established a stringent four-part test to establish standing as a *de facto* parent, making it “no easy task” to meet the requirements in order to avoid opening the door to persons like John Shmilenko who seek legal rights in children to whom they are not parents, including “teachers, nannies, parents of best friends, adult siblings, aunts, grandparents, and every third-party caregiver.” *L.B.*, 155 Wn.2d at 712, ¶ 47. Failure to meet even one factor is fatal to a *de facto* parentage claim. *Dependency of D.M.*, 136 Wn. App. 387, 397, ¶ 22, 149 P.3d 433 (2006), *rev. denied*, 162 Wn.2d 1003 (2007). Yet John Shmilenko is being

allowed to pursue this claim even though he cannot meet any of the *de facto* parentage factors.

The trial court decided to make it “easy” for John Shmilenko to become a *de facto* parent because the child has no living parents. For instance, there is no evidence that Mason’s parents “*consented to and fostered parent-like relationship*” between Mason and John during their lifetime. Nor is there any evidence that the Miniums – the child’s third party custodians - consented to a relationship between John and the child other than one that was “grandparent-like” in nature. But such a relationship is a far cry from the cases where *de facto* parentage was established when the biological parent held out the third party as the other “parent” to her child. *See, e.g., Parentage of L.B.*, 155 Wn.2d 679 (for the first 6 years of child’s life, the biological mother held out her former partner as a second mother to her child, naming her as mother in baby book, listing her as a parent for school records, and sharing parental responsibilities); *Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013) (biological mother and partner agreed to raise child together, gave child both their names, and held each other out as co-parents); *see also Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008) (the child always considered petitioner as his father, both child’s legal parents

fostered this “parent-like” relationship, and the parents had at one point supported the idea of petitioner adopting the child).

John Shmilenko also cannot meet the second factor, because other than the visitation that has been allowed by virtue of Patti Shmilenko’s third party visitation order, he has never “*lived together [with the child] in the same household.*” See *Adoption of R.L.M.*, 138 Wn. App. 276, 288, ¶ 21, 156 P.3d 940 (2007) (petitioner was not a *de facto* parent because there was no evidence that the petitioner had lived with the child prior to an order allowing her to do so when the child was found dependent), *cert. denied*, 555 U.S. 815 (2008). While no Washington case has examined the extent that the petitioner and child must have lived together to meet this factor, the ALI *Principles of the Law of Family Dissolution*, §2.03 (2000) provides some guidance. There, the drafters state, “the most significant factor in determining whether an individual has ‘lived with’ a child is whether that individual and the child regularly spend the night in the same residence.” *Principles of the Law of Family Dissolution*, §2.03 at 119.

John Shmilenko also cannot prove the third factor that he “*assumed obligations of parenthood without expectation of financial compensation.*” With the exception of any incidentals that might be provided during Mason’s residential time with Patti Shmilenko, John

Shmilenko has not undertaken any obligations of parenthood – financial or otherwise – to warrant a finding that he is *de facto* parent. While the trial court analogized this situation to one where John was the equivalent of a non-residential biological parent, a non-residential parent would have paid child support to provide support in the other parent’s household. Here, it is undisputed that John has never paid child support nor provided any financial support for Mason beyond the support provided to him while he is in John’s home.

Finally, John Shmilenko cannot prove the fourth factor that he has been in “*parental role for a length of time sufficient to have established with a child a bonded, dependent relationship, parental in nature.*” John Shmilenko’s relationship with Mason is one that is “grandparent-like” in nature. This is unlike *Parentage of L.B.*, 155 Wn.2d 679, where there was evidence that the child viewed the petitioner as her mother, called her “mamma,” and the petitioner provided “much of the child’s mothering during the first six years of life.” This is also unlike *Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013), where the child referred to the petitioner as his “father,” and witnesses testified that the children saw the petitioner “as his one

and only father [and] is bonded with [petitioner] as any boy to his father.”

