

64124-7

64124-7

NO. 64124-7-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Parentage of:

MASON FULTON, Child

FRANK MILLER
Respondent,

MEGHAN COTTON
Mother

And

RUSS FULTON
Appellant

2015 MAR 9 11:00 AM
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
ST. JOHNS
COURT

REVIEW FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
The Honorable Larry E. McKeeman

APPELLANT'S REPLY BRIEF

KAREN D. MOORE
Attorney for Respondent
Brewer Layman, P.S.
333 Cobalt Building
3525 Colby Avenue
P.O. Box 488
Everett, WA 98206-0488
Telephone: (425) 252-5167

ORIGINAL

TABLE OF CONTENTS

I. SUMMARY OF REPLY.....1

II. ARGUMENT.....3

A. The Uniform Parentage Act (UPA) Clearly Establishes
The Method For Eliminating The Father-Child Relationship
Between An Acknowledged Father And A Child Is
Through Rescission Of, Or A Successful Challenge To,
The Paternity Acknowledgment.....3

B. If A Timely Paternity Action Under RCW 26.26.540 Is
A *Per Se* Challenge To A Prior Paternity Acknowledgment,
Then The Common Law Remedy Of *De Facto* Parent Must
Apply.....8

III. CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Parentage of J.A.B.,
146 Wn. App. 417, 1981 P.3d 71 (2008).....12, 13, 14

In re Parentage of L.B.,
155 Wn.2d 679, 122 P.3d 161 (2005), cert. denied,
Britian v. Carvin, 126 S. Ct. 2021 (2006).....10, 14, 15

In re Parentage of M.S.,
128 Wn. App. 408, 115 P.3d 405 (2005).....1, 4, 5

STATUTES

RCW 26.10.....12

RCW 26.26.011.....3, 5, 6

RCW 26.26.101.....6

RCW 26.26.106.....11

RCW 26.26.116.....5, 6

RCW 26.26.330.....2, 5, 7

RCW 26.26.335.....2, 7

RCW 26.26.375.....5

RCW 26.26.405.....9, 10

RCW 26.26.530.....4, 5, 10

RCW 26.26.540.....1, 3, 5, 8-10, 16

RCW 26.26.570.....9

RCW 26.26.630.....5

I. SUMMARY OF REPLY.

There is no dispute Appellant Russ Fulton established a legally recognized father-child relationship with Mason Fulton by signing and filing a paternity acknowledgment shortly after Mason's birth. There is no dispute the paternity acknowledgment was neither rescinded nor successfully challenged. Finally, there is no dispute Frank also established a legal father-child relationship with Mason through a timely adjