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No. 63919-6-1

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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***In re Parentage and Custody of  
Alec Franklin Johnston***

Mary Franklin, Pro Se  
Appellant

v.

Jackie J. Johnston  
Respondent/Cross-Appellant

2010 JUL 15 AM 10:04

FILED  
COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON

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**APPELLANT'S CORRECTED BRIEF**

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## I. Identify of Party

The appellant, pro se, Mary Franklin, respectfully advances her appeal based on the pleadings, judgments, and papers in the in the records, points and authorities stated, my declaration incorporated herein, and the arguments that arise during this review.

At heart, is Alec Franklin Johnston, a vivacious little boy correctly adjudicated my de facto son; born on November 5, 2,005, he's the silent party, spared harm because lifelong, till visitations liberalized, he'd been in my safe, loving care, and home.<sup>1</sup> His safety and substantive liberty rights eclipse the rights of the litigants.<sup>2</sup> (CP 284)<sup>3</sup> Foremost and forevermore, Alec's constitutionally grounded right to a non-biological familial bond should be protected by collateral estoppel.

## II. Issues Presented for Review

1. Should this court take judicial notice of the child's enmeshed dependency cases and TPR Trial Brief (C.P. 1088 – 1102) for the

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<sup>1</sup> C.P. 708, Findings of Fact, Conclusions of Law, May 26, 2009, Section 2.12, 1. 9- 10; "Mary Franklin has provided for his primary care for most, if not all, of his life."

<sup>2</sup> Federally and in our state children have a liberty right to pursue a non-biological parent – child relationship. See *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05, 97 S. Ct. 1932, 52 L.Ed. 2d 531 (1977); Article 1, Section 3 if Washington State's Constitution; see *L.B.* (footnote #3)

<sup>3</sup> Child's viewpoint, babies are shown to be attached and bonded almost immediately after birth, and the court must use the child's viewpoint. In re Hall, supra, 99 Wn.2d at 851

equitable purpose of showing appellee's collateral estoppel, bad faith, and common fund? Also ameliorates harms and omissions from ineffectual assistance of counsel.

2. Should appellee's collateral estoppel serve in perpetuity to preserve a sweet boy's constitutional right to maintain child-non biological familial relationship?
3. Did the trial court abuse its discretion and make unlawful and substantive errors when it instilled attorney fees and child support? Are CR 11 sanctions warranted, the requested relief reasonable?
4. Did the court contravene due process guarantees and failed to build an adequate record prior to setting child support, and was it improper not to grant Mary full custody when the dependency could not safely be dismissed?
5. Did the trial court contravene the "parity provision" of *L.B.*'s de facto parentage doctrine inadvertently creating a "second class" parent; it imposed the duty of financial support and liabilities yet denied full parental rights? A discriminatory inequity not found in any other legally cognizable means of establishing parentage? The de facto parent is a parent for all purposes and not just financial support.

### **III. STATEMENT & SYNOPSIS OF THE CASE**

#### **Enmeshed cases evince appellee's Collateral Estoppel, Bad Faith, and Common Benefit.**

The records show the parties' relationship predates domestic partnership laws and we never advanced any claims under a meretricious theory action; cases herein cannot be retooled as such. The appellee (Alec's birth parent) and I were tumultuously coupled 2002 through 2006;

in our latter time together, living off my largess and home in Tukwila<sup>4</sup> as appellee ultimately failed about 12 different (mostly outpatient) drug rehab attempts<sup>5</sup> (CP 479 – 483) for substance abuses, not limited, to heroin, methamphetamine, alcohol, cocaine, LSD, prescription narcotics, and nicotine; the drugs of choice crack cocaine and marijuana (marijuana abused for decades). Employed as a nurse, I supported my family as best I could as appellee hid her life style, on discovery, I advocated absolute sobriety, I participated in each rehab program as the program allowed, additionally, accompanied appellee to AA and NA meetings: I paid some of her drug care services, private mental health counseling, couples' counseling, and parenting classes. Appellee's credited me for saving her life when she suffered flesh eating bacteria when injecting heroin. (CP 479 - 483) (See Verbatim Reports of April 2008) Appellee was arrested and convicted several times for domestic violence against me. Alec was unexpectedly conceived during one of many relapses; his conception, as in most couples, re-catalyzed our relationship and hopes for the future; we joyfully planned his birth. I participated equally and fully in his pre-natal

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<sup>4</sup> CP 639, line 1 – 9, Verbatim Report April 8, 2008 TPR Trial; Ms. Johnston's testimony (A)A. And the other time I don't believe I had to work because I was supported by Mary Franklin.

<sup>5</sup> CP 707, lines 18-16, Findings of Fact, Conclusions of Law, May 26, 2009.

care, selected his name, paid for his circumcision and all his care items, outfitted his nursery set up in my bedroom which I shared with Appellee; I was wholly committed and began caring for Alec well before his birth, then coexistent with dependency without expectation of compensation.<sup>6</sup> Afterward, appellee's mental health and continued substance abuses and repeated violence and vandalism against our home triggered protracted dependency actions; pursuant to RCW 13.34.030(c) the state became Alec's *parens patriae* (06-7-01776-3 KNT)<sup>7</sup> on agreed upon orders entered April 2006 against appellee.

**A. Facts of the Dependency:** Late January 2006, I came home and in our bedroom doubling as the nursery found appellee obtunded on drugs, and Alec clearly imperiled, without recourse but to call C.P.S. for help, Alec's placement into a three day shelter hold completely unanticipated; I was as much a victim to the court's mandate at the 72 hour Shelter Hearing, at C.P.S.'s adamant insistence, that I became foster licensed (I was bereft counsel or party status to the proceeding) as Alec's ensuing entrapment. Licensure took over eight months to obtain. The Juvenile Court's mandate was issued in spite of appellee's motion that

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<sup>6</sup> C.P. 707, 1.18 - 16 Findings of Fact, Conclusions of Law, May 26, 2009.

<sup>7</sup> CP 1164, see Section 1.6

Alec be returned to me. Keeping Alec home was our imperative as parents; little did I know the appellee would later try to twist and distort these facts. See petitioner's Ex # 25<sup>8</sup>, #26<sup>9</sup>, and #201,<sup>10</sup> See Shelter Care Order Minutes - Agreed Order. (CP 894 - 901) Our relationship co-existed with the dependency; we continued to live together and/or or appellee stayed nearby in my RV when not housed in an impatient unit and we co-parented Alec till the eve of his first birthday. Appellee, for the umpteenth time vandalized our home, relapsed, then abandoned our family, and I irrevocably separated. (CP 286 - 288). Soon afterward, appellee began threats to extinguish Alec's familial bond with me refuting she instilled my parentage or we were once coupled, and has tried to defame my character. Appellee's subsequent psychiatric evaluation demonstrated she has the serious disorder of Borderline Personality, NOS – with histrionic and anti social traits (diagnosis reconfirmed by her own certified witness at the family law trials).

The dependency ordered perpetuated past the family law trial; DCFS had a requisite minimum six (6) month period to monitor appellee's

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<sup>8</sup> CP 666 – Exhibit List, # 25, 72 Hour Shelter Care Order, King County Cause # 06-7-01776-3 KNT

<sup>9</sup> CP 666 – Exhibit List, # 26, Shelter Care Order, King County Cause # 06-7-01776-3 KNT

<sup>10</sup> CP 686 – Exhibit List, # 201, Clerk's Minutes from the 72 Hour Shelter Care Hearing.

purported remission and the efficaciousness of the parenting plan. (CP 927; 297; 970 - 971; 9, line 21 - 22; 839 - 849) In hearing held September 2009 it was discovered appellee was testing positive for marijuana and or impermissibly missing an inordinate number of UA tests as early as May 2009, before the dispositional family trial orders penned, relapse lasting through November of 2009. The trial court deemed the illegal drug use trivial because it was not harmful as cocaine. The dependency protracted through March 13, 2010 and then terminated after appellee demonstrated only three (3) months of clean UA's. (See Verbatim Reports of May 22, 2009, September 25, 2009, and November 9, 2009)

**B. Facts To Termination of Parental Rights Trial**

Appellee's repeated drug use and criminal actions compelled the state to hold a multi-day termination of parental rights trial (TPR) in April 2008 (#07-07-00596-8-KNT). Judge Doyle presided, and ultimately stayed the action upon the state's motion, pending outcome of my non parental custody action; she took jurisdiction of all four (4) cases, linked and consolidated them to Uniform Family Court (cause no. 20081143-UFC) and ordered my separate trials to coincide together. (CP 31, CP

1098, lines 5 – 9, <sup>11</sup> CP 33, Section III<sup>12</sup>)

In the TPR trial, to suit her defense, appellee averred opposite facts as to her declarations in the family law cases, adopting my family claims as shield against the state's action. My attorney filed an amicus brief to expose the disingenuousness. Appellee's "bad faith," and "collateral estoppel," is succinctly obvious by her brief to this trial (CP 1088 - 1102); judicial review is requested. It is very clear that my cases became a golden shield against termination and conveyed appellee invaluable time to repair deficiencies; thereafter mutual benefit to the family law cases. It's very apparent she sold drugs, squandered vast sums of money; overall, her life style choices lead to her many years of chronic unemployment and underemployment. She bragged a \$90,000 windfall ignored in the family trial. Excerpts as follows:

**CP 1088, lines 19 – 25** (TPR Brief)

*"...she was sharing her life" and "committed to Mary Franklin and viewed her as a life partner with whom she would raise Alec."*

**CP 1089, lines 1 – 5** (TPR Brief)

*"Ms Johnston agreed to the arrangement (Alec's placement with Mary) because she knew she was not able to care for Alec at that time and believed Ms.*

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<sup>11</sup> Section 3.2 "It is further ordered that the termination trial is continued and will be linked with the third party custody and parentage action, (cause number 07-5-02508-2 KNT, 07-3-07493-1 KNT and the dependency action (cause number 06-7-01776-3 KNT). The third party custody and parentage action is reassigned to Judge Doyle."