As the Supreme Court held in *Parentage of M.F.*, 168 Wn.2d 528, 534, ¶ 17, 228 P.3d 1270 (2010), “attending school functions, helping the child get dressed in the morning, or engaging in the other numerous events that together make up family with a child” alone is not sufficient to establish standing for a petitioner to pursue status as a *de facto* parent. And as John Shmilenko himself admits, the circumstances of this case are a “rough fit.” (DR 77) In fact, it is no fit at all. The trial court erred by ignoring the stringent standards required by this Court and allowing John Shmilenko to pursue *de facto* parentage of the petitioners’ grandchild.

**3. Allowing the step-grandfather to pursue *de facto* parentage substantially alters the status quo, because it would elevate his rights over and above the child’s biological relatives, including his third party custodians.**

The trial court’s probable error in allowing the step-grandfather to pursue his *de facto* parentage claim substantially alters the status quo, warranting review by this Court under RAP 2.3(b)(2). If John Shmilenko were established as Mason’s *de facto* parent his “rights” as a “parent” would be elevated above the Miniiums, who have been the child’s third party custodians for the last 5 years, and over

even his wife, Patti Shmilenko, who is only entitled to third party visitation. John is not biologically related to Mason and his role in Mason's life has been extremely limited compared to the Miniums. The trial court's order allowing him to pursue *de facto* parentage alters the status quo warranting immediate review by this Court under RAP 2.3(b)(2).

**F. Conclusion.**

This Court should accept direct discretionary review and dismiss this action.

Dated this 1st day of April, 2014.

SMITH GOODFRIEND, P.S.

NOELLE A. McLEAN, P.S.

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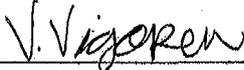
**DECLARATION OF SERVICE**

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

That on April 1, 2014, I arranged for service of the foregoing Motion for Discretionary Review, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 1st day of April, 2014.

  
\_\_\_\_\_  
Victoria K. Vigoren

No. \_\_\_\_\_

SUPREME COURT  
OF THE STATE OF WASHINGTON

Cowlitz County Cause Nos. 08-3-00476-1 and 13-3-00787-2  
Consolidated

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In re the Custody of:  
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Petitioners,  
and

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Respondent,

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JOHN SHMILENKO,  
Respondent,

PATTI SHMILENKO,  
Respondent  
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GREG and LINDA MINIUM,  
Petitioners.

---

APPEAL FROM THE SUPERIOR COURT  
FOR COWLITZ COUNTY  
THE HONORABLE STEPHEN M. WARNING

---

APPENDIX TO MOTION FOR DISCRETIONARY REVIEW

---

SMITH GOODFRIEND, P.S.

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, April 01, 2014 4:36 PM  
**To:** 'Victoria Vigoren'  
**Cc:** Valerie Villacin; Catherine Smith; noelle@noellemclean.com; Dana Walker; dahl@walstead.com  
**Subject:** RE: In re the Custody of Waddle, Cause No. 08-3-00476-1 and 13-3-00787-2

Rec'd 4-1-14

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**From:** Victoria Vigoren [mailto:victoria@washingtonappeals.com]  
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**Cc:** Valerie Villacin; Catherine Smith; noelle@noellemclean.com; Dana Walker; dahl@walstead.com  
**Subject:** In re the Custody of Waddle, Cause No. 08-3-00476-1 and 13-3-00787-2

Attached for filing in pdf format is a Motion for Discretionary Review and Statement of Grounds for Direct Review, in *Custody of Waddle*, Cowlitz County Cause No. 08-3-00476-1 and 13-3-00787-2. The attorney filing these documents is Valerie A. Villacin, WSBA No. 34515, email address [valerie@washingtonappeals.com](mailto:valerie@washingtonappeals.com). The Appendix to Motion for Discretionary Review is 205 pages. A hard copy of the appendix will follow via Messenger.

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