<sup>12</sup> CP 33, Section III; "The petition to establish De facto Parentage, Petition for Non Parental Custody and the dependency matter are hereby linked...the trial date in the Petition to Establish Defactor Parentage is adjusted to coincide with the trial in the Non Parental Custody...;" signed on May 22, 2008

*Franklin, her life partner, would care for the baby."*

**CP 1089, lines 6 – 9** (TPR Brief)

*"For several months she was not consistent, she was irrational, and rude to Ms. Franklin."*

**CP 1089, lines 24 – 25** (TPR Brief)

*"Ms. Johnston wants to co-parent Alec with Ms. Franklin. Though now estranged from Ms. Franklin, she believes that it is not in Alec's best interest to be taken away from Ms. Franklin."*

**Verbatim Transcripts, April 2008 – Parental Rights Termination Trial: Testimony of Jackie J. Johnston:**

**CP 528 line 2 - 5**

**Q.** *"Now, if you were in a situation where there's a third party custody decree allocating custody and visitation between you and Mary Franklin would you be willing to follow that order?"*

**CP 530, line 13**

**A.** *Yes I would.*

**CP 596**

**A.** *I have sold, on and off, drugs a long time. I don't think I would dispute anything that these drug assessments – you know prior to my son being born.*

**CP 598 – 599, lines 1 - 25**

**Q.** *Was there a period you received an inheritance of \$90,000 while you were using. Did you receive an inheritance of \$90,000.*

**A.** *No*

**Q.** *So you didn't report to anybody at Swedish Hospital that you received \$90,000 of an inheritance which you spent.*

**A.** *I believe I got – I came into some money, but it was not through an inheritance, and I don't believe I wanted to tell them how I got it.*

**Q.** *And how did you get it.*

**A.** *I was in real estate*

**Q.** *And so was that when you sold your house?*

**A.** *No*

**Q.** *Okay, did you spend it on drugs?*

**A.** *I spent a lot of money on drugs?*

**The TPR Finding of Fact, Conclusions of Law and Order Continuing the Termination Trail, May 9, 2008**

**CP 1129 - 1143**

**¶ 1.16** *"Jackie testified she seeks a shared custody arrangement that is fair..."*

**¶ 2.7** *"because third party custody is a permanent plan, RCW 13.34.136(2), and Ms. Franklin's third party petition is proceeding to trial..., continuation of this termination petition will not, by clear, cogent, and convincing evidence,*

*diminish Alec's prospect for permanency..."*

My subsequent motion to join in the dependency for equitable access to all records influencing the bench was denied, a prejudicial hindrance only removed in September 2009; records I produced required costly motions to compel and subpoenas (CP 979 - 1031; see Verbatim Report of September 25, 2009). My request to bifurcate the trial to mitigate expenses (CP 31 - 36) was also denied.

In late January 2009 the bench's continuity to all facts and appellee's disingenuous TPR testimony and pleadings lost because of reassignment; cases passed finally to Judge Prochnau (CP 28; CP 837) who later articulated "but for the issue of whether third-party custody was a viable option, it appears that Judge Doyle would have terminated her parental rights." (Verbatim Report, Oral Ruling April 13, 2009, p.6, lines 16 - 25) The TPR action was dismissed when I became Alec's adjudicated parent.

**C. Facts of the Family Law Cases:** In November 2007, awaiting the termination trial, in response to DCFS bequest and motion for concurrent jurisdiction (entered October 23, 2007, CP 970 - 971<sup>13</sup>) and to

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<sup>13</sup> CP 668 - Petitioner's Trial Exhibit # 34 – "Order for Concurrent Jurisdiction..." entered October 23, 2007.

protect Alec, I filed two separate actions and granted 2 separate trials; pursuant to *L.B.*,<sup>14</sup> a de facto parentage petition (cause no. 07-5-02508-2 KNT)<sup>15</sup> emphatically refuted by the appellee (CP 24, 26, line 5 - 9),<sup>16</sup> and a non parental custody action under RCW 26.10 (cause no. 07-3-07493-1 KNT).<sup>17</sup> The then “ISSP” reports indicated my adoption or third party custody of Alec the primary permanency plan; it’s important to point out that RCW 26.27.541(2) states “a prosecutor or attorney general acts on behalf of the court and may not represent any party;” thus, the costly onus to effectuate the state’s custody plans thereafter born by the custodial or adoptive claimants.

Trial began March 23, 2009 exclusively focused on the de facto parentage and parental unfitness claims (see appellee’s brief at CP 381 - 391, and appellant’s at CP 355 - 380); solicitations for and facts relevant to attorney fees and child support were neither briefed nor adequately introduced at trial. Incorporated into my trial records were appellee’s dependency records, mental health and chemical dependency treatments,

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<sup>14</sup> In re *L.B.* 121 Wn.App. 460, 485,89 P.3d 271, at 284. “Familial rights extend to children as well as parents.”

<sup>15</sup> CP 183 (1) “Order Setting Paternity Case” was signed on November 7, 2007 and trial set for September 29, 2008.

<sup>16</sup> CP 26, line 5-9, Section 1.6; “respondent denies petitioner...is not the psychological and/or de facto mother...;” signed on March 3, 2008.

<sup>17</sup> CP 1; trial originally set for October 6, 2008. See also CP 20, 1. 24, CP 182; adequate cause was granted on January 11, 2009, see CP 19 - 21.

ISSP reports, the TPR Verbatim Reports of April 2008 (CP 435, see 10:57:45), and her convictions for VUCSA–PWI Deliver Marijuana 91-1-01705-7 (1991), Theft in 3<sup>rd</sup> Degree (2006), Violation of Contact Order – DV (2005, 2006), Malicious Mischief in 3<sup>rd</sup> Degree DV (2005); Malicious Mischief in 3<sup>rd</sup> Degree (1991); and reckless driving (1991). (CP 1059, 1162 - 1172; C.P. 665, Exhibits List # 12, 14, 17; CP 667, Exhibit List # 27 - 33; CP 668, Exhibit List # 34 - 40) See Petitioner's Motion to Adopt the TPR "Findings of Fact and Conclusions of Law" with stipulations. (CP 424 - 429) The court took judicial notice of the "Clerks Minutes from the 72 Hour Shelter Care Hearing" as Exhibit # 201. (C.P. 686) At trial, it came out appellee was again breaking the law by driving and picking up Alec without a valid driver's license; discounted by the court as mere "impulsivity."<sup>18</sup> (CP 979 - 1030, CP 1144 - 1151, CP 1162 - 1172)

Trial concluded after closing arguments on April 13, 2009; oral rulings were announced after morning recess; the formal presentation scheduled for May 22, 2009 coinciding with the next scheduled dependency review hearing. During closing argument opposing counsel raised fees without being in his client's trial brief and asked the court's

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<sup>18</sup> Verbatim Report, Oral Ruling: Fact Finding and Conclusion of Law, April 13, 2009. p. 5, line 8, "She still has some problems with impulsivity...not a smart move to drive to pick up the child when she didn't have a license."

judicial notice of financial declarations (CP 349 – 353, CP 392 - 398). My counsel was purposefully caught off guard; her request for the matter to be continued for fair opportunity to prepare and defend was denied; the court entered an immediate finding in oral ruling. My counsel failed to contemporize my debts up through trial at closing or post trial, debts substantially higher than forecasted on financial declarations; twice that of appellee, my out of pocket payments ten-fold higher. Opposing counsel did not partition fees to separate cases, patently inflated his client's fees, omitting serial remittances, interim awards, or any waived pro bono or discounted fees; and contemporized appellee's debts up through trial, supplanting financial declarations (See CP 381 - 391, Verbatim Report, April 13 - Closing Arguments, see CP 81 – 82,<sup>19</sup> see also Page 46, line. 18 -24, Page 48, lines 5 – 8)

**Verbatim Report, Oral Ruling, April 13, 2009:**

**Page 22, lines 7 - 16**

*Court: "With regards to attorney fees, the court was asked to take judicial notice of their financial declarations. It's true that Ms. Franklin has higher earning capacity and earns more wages than Ms. Johnston. She had had some very heavy attorney fees in this case. Ms. Johnston has incurred some significant attorneys' fees in this case. Ms. Franklin also had benefit of the proceeds from*

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<sup>19</sup> In closing argument opposing purported fees of \$65,000, denouncing the \$13,178.09 balance appellee reported owed (CP 353, line 11), and omitted accounting for remitted payments of \$6,548.85 (CP 93, section #2), \$5,000 interim award, \$5,000 (\$500/mo installments payments declared on appellee's financial declaration – CP 353, line 11). The records on hand indicate appellee's balance approximated \$40,000, not \$65,000 and her reported installments payments of \$500.00/mo put her on a short 6.5 year repayment structure.

*the California home. I am going to award \$20,000 in attorney fees to Ms. Johnston."*

**Fact Finding and Conclusion of Law, May 26, 2009 (CP 710)**

*P. The transfer of Ms. Johnston's' home in California to Ms. Franklin was not made as compensation for Ms. Franklin's care of Alec. It was made as an effort to "wake Ms. Johnston up" to the severity of her substance abuse. When it was sold, Ms. Franklin used some or all of the proceeds to reimburse herself the costs of bringing the loan current, keeping the house out of foreclosure, preparing the house for sale, paying the closing costs and other costs associated with the sale, for the expenses she paid to support Ms. Johnston's substance abuse treatment and for the damages and costs caused by Ms. Johnston's during her many relapses. Whether or not Ms. Johnston was justified in retaining 100% of the proceeds from the home is not the subject of these proceedings and the court makes no finding in that regard.*

*w. Ms. Franklin has higher earning capacity and earns more wages than Ms. Johnston*

*x. Ms. Franklin has paid substantial attorney fees in this case*

*y. Ms. Johnston has incurred substantial attorney fees in this case*

*z. Ms. Franklin also had benefit of the proceeds from the California home.*

*AA. It is fair and equitable in this case to award Ms. Johnston \$20,000 in attorney fee's from Ms. Franklin. This amount is over and above any amounts Ms. Franklin may have paid to Ms. Johnston..."*

*3.4 Pursuant to RCW 26.26.140 and RCW 26.10.080 respondent is entitled to \$20,000 in attorney fees and costs from Petitioner.*

In oration, the court announced "by clear, cogent, and convincing evidence" appellee instilled Alec Franklin Johnston as my namesake and de facto son; he holds me dear in his heart, and I am a wonderful mother! (CP 709, line 14 - 15; see Verbatim Report, Oral Ruling of April 13, 2009, pages 12 - 20.)<sup>20</sup> I did not prevail on the non parental custody action. I was to pay \$20,000 (bases omitted) for attorney fees and costs to appellee,

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<sup>20</sup> Verbatim Report: Oral Ruling Fact Finding & Conclusion of Law, April 13, 2009; page 3 l. 25. "First of all what they have to be proud of is Alec Franklin Johnston...he's a sweet, bright, happy boy who loves both of his mommies.... Everyone has acknowledged that she has been a wonderful mother to this child..."

order later memorialized in the JDOEP issued in May. Gradually, during lifespan of the dependency, move toward equally shared custody. The court announced its deference to appellee, indicating she would be granted sole decision making if disharmony between litigants persisted.

As in the TPR trial, the evidence of estoppel continued; appellee, averred under oath the following:

**Verbatim Transcripts, Family Law: Fact Finding Trial, Testimony of Jackie Johnston, April 9, 2009:**

**Page 18, lines 1 - 25**

*A. Who's got to help me with Alec? Who do I want to help me?*

*Q. Who is going to help you with Alec?*

*A. I want Mary Franklin to help me.*

*A. But what I would like is that he -- that he share time.*

*Q. When you say, "share time," what are you saying?*

**Page 18, lines 1 - 25**

*A. When I'm not working, Alec can be with me. When I'm working, he's with her, vice versa. It's like a shared, equal time, fair.*

*Q. When you say, "shared," are you talking about shared equally, roughly?*

*A. I want -- I just want it to be fair. You know, we both deserve just to have the same amount of time with him.*

**Page 15, lines 8 - 21**

*Q. So moving forward, if you were to be given custody of Alec, what is your plan?*

*A. Well, my hope and my plan is that I'm not doing this anymore; that I'm not fighting for my son. And my plan is that -- I had my basic ideas when I walked into this courtroom, and now I know for sure because I've heard a lot testimony from experts that my son could be damaged. And I can't risk Alec being damaged. He's my most important thing in the world... I'm not going to risk damaging my son. He's got two mommies and I want him to have two mommies.*

**Verbatim Transcripts, Family Law: Fact Finding Trial, Testimony of Jackie Johnston, April 9, 2009**

**Page 16, lines 1 - 25**

*A. "...I need Mary Franklin to work with me. I mean, I don't want my son in a day care where he doesn't know anybody. If I had my choice -- I mean, I absolutely want my son... I want to share my child. I want what's best for my child, but I'm worried at the same time. I'm very fearful, but I don't want him in*

*day care. If I'm at work and I'm not available to Alec, let him be with Mary Franklin. If she's at work, let him be with me. Just...I'm not going to break anybody's heart. And I said that in the termination trial. Twice, I said that, "I don't want to break anybody's heart. Most of all Alec's." You know, he -- he loves her. I can't hurt my child and go, "You can't see Mommy Mary, sorry." No, I'm not going to do that. But what probably more resonates with me is that I can't hurt Mary Franklin. This is not necessary. It is not necessary to do this to anybody, to me, to her, to Alec. None of it is necessary."*

The formal Fact Finding and Conclusion of Law was held on May 22, 2009 jointly with a dependency review hearing; the latter occupying the majority of the court's time, and is also the day my attorneys withdrew from the case. The "JDOEP" (CP 701 – 703) was entered, therein; the \$20,000 attorney judgment basis was given on the conglomeration of RCW 26.26.140<sup>21</sup> and RCW 26.10.08.<sup>22</sup> (See the Verbatim Report of May 22, 2009, See JDOEP Order). Agreed findings between counsels were not reached and the court entered its own written Fact Finding and Conclusion of Law on May 26, 2009. (CP 704 – 713)

The parenting plan - Phase I (CP 769 – 780) and the Child Support Order (CP 756 – 767) entered on May 27, 2009. In the parenting plan,

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<sup>21</sup> RCW 26.26.140 – is a provision of the UPA statute; in part reads “The court may order reasonable fees of experts and the child's guardian ad litem, and other costs of the action, including blood test costs, to be paid by the parties in proportions and at times determined by the court. The court may order that all or a portion of a party's reasonable attorney's fees be paid by another party.”

<sup>22</sup> RCW 26.10.080 is the verbatim copy of RCW 26.09.140 – a meretricious –dissolution of marriage statute and both exactly read in part: “The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs...”

instead of gradually instilling a 50/50 custodial plan set in oral ruling, the court instilled it in thirty days, and re-announced intention to default sole decision making in deference to the appellee despite her untested long term sobriety, mental health condition, criminal history, untested parental fitness, and the announcement of the perpetuation of dependency.

**D. Case facts Relevant To Attorney Fees.** In addition to the defective JDOEP award, interim fees of \$6,500 were also untimely and illegally granted in August 2008 on opposing counsel's spurious "slight of hand. In responsive motion to paternity test (CP 54 - 57)<sup>23</sup> opposing signed on July 3, 2008 as truthful, correctly citing *L.B.*, declared the UPA inoperable:

*"In re Parentage of L.B., 155 Wn.2d 679, 695-701, 122 P.2d 161 (2005), found de facto parentage actions were not recognized by the UPA....Had the UPA allowed de facto parentage determinations then there would have been no reason for the Washington Supreme Court to articulate the common law cause of action to establish de facto parentage... if the UPA provided Petitioner with an adequate remedy then she would not have standing to bring a common law de facto parentage action."*

On August 8, 2008, opposing counsel's then penned the UPA operable in "Respondent's Motion for Interim Attorney Fees & Cost"<sup>24</sup>(CP116, 117 - 120),<sup>25</sup> thereafter, enticed its instilment, purported

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<sup>23</sup> CP 37, in pleading titled "Response to Petitioner's Motion to Strike Paternity Test", July 3, 2008.

<sup>24</sup> Fee affidavit patently misleading, discounts and remittances missing; the \$5,000 payment averred paid by both appellee (CP 93, #2) and counsel (CP 81, #3) is missing,

on appellee's "need for fees" despite averred declaration to be providing substantially discounted or pro bono services? (CP 81 - 82, #7, CP 54)<sup>26</sup>

The motion for interim fees tactically filed on my attorney's vacation, upon return, had one (1) day to respond.<sup>27</sup> At the time appellee declared she paid \$5,648.85 in fees with only \$1,000 owed to her attorney. (CP 93)

I contested fees on grounds I was not funded, the UPA was inoperable, the requisite partitioning of fees omitted, and it incentivized further litigation because appellee would shoulder no liability and her malfeasances triggered all the litigations. (CP 107 - 111, CP 95 -100)

The interim and JDOEP orders are seemingly predicated upon the "red herring" issue of the California house appellee let fall into ruinous condition and deeded to me early 2005 to escape its debts; the conveyance retro active to 2004 reflecting the timeline and breadth of arrear mortgage

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it does not show the declared balance owed of \$1,000.00; instead his bill shows fees of \$6,371.00 and costs of \$278.85. The fee affidavit attached to counsel's exhibit trial notebook holds similar flaws.

<sup>25</sup> CP 116, pleading titled "Respondent's Motion for Interim Attorney Fees & Cost," August 8, 2008, "Pursuant to RCW 26.26.140 Respondent requests this court order Petitioner to pay Respondent's attorney \$5,000 as an interim award of attorney fees and costs."

<sup>26</sup> CP 82, # 7; I am willing to be flexible and generous with fees and costs in this matter because it is important matter and attorneys has a certain duty to provide pro bono ore reduced-fee services to people..."

<sup>27</sup> "Order Requiring Interim Attorney Fees and Costs Including Mediation Fees" "Basis of the fee: respondent timely presented a motion for Interim Attorney Fees and costs to this court. This court considering the motion, response (if any), reply (if any) and the court file. Based on the forgoing... awards \$5,000..." (Signed, September 8, 2008, Hon. Teresa Doyle).

and tax debts I assumed, and I sold in 2007. A transaction briefly reviewed by the court and determined that it was not conveyed as compensation for Alec's care, rather, for significant damages/cost respective to the house or appellee. I testified that at significant cost and personal hardship forgoing my own bills, I cured the foreclosure and arrear taxes, maintained the mortgage, repaired - reconditioned the property, and bore all the seller's costs. I sold the house in early 2007 and reported escrow received approximately \$145,000 and I owed at least \$30,000 in capital gains, \$15,000 in California taxes, 6% to seller's costs; the remaining balance went to defray the heavy ownership costs and remedy the significant damages incurred at appellee's hands; tabulated equity was not given, I was bereft ledgers during testimony, the facts as to the house was in appellee's trial exhibit note book but not entered into evidence? The deed in the records showed appellee abdicated all ownership responsibility five years before trial yet the trial court still inferred the house as belonging to her, and verbalized pejoratively that I had "overpaid" myself in the transaction; an improper meretricious viewpoint untimely evidenced in oral rulings and Fact Finding and Conclusion of laws

**Verbatim Report, Fact Finding and Conclusion of Law, Oral Ruling, April 13, 2009:**

**Page 17, l. 5 – 17**

*Court: Later, she may have kept the family home – California home and sold it in order to pay herself back for the damages caused her home, for the treatment programs, and **maybe she even paid herself back a little more than she should have**, but it wasn't for compensation for raising Alec....her decision as to what she thought she was justified in being compensated for in order to keep the home out of foreclosure, the time and expense to get it ready for sale, the damages caused by Ms. Johnston's drug addiction and the treatment conditions.*

**E. Facts of Parties Financial Declarations** My

financial declaration was never impugned by the court or opposing counsel (CP 394) and was substantiated by copious financial documents provided to and in the appellee's exhibit note book (CP 674 - 680). It did not support the court's conclusion I had ability to pay fees at time of trial. Rather, it demonstrated nominal pension savings, approximately \$24,000 reserved for trial forecasted to minimally cost \$40,000, personal savings of only \$100.00, Section 5.4 indicated my monthly child care costs of \$670.00/month, equating to roughly \$24,120 for the 3.5 years I raised Alec. (CP 395) As head of household with mortgage and home costs I had net income of \$5,535.36 against monthly living expenses of \$5,560.65 with no overage to take on additional costs. Inapposite to appellee, I did not have benefit of counsel averred on record discounting fees or deferring fees pro bono, my fees climbing because the dependency was ordered to survive the trial. I was financially harmed by the dependency action - I did

not have benefit of appointed – free public defender, which by the way my taxes helped pay for, which I impugned as income to appellee in my motion for reconsideration; a significant benefit overlooked by the court.

I did impugn appellee's declaration (CP 392) questioning personal and household income; appellee had testified living rent free with wealthy family benefactors in the lush, gated, million dollar community of Sahallee Golf and Country Club, provided a car, car insurance, and other luxury sundries; she also worked in an upscale Bellevue restaurant able to shield tips as income; her true income indeterminate, and failed to disclose the income of her household members as required by statute. Evinced, before and during trial appellee always had nice housing, transportation, access to healthcare and mental health providers, long standing benefit of public defender, public assistance, family law counsel averring free or discounted services, and she had never contributed to the financial care of her son; her repayment structure to her attorney showed a payout in 6.5 years, before discounts or deferments hidden from court view. Extrapolating "need" is not evidenced by the facts.

**F. Facts Pertinent to Child Support Orders.** Child support first surfaced in untimely memo sent to my then counsel on May 19, 2009 at 5.35 p.m. (CP 692, lines 8 - 22) who in return sent and filed a

responsive Memorandum of Law on May 21, 2009. The court's haste and confusion is apparent by reviewing the Verbatim Report May 22, 2009 page 15, lines 14 - page 20, line 19). My counsel pointed out the request was novel to the trial, not properly set, denied opportunity to properly prepare and defend, and complained that the financial declarations the support tables were to be predicated from were erroneous, outdated, and/or impugned. The court's support calculations show without any evidence or adequate explanation of its decisions, inflated the cost of my Tukwila home from \$250,000 to \$500,000, inadequately assigned an additional \$500.00/month of extra income to appellee, and made one deviation crediting residential time and child support to appellee of \$215.00 month commencing October 2009, forecasted to the dependency's anticipated termination. Other childcare costs divided along 78% and 22% divide; I would shoulder the majority of the child's costs. The court made no allowances for either my prior child care expenses raising Alec, nor, for my disparate household expenses despite appellee's standard of living evinced comparable, arguably, higher, ensconced in the home of wealthy family benefactors.

**G. Other Case Facts.** I was harmed by ineffectual assistance of counsel; they did not enter into my records appellee's TPR trial brief, a

critical omissions leading to global failure to claim estoppel, bad faith, and failed to offer the theory of common fund. They failed to anticipate and adequately defend against untimely requests for attorney fees and child support actions. Failures due in part because they were planning an exodus from the case due to the fees I owed. Immediately after trial concluded I received a letter from counsel stating if I did not cure my account they would withdraw post haste, I paid \$20,000, liquidating all my funds (leaving balance excess of \$73,000) to ensure their imperative services to finalize my parentage judgment at the Formal Presentation hearing set for May 22, 2009.

In protecting Alec's constitutionally grounded rights I have exhausted my finances, forcing me to file bankruptcy in May of 2010 and act pro se on appeal. Including assessed fees, as of November 2009, I've incurred at least \$205,850 in legal expenses which I reported to the court on motion for reconsideration; my motion was cast aside by the bench without explanation after sitting idle at the judge's chamber for almost a month. I doubt it was even read because it was filed pro se, and like here, bulky. Subsequently, I filed a notice of appeal; all delays therein stem accidentally acting pro se and time needed to build funds for mandated RAP fees and documents.

Seeking to block me from affording appellate counsel, appellee retained a collections attorney who obtained a writ of garnishment on

November 19, 2009, under the writ, collections counsel seized the funds I had built up in my bank account, taking \$9,884.44 - leaving a negative balance of -\$150 in which to live on; I was left without any funds to pay the necessities of life or pay for the appeal and forced to limit my appeal to the issue of attorney fees, child support schedule, and defend the parentage ruling. Additionally, opposing counsel filed motion of contempt, alleging I owed child support from October 2009 despite knowing the court intended the support to being upon death of the dependency and he challenged the parentage on cross – appeal. The motion was stayed upon my bankruptcy filing; I was assessed \$500.00 judgment because the contempt motioned deemed to be properly set before the court.

In prior pleadings in this court I filed contemporaneous financial declarations and pursuant to RAP 18.1c and rules therein, reserve the right to file affidavits and declaration seeking legal costs and attorney fees not set here due to this brief's expense necessary to defend my positions.

## **VI. ASSIGNMENT OF ERRORS**

1. The trial court improperly made meretricious opinions to real estate setting bias against appellant. The court made a prohibitive retroactive lien on my Fifth Amendment right to own and dispense property.

2. Harmed by “ineffectual assistance of counsel” by inadequately defending and anticipating attorney fees and child support, and global failure to advance the theories of bad faith, estoppel, and common benefit.
3. Attorney Awards:
  - i. Fact Finding and Conclusion of Law (CP 704 - 713), May 26, 2009. Error invalidates: ¶ 2.9 ¶ X ¶Z ¶ AA ¶ 3.4
  - ii. JDOEP (CP 701 - 703), May 22, 2009; \$20,000 award. Error invalidates: ¶ 1.2 ¶ 3.4; and all/any writs/garnishments thereto attached. The request not properly set before the bench.
  - iii. Order Requiring Interim Attorney Fees and Costs, Including Mediation Fees, (C.P. 220) September 5, 2009; \$5,000 and GAL \$1,500. Error invalidates: Entire order.
  - iv. Order Appointing Guardian ad Litem on Behalf of Minor (CP142 - 145), September 24, 2009. Error invalidates: ¶ 3.5
  - v. Supplemental Judgment and Order Granting Post Judgment interest (CP 740 - 741), July 27, 2009. Error invalidates: Entire order4. PARENTING PLAN
    - i. FINAL PARENTING PLAN WITH INTERIM PROVISIONS (CP 769 – 777), May 27, 2009. Error invalidates: Entire Order.
    - ii. FINAL ORDER PARENTING PLAN RESERVING ISSUES, (CP 778 - 780), July 14, 2009. Error invalidates: Entire Order.
5. CUSTODY AND CHILD SUPPORT
  - i. Order of Child Support and Work Sheet, (CP 756) May 27, 2009. Error invalidates: Entire Order.
  - ii. Motion for Contempt of Child Support. Entire order.

## **V. Standards on Review**

A civil appellant has a right to appeal under RAP 2.2(2) all doubts should be resolved in favor of the appellant; (3) the record should be

considered as a whole.<sup>28</sup> Pro se complaints are held to “less stringent” standards.<sup>29</sup>

### **1. Judicial Review of Enmeshed Dependency Cases.**

Cases “engrafted, ancillary, or supplementary to the case at hand and may be reviewed.”<sup>30</sup> ER 201 requires a court to take judicial notice of adjudicative facts when requested by a party and supplied with the necessary information. ER 201(d). Judicial notice may be taken on appellate review. ER 201(f). Adjudicative facts are defined as those not subject to reasonable dispute because they are (1) generally known with the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. RAP 9.11 is in determining if it should take judicial notice of another court action, the rule in part provides:

*The appellate court may direct that additional evidence on the merits of the case be taken before the decision on a case on review if: (1) additional proof of facts is needed to fairly resolve the issue on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive.*

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<sup>28</sup> In *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980),

<sup>29</sup> *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

<sup>30</sup> *State v. Myers*, 47 Wn.2d 842, 843-44, 209 P.2d 253 (1955); *Swak v. Dept. of Labor & Industries*, 47 Wn.2d 51, 53, 240 P.2d 560 (1952)

## **2. Statutory Interpretation Errors Require De Novo Review.**

The trial court erroneously cast cases at bar as having a UPA terminus; it was without lawful authority to instill any portion of RCWch.26.26 and it violated the “separation of powers” doctrine and due process guarantees? Statutory interpretations and constitutional infringements are held to be a question of law, and the standard of review is de novo.<sup>31 32</sup> In *State V. Ramos*, 149 Wash.App. 266, 270 n.2, 202 P.3d 383 (2009) it was noted that an appellant may raise a separation of powers violation for the first time on appeal.

## **3. Alternative Standard/s:**

This court can disturb the trial court's attorney award,<sup>33</sup> parenting plan,<sup>34</sup> and child support<sup>35</sup> on an “abuse of discretion” standard. Each can be disturbed if manifestly unreasonable or based on untenable grounds. Whether the amount of fees awarded was reasonable is reviewed under an abuse of discretion standard, in determining the reasonableness of an award, in order to reverse that award, it must be shown that the trial court

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<sup>31</sup> *Cerillo v. Esparza*, 158 Wn.2d 194, 199 142 P.3d 155 (2006)

<sup>32</sup> *Amunrud v. Bd. Of Appeals*, 158 Wn.2d, 208, 215, 143 P.3d 571 (2006) concluded that “constitutional challenges” are questions of laws subject to de novo review.”

<sup>33</sup> *Fernando v. Nieswandt*, 87 Wn. App. 103, 110, 940 P.2d 1380 (1997).

<sup>34</sup> *In re Dependency of A.C.*, 74 Wn. App. 271, 275, 873 P.2d 535 (1994).

<sup>35</sup> *In re Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2.d 519 (1990).

manifestly abused its discretion.<sup>36</sup> An attorney fee award is appealable, this court has jurisdiction.<sup>37</sup> The exclusive procedure for attacking an allegedly defective judgment is by appealing the judgment.<sup>38</sup> A court by definition abuses its discretion or power when it makes an error of law.<sup>39</sup>

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds, if the factual findings are unsupported by the record, it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. In re *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

#### **4. Overview of Case Laws on Review:**

L.B.<sup>40</sup> court contemplated a child's rights in aftermath of a lesbian family, who after six years together raising a child, separated; the court found a complete, and absolute statutory vacuum left the child's profoundly important relationship with the non - biological parent unprotected. The court opined a "common law" child welfare doctrine

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<sup>36</sup> *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn.App. 283, 289, 951 P.2d 798 (1998)

<sup>37</sup> *Brown v. Suburban Obstetrics & Gyne, P.S.*, 35 Wn. App. 880, 670 P.2d 1077 (1983)

<sup>38</sup> *Bjurstom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980)

<sup>39</sup> *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047 (1196)

<sup>40</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005)

predicated on a multifactor test<sup>41</sup> grounded on equitable and constitutional principles that a child has a fundamental right to parental relationships fostered by the natural parent; the joys that derive from the lifelong “familial” bond are an intrinsic right; a bond endeared and nuclear to our society. The adjudicated de facto parent, thereafter, treated in parity to the biological parent, both parents involvement predicated upon the “best interest of the child.”

RCWch.26.26, the court makes child support provisions under RCW 26.10.040(1)(a) only to the birth parent, not custodial petitioners’; the chapter inherently is a child welfare act; claimant petitioner’s act on behalf of the child; stringent adequate cause, evidentiary standards, and findings thresholds prevent both erroneous litigation and deprivations to the parent; natural parents given deference. It’s well known the state has no interest in private custody proceedings, therefore, RCW 26.26.080, verbatim copied from RCW 26.09.140 – a dissolution/marriage act wherein the state has interest is protecting “community funds,”

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<sup>41</sup> In. L.B., 155 Wn.2d at 708. (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 the parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a de facto parent is “limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life

questionably would not pass a strict scrutiny analysis on a proper constitutional challenge. Any fee shifting provision potentially deters legitimate claimants from stepping forward for they risk their financial health to the court's unpredictable arbitrations and whims.

**In common law, the “American rule” predominates.** Generally speaking, each party shoulder's their own costs to prevent abuses of the legal system unless a statutory or ground for equity provides otherwise; allows remedy under theories of “bad faith” and “common fund,” the prior accounts when a party has acted vexatiously; the latter prohibits unfair enrichment to a singular party if the action has mutual benefit to other parties' involved. See *F.D. Rich Co., v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Alyeska Pipeline Co., v. Wilderness Society*, 424 U.S. 258.

## **VI. ARGUMENT**

### **A. Judicial notice of the child's legal landscape creates no harm, it's the vista of the trial court and has great benefit for the child.**

All of Alec's cases are clearly enmeshed and linked; his constitutional rights at bar require the highest protections available. “A plaintiff's allegations are presumed to be true, the court may consider

hypothetical facts not in the record.”<sup>42</sup> Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.”<sup>43</sup> Judicial review does not compel the court to adopt my theories or legal conclusions of estoppel, bad faith, or common fund.<sup>44</sup>

Collateral estoppel (issue preclusion) bars and prevents re-litigation of a claim already admitted even in connection with a different claim or cause of action. *Robinson v. Hamed*, 62 Wn.App. 92, 96, 813 P.2d 171 (1991). It's unnecessary for me to have been a party to the termination trial. See *Hanson v. City of Snohomish*, 121 Wn.2d 553, 561, 852 P.2d 295 (1993); collateral estoppel doctrine requires only that the party against whom the doctrine is asserted was party to the previous action. I believe facts brought to the forefront herein undeniable evince estoppel, and Alec forevermore protected; to understand the family law cases requires understanding of the enmeshed dependency cases.

The TPR, appellee's brief to that trial (C.P.1088 – 1089), the dependency, appellee's averred estoppel declarations therein, linkage, my

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<sup>42</sup> *Tenore*, 136 Wn.2d at 330, (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

<sup>43</sup> *Bravo v. Dolsen Companies.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)).

<sup>44</sup> *Haberman*, 109 Wn.2d at 120, 488 U.S. 805, 109 S. Ct. 35, 102 L.Ed.2d 15 (1988).

lengthy exclusion as a party to the dependency, all indisputable; each affected the court. A child's placement into dependency occurs on requisite showing that "the child has suffered or is likely to suffer physical, mental, or emotional harm as a result of the parents' conduct;" RCW 13.34.030 Appellee had party status, unfettered access to all records, multiple counsels, and a full and fair opportunity to present her case in all actions as required in collateral estoppel claims. *McDaniels v. Carlson*, 108 Wash.2d 299, 303 (1987). At trials, appellee instead of categorically refuting my parentage, endorsed its presence.

Conversely, I was harmed and prejudiced by the dependency cases, and also not elevated as a party until September 2009; in obtaining clerk's papers. I discovered appellee's "TPR Brief" and stunned to find it was not incorporated earlier to my records by prior counsel. As an intervening party, I have the right to participate in the principal action to the same extent as the original parties. *Dumas v. Gagner*, 137 Wn.2d 268, 295 98, 971 P.2d 17. (1999). The TPR Brief's prior exclusion from the records is excusable due to my long fettered access to records; it was part of the chain of evidence before the Juvenile Court altering the course of my; the current trial court's judicial memory of it erased on reassignment of judges, a happenstance not of my doing or control.

**B. Attorney Judgements pejoratively reasoned, unlawfully instilled, and substantively flawed; errors spuriously enticed by opposing counsel in violation of CR 11 and set intolerable constitutional infringements. Sanction and restitution warranted.**

The court's analysis of the California property denote it favored the appellee' drug addled story and made meretricious pejorative statements in oral ruling in concluding I "overpaid" myself; thereafter, put a retroactive lien on the property by way of attorney fess in 2009 on a home I sold in 2007; the court's action is prohibited by the Constitution's Fifth Amendment. Appellee has no constitutional or meretricious or non-meretricious :entitlement" or claim to "benefit" from the California property as the court ruled. Even in meretricious proceeding the court is not authorized to award "spousal" or attorney fees. *Connell v. Francisco.*, 127 Wn.2d 339, 350, 898 P.2d 93 (1995); *Id.* at 349 - 40. I had clear, unfettered title, see RCW 26.10.50, and RCW 26.16.100 in part states:

*"...if a domestic partner fails to file in the auditor's office in the county in which real estate is situated, a writ... within a period of ninety days from the date when such legal title has been made a matter of record the holder shall be deemed...to have received full legal and equitable title to such real estate..."*

Secondly, the appellee has no constitutional or statutory entitlement to counsel in cases involving parentage or third party custody;

this right reserved where parental rights are being severed.<sup>45</sup>

The court, to use the house in its fee analysis was obliged to quantify “benefit” into a calculated equity after expenses, otherwise its use and value is wantonly arbitrary. Additionally, the parties’ current financial status, at time of trial for fees under 26.10.080 is where the court should have rested its opinion. Financial declarations did not support the court’s conclusions of “need v. ability to pay.”

The court’s favoritism of appellee’s is the explanation accounting the trial court’s unlawful enactment, on the spurious enticement of opposing counsel, of the UPA - RCW 26.26.140, in the blatant face of correctly relying on L.B. in determining parentage, and for the subsequent parenting plan and child support orders favoring appellee.

A UPA cause of action was never advanced, the petitions at bar do not terminate as such; the trial court wantonly instilled the RCW 26.26.140.<sup>46</sup> As opposing counsel penned, before slight of hand, L.B.<sup>47</sup> is

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<sup>45</sup> *King v. King*, 162 Wash.2d 378, 395 174 P.3d 659, 668 (2007).

<sup>46</sup> A trial court abuses its discretion when its decision is based on untenable grounds; In re *Marriage of Kovacs*, 121 Wn.2d 795, 801 (1993)

<sup>47</sup> In re *L.B.*, 155 Wn.2d 475-76, 679 (2005) *Id.* “this court holds, that a common law claim of de facto or psychological parentage exists in Washington separate and distinct from the parameters of the UPA... a de facto parent stands in legal parity with an otherwise legal parent... is not entitled to any parental privileges as a matter of right, but only as is determined to be in the best interest of the child at the center of any such dispute.”

the stare decisis - ratio decidendi establishing de facto parentage strictly resides in the common law due to its statutory exclusion; the UPA absolutely inoperable.<sup>48</sup> The court's duty to stay on the common law path is articulated in RCW 4.404.010, which in part states "the common law ...shall be the rule of decisions in all the court's of this state." Even to a pro se, novice appellant, it is clear there is no fresh statutory innovation upon L.B. or the UPA endorsing the trial court's action. RCW 26.26.140 was last ratified by the legislature in 2002,<sup>49</sup> de facto doctrine entered in 2006; in the summer of 2009, the legislature narrowly modified the UPA, to only "registered domestic partnerships;" see RCW 26.26.914. Facts so glaringly obvious, bias on the court's part and duplicity on the part of opposing counsel are the only reasonable inferences that can be made.

The court is held to the settled principles of "separation of powers"<sup>50</sup> and rules of statutory interpretation and construction; it cannot derogate L.B. or the UPA to enact RCW 26.26.140. It cannot read, alter, tamper,

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<sup>48</sup> *L.B.*, 155 Wn.2d at 707 "to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy."

<sup>49</sup> Chapter 26.26 RCW, the Uniform Parentage Act, was modified in 2002. See LAWS OF 2002, ch. 302, § 711; Second Substitute H.B. 2346, 57th Leg., Reg. Sess. (Wash. 2002) (explaining that the former RCW parentage provisions were based on the Uniform Parentage Act (UPA) of 1973, drafted by the National Conference of Commissioners on Uniform State Laws (the Commissioners), and were repealed and replaced by the UPA of 2000).

<sup>50</sup> *In re Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976).(Our state embodies the principle of separation of state).

distort, rewrite, genuflect, or insert language into a statute not put there by legislative intent.<sup>51</sup> It cannot alter the common law where the legislature has failed to do so.<sup>52</sup>

Secondly, opposing counsel's declarations and solicitations for fees must be founded in fact, his slight of hand distorting the UPA inoperable to operable is a dichotomous chiasm; its blatancy cannot be ignored, sanctions are permitted and the court's failure therein, pursuant to CR 11 for an abuse of discretion.<sup>53</sup> CR 11 in part allows for sanctions on the "assertion of a legally frivolous claim or defense." RAP 18.7 has been held to incorporate the remedies for violation of CR 11 into the appellate rules. *Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992) ; *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83, rev. denied, 113 Wn.2d 1016 (1989) . *United States v. Bernal – Obeso*, 980 F.2d 331, 35 (9<sup>th</sup> Cir. 1993) "courts rely on the integrity of government agents and judicial officers not to introduce untrustworthy information or evidence into the system." The violation of CR 11 occurs upon the filing of the offending

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<sup>51</sup> *Arborwood Idaho L.L.C. v. City of Kennewick*, 151 Wash.2d 359, 367, 89 P.3d 217 (2004).

<sup>52</sup> *Green Mountain Sch. Dist. No. 103 v. Durkee*, 161, 351 P.2d 525 (1960).

<sup>53</sup> *Biggs*, 124 Wn.2d at 197; *Wash. State Physicians Ins. Exh. & Ass'n v. Fissons Corp*, 122 Wn.2d 299, 338 – 39, 858 P.2d 1054 (1993)

pleading, involuntary or voluntary removal does not erase the violation.<sup>54</sup>

Sanctions against opposing counsel and restitution seem equitable given my costs and harms suffered at its expense.

The UPA (likewise RCW 26.10.080) do not authorize appellee's claims to fees in the *L.B.* action;<sup>55</sup> additionally, statutorily, per RCW 8.84.010.56, and RCW 8.84.030.57, and equitably, they belong to the appellant for vindicating liberty rights, the state's dependency interests, for suffering entrapment into the dependency and foster care actions, and defending against appellee's malfeasances necessitating litigation. In *Marriage of T.*, 68 Wash.App. at 355, 842 P.2d 1010 states a trial court's award remains undisturbed unless it was manifestly unreasonable or based

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<sup>54</sup> *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)

<sup>55</sup> *City of Bellingham v. Eiford Constr.*, 10 Wash.App. 606, 608, 519 P.2d 1330 (the right to costs and attorney fees and amounts thereof is governed by statute enforce at the time)

<sup>56</sup> RCW 8.84.010: The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, .... the following expenses: (1) Filing fees; (2) Fees for the service of process by a public officer, registered process server, or other means, as follows.....(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files; (6) Statutory attorney and witness fees; and (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing..."

<sup>57</sup> RCW 4.84.030: In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements..."

on untenable reasons, and also states the UPA fee provision only governs in cases arising under that act. In *Connell v. Francisco*, 127 Wn.2d 339, 348-49, 898 P.2d 831 (1995); *State ex rel. T.A.W. v. Weston*, 66 Wn. App. 140, 147, 831 P.2d 771 (1992) ('an award of attorney fees should only be made for those issues for which attorney fees are authorized.'). It is a basic rule of statutory construction that a specific provision controls over one that it is written to or general in nature with. *Miller v. Sybouts*, 97 Wash.2d 445, 448, 645 P.2d 1082 (1982). In *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (“a break down is required for the court to determine hours spent and deny fees on “unsuccessful claims, duplicated efforts, or otherwise unproductive time”).

Under RCW 4.84, Washington's costs statute, in civil cases, the prevailing party's attorney fees are considered “costs” and may be awarded, it also provides relief if by statute, agreement, or other recognized ground of equity. The American rule sets forth clear equitable grounds of estoppel, common fund, and bad faith.

The court wore “meretricious” blinders, egregiously derogated its duty to conduct a full analysis when deliberating fees;<sup>58</sup> instead, it made

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<sup>58</sup> In re Marriage of White, 105 Wn.App. 545, 549, 20 P.3d 481 (2001) requires the trial court must consider all circumstances when deciding a parties' right to reimbursement.

an anemic - singular deliberation of “need v. ability to pay” not found in the UPA.<sup>59</sup> It categorically eschewed the UPA construct all other facts and explanation as to why Alec’s and the appellant’s constitutional rights and the state’s dependency interests at bar, and subsequently vindicated, and the aggrieved, now prevailing party therein, completely ignored. It’s settled law under the UPA parties’ personal finances are moot. *State v. Weston*, 66 Wash.Ap 140, 831 P.2d 771 (1992); an affidavit of financial need is not necessary in parentage actions; see *In re Marriage of Wendy M.*, and see *In re the Parentage of J.P.M.*, 92 Wash.App.430, 442, 962 P.2d 130 (1998). A manifest error/s is unmistakable, evident, or has an impact and makes a difference with “practical and identifiable consequences” and notably can be raised for the first time on appeal; RAP 2.5(a)(3).<sup>60</sup> In *Moore v. East Cleveland*, 431 U.S. 494, 97 SCt. 1932, 52 Led 2d 531 (1977), the court recognized that non-nuclear family members are entitled to the same substantive due process protections as traditional family members. The UPA is well known to be a child welfare act, differentiated from L.B. and RCW 26.10 in that the state’s interests is

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<sup>59</sup> *In re Marriage of T.*, 68 Wn.App.329, 334, 842 P.2d 1010 (1993)(consideration of “need or ability to pay” in making an award is not required, and petitioners are not required to complete financial declarations).

<sup>60</sup> *State v. Lynn*, 67 Wn.App. 339, 345-46, 835 P.2d 251 (1992); RAP 2.5(a)(3).

actually at bar to prevent a welfare burden on the public; the state, sue sponte, can become a party. See *Linda D. v. Fritz C.*, 38 Wn.App.288, 300, 687 P.2d 223 (1984); RCW 26.26.150; RCW 74.20A.030(1), the UPA rose from the need to protect the constitutional rights of “illegitimate children.”<sup>61</sup> To use the UPA correctly the court would have to acknowledge the child in active dependency and state’s interest in filing concurrent jurisdiction specifically so its custody plans for the child could be effectuated by the appellant; litigation costs therein transferred to the petitioner. The same analysis applies to *L.B.*; the state had interest via the dependency. Charging the appellant fees under a UPA provision when she’s first acting on the behalf of the state with an open dependency triggered by the appellee, and is defending and vindicating against disingenuous declarations, simply, is unjust court action.

**Due Process Violations.**

The Supreme Court distinctly established that familial relationships are a liberty interest. Due process guarantees are set in our state’s Constitution, Articles I § 7 and I § 12, and constitution’s Fifth Amendment rights to property. Article I § 7, “no person shall be disturbed

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<sup>61</sup> *State v. Koome*, 84 Wn.2d 901, 907, 530P.2d 260 (1975). “although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable deference, they are not absolute and must yield to the fundamental rights of the child or important interests of the state.”

in his private affairs without authority of law.” Article I § 12 that “no law shall be passed granting to any citizen [or] class of citizens...privileges or immunities which upon the same terms shall not equally belong to all citizens.” The Fourteenth Amendment requires that “persons similarly situated with respect to legitimate purpose of the law” be treated alike. Evinced, the court opened the UPA, inequitably, only to the appellee, granting first Interim and JDOEP fee awards, then deference in parenting plan and child support; all the while I was bared its protections, my parentage claims and remedies locked to L.B. If RCW 26.26.140 remains enforced, then the cases must be remanded and adjudicated under the tenets of the UPA, where the presumptive and/or impugned parents are deemed equally situated, with identical constitutional protected parental rights.<sup>62</sup>

Additionally, the parties’ respective trial brief omitted the trial would be used to solicit attorney fees or child support fees; therefore the JDOEP and subsequent Child Support Order were illegally set, contravening due process; my counsel was robbed meaningful opportunity to prepare and defend these issues. CR 8(a) requires that a pleading “shall

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<sup>62</sup> See, e.g., Sheila A. Malloy, Comment, *Washington's Parentage Act: A Step Forward for Children's Rights*, 12 GONZ. L. REV. 455 (1976-77) (citing *Gomez v. Perez*, 409 U.S. 535, 538, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973)).

contain a demand for judgment” and the demand for special damages also be specifically stated in the pleadings. Evinced, the court took face value the fee amounts articulated by opposing counsel during closing arguments, it did not partition fees, and only perfunctorily examined financial declarations. Courts should not simply accept unquestioningly fee affidavits from counsel.<sup>63</sup> The court did not allow me nor required my financial declaration to be as contemporarized as appellee’s; the court allowed opposing counsel to render her fees current through trial and heard that my declaration was outdated, as expresses at closing, in Memorandum of Law filed May 21, 2009, hearing of May 22, 2009, and on motion for reconsideration; another instance of unfair and bias treatment.

**C. Fees under RCW 26.10.080 hold the aforementioned defects; additionally, are profoundly inequitable; all associated fees should be voided.**

The aforementioned fee arguments hold true to the courts operation of RCW 26.10.080 (despite the statue’s provision of “need v. ability to pay); awarding appellee fees and costs is unjust and the court’s abacus is deficient. The current judgments defective because two separate

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<sup>63</sup> Scott Fetzer Co., Kirby Co. Div. v. Weeks, 122 Wn.2d 141, 151, 859. P.2d 1210 (1993)

trials occurred together, fees under RCW 26.10.080 can only be reasonably determined after and is limited to strictly to that portion of the attorney fees incurred in its connection, factoring in discounts and pro bono waivers; the true “lodestar” must come first. As stated, appellee cannot claim or rightfully be granted relief in work in the L.B. action; additionally, she should not be entitled to claim any deferred fees. The “need” for fees is directly proportional to the amount actually owed. “Pro bono” is defined as legal services provided for the public good without compensation,<sup>64</sup> here, counsel averred services provided free or discounted, contended as setting the reasonable hourly rate his client would be willing to pay, therefore, the actual lodestar fee the court should consider on review for attorney fees.<sup>65</sup> As previously stated appellee has no constitutional right to counsel; this is not a divorce/dissolution case involving “mutual funds”, as RCW 26.10.080, verbatim of RCW 26.09.140 portends, technically, the state has no interest in protecting parties and shifting fees arguably deters legitimate claimants from stepping forward to protect children; arguably facially unconstitutional.

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<sup>64</sup> Black's Law Dictionary 1240-41 (8<sup>th</sup> ed. 2004)

<sup>65</sup> See Hensley, 41 U.S. at 433; Blum v. Stenson, 465 U.S. 886 (1984); “the reasonable hourly rate is the rate a paying client would be willing to pay. Bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively or what we are now calling the presumptively reasonable fee.”

Additionally, opposing counsel freely took the risk of representing an under funded client; he had full access to all records, with slight of hand, violated CR 11 for self gain.

The court's fee abacus hastily determined after the request illegally set in closing argument, is abstract, and void measurable mathematical computations; fees referenced in vague terms as "heavy" versus "substantial" in oral and written ruling. The court never quantified the California "benefit" or the actual fees between litigants. It reached its decision on impugned financial declarations. See Verbatim Reports of April 13, 2009, both Oral Ruling, and Closing Arguments. See Verbatim Report of May 22, 2009.

The court unreasonably ignored multiple key facts of equity recognized in common law: 1) as the court acknowledged, the appellee clearly had a common benefit from these proceedings preventing the termination of parental rights, 2) appellee's malfeasance created the necessity for all the cases before the bench; the dependency actions were emotionally and financially harmful to the appellant and child 3) the cause of the wage disparity between litigants due to appellant's criminal activity 4) the financial declarations on record did not support the conclusion of "need v. ability to pay" and 5) wage disparity of citizens is a proclivity

guaranteed and a natural outcome of our democratic constitution; disconnected from tort, malfeasance, meretricious, or fiduciary cases, should be eschewed a determinate to shift fees; especially when the criminal actions of a party instilled the disparity. A provision allowing for income disparity categorically triggering a “need v. pay” paradigm in face of such “disconnect” violates of our Fifth Amendment rights to own property. The court never once remarked the appellee needed support, instead stated she was “entitled compensation?” The court abused its power by failing to sue sponte draw these conclusions based on the copious records before it and by preventing me true, meaningful opportunity on motion for reconsideration to argue there merits. Appellee averred opposite facts as it suit her; “intransigence” is “a recognized equitable ground.” *In re Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120 (1992). Awarding appellee fees/costs is akin to “allowing the fox to steal the chickens and later getting paid for them at the market.”

#### **D. Errors in the Child Support Calculation**

Again, the court violated “due process” in not allowing facts and full arguments on the merits of child support be set first in prepared motion, instead it was an untimely afterthought, piggy-backed less than

twenty-four hours ahead and onto the “Fact Finding and Conclusion of Law Hearing” scheduled to reach agreed facts to the trial, before I was legally set as the child’s parent. A hearing becoming mostly devoted to the dependency matter.

**Verbatim Report, May 22, 2010 below:**

**Page 11, Lines 22 - 23**

*MS. TOBIAS: “Well, the final orders haven't been entered yet, so I don't think technically she's legally a parent yet.”*

**Page 16 lines 20 -25 through Page 17 lines 1 -16**

*MS. TOBIAS: “The other big issue in that document is child support. Your Honor made absolutely no reference to child support when you entered your ruling on the 13th in this case. And as I -- I won't belabor the point, because I think I covered it pretty well in the memorandum. But because we didn't know the parties' status or what the arrangements would be or what the schedule would be, there was no way for us, through that proceeding, to present the relevant information on child support. So I don't think it's appropriate for your honor to enter child support orders today. A couple things are really strikingly wrong with the worksheets that have been submitted First of all, they don't take into account the in-kind rent that Ms. Johnston receives and the other in-kind income that she receives through services, ADATSA, and that kind of thing. So I think that needs to be clarified. They also don't reflect Ms. Franklin's current financial status because she changed jobs after the financial declaration was submitted. So I didn't have time since Tuesday night to fix all the things that are wrong with the worksheets.”*

**Page 18 lines 5 - 11**

*MS. TOBIAS: So again, I just don't think it's appropriate for you to set child support at all today. The worksheets also don't accurately reflect the debt of the parties at this time. So I would ask that you set that matter over so that it can be fully prepared and accurate orders can be entered at a later date.”*

The court acted wantonly, and without authority to arbitrarily inflate and double the value of my home. Per RCW 26.09, in calculating support payments it was obliged to use accurate, equally contemporized

financial information, and give the reason as to its support calculation determinations pursuant to RCW 26.09. The court overlooked my costs to care for the child for 3.5 years and the catastrophic legal fees I incurred, and did not impugn correctly appellee's income, or its basis for the limits it set. See Verbatim Report of May 22, 2009. Since I was adjudicated a de facto parent, with limited visitation of 50%, my apportioned support should have been limited to the time I actually cared for the child, instead I was apportioned 78% of the child support schedule? Additionally, the court substantively intended child support to begin when the dependency ended, the dependency survived past its forecasted life; the commencement of any Child Support Order surviving this appeal adjusted to April 2010. See Verbatim Report of May 22, 2009.

Additionally, when it was discovered the appellee had active relapses through November 2009, the court *sue sponte* should have adjusted its order making me the trustee of the child's support payments; funds are apt to be siphoned when parents abuse drugs or used to enable addictions. In *Ditmar v. Ditmar*, 48 Wash.2d 373, 293, P.2d 759 (1956) it was determined child support belongs to the child, not custodial parent, who instead acts as a trustee for the child. I have an exemplar history

providing for the child and should be tasked with being the child's "trustee."

#### **E. Errors in the Parenting Plan**

It's settled law the child's right to permanency, a safe home, and when their liberty rights collide with parents the best interest of the child prevails. See RCW 13.34. The parenting plan was subordinated to the dependency action, and therefore the court should have rested on the current condition of the parent(s), *In re Marriage of Nordby*, 41 Wn.App. 531, 534, 705 P.2d 277 (1985) and should have limited appellee's custody when the dependency against appellee could not be safely dismissed. The records show appellee's long term sobriety was unconfirmed, she still had issues breaking the law, had not completed drug rehabilitation services; the court did not have a parenting study on the appellee; lastly, she relapsed before dispositional orders penned, discovered untimely. Additionally pursuant to RCW 26.10.160(1)(iii) because appellee had a history of acts of domestic violence she should have been required to enter treatment specific to this deficit before being given custodial privileges.

When the court discovered the appellee had freshly relapsed it should have sue sponte adjusted the parenting plan granting me full custody; if appellee succumbed to her additions under hyper vigilance of

the court and DSFS, the probability of appellee staying sober past their exodus, remote. An express harm finding is not required; In re Dep. of T.H., 139 Wn. App. 784, 794-95, 162 P.3d 1141, review denied, 162 Wn.2d 1001 (2007). But, the harm must be "an actual risk, not speculation based on reports." T.L.G., 139 Wn. App. at 17.

In determining an appropriate placement the best interests of the child are the court's paramount concern. RCW 13.34.020, In re Dependency of J.B.S., 123 Wn.2d 1, 10, 863 a trial court should not allow the rights of the biological parents to override a child's best interests when determining placement under the dependency statute. RCW 13.34.020; J.B.S., 123 Wn.2d at 8.

**F. Issues of the de facto parentage.**

L.B. definitely states "parity" exists between de facto and biological parent predicated upon the "best interests of the child." The trial court inappropriately gave difference to the natural parent when voicing "sole decision making" plans. It's settled law under RCW 26.09 and 26.26 that the parent with the larger historical role in the child's life, when that role has been stellar is usually maintained, both for custodial placement and decision making.

Secondly, the court had evidence of sustained active relapse post trial and continued to favor the appellee

By giving the natural parent deference the court limited my parental rights to that of a second class citizen, yet apportioned me 78% of the child support payment. There is no other identifiable means of parentage that renders this treatment, and violates my constitutional rights. If I am a parent, then I should be considered an equal parent under the eyes of the law, and not an “endless pocket” of money.

## **VI. Conclusion & Relief Sought**

The records undeniable show the appellee's attack on Alec's rights should forever be protected by collateral estoppel; she unequivocally expressed Alec has two mothers. The court abused its discretion and overlooked a breadth of facts creating inequities and constitutional injuries For all the reasons stated herein, I humbly believe compels this court's remedy as follows:

- 1. Reverse all attorney fees; opposing counsel to return seized funds with 12% APR interest penalty.**
- 2. Hold sanctions against opposing counsel for CR 11 violations, grant restitution no less than appellant's costs to**

**defend writs, allegations of contempt of child support, and bankruptcy costs.**

- 3. Any child support surviving this appeal remanded for recalculation on equally contemporaneous financial facts and lodestar fees; commencement altered to April 2010; appellant named trustee of any funds.**
- 4. Forevermore, protect Alec's relationship with his non biological mother by the equity and power of estoppel.**
- 5. Award appellant sole decision making.**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, and respectfully / appellant's signature was signed in City of Seattle, in King County, in the State of Washington, dated on this Day, July 6, 2010.

  
Mary F. Franklin, pro se, Appellant



COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION 1

MARY FRANKLIN,

*Petitioner, Appellant*

In re Parentage of and Custody of:  
ALEC FRANKLIN JOHNSTON,

Child.

JACKIE J. JOHNSTON,

*Respondent/Cross -Appellant*

SUPERIOR NO:

07-3-07493 - 1 UFK

07-5-02508 - 2 UFK

Appeal NO: 63919-6-1

NOTICE OF REFILING -  
APPELLANT'S CORRECTED BRIEF - July  
6, 2010

2010 JUL 15 AM 10:04

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, the following is true and correct: On July 6, 2010, I arranged service of the foregoing "APPELLANT'S CORRECTED BRIEF" to the parties in this action as follows:

**Office of Clerk, Division 1  
Court of Appeals**  
600 University St.  
Seattle, WA. 98101 -1176  
Facsimile: (206) 389 - 2613

Brief (2 copies) U.S. Postal Service, regular delivery  
Declaration Notification by Facsimile

Dennis McGlothlin  
Olympic Law Group  
1221 E. Pike St, Suite 205  
Seattle, WA. 98122  
(206) 527-7100 - FAX

Brief (1 copy) U.S. Postal Service, regular delivery  
Declaration Notification by U.S. Postal Service, regular  
delivery

Seattle Legal Messengers is my authorized and appointed agent to receive documents and facsimiles on my behalf. Agency is located at: 711 6th Ave N #100 Seattle, WA 98109. (206) 443-0885 - Main (206) 728-2833 - Fax.

Respectfully submitted on this day, Tuesday, July 6, 2010.

  
Mary F. Franklin, pro se, Appellant

Date: July 6, 2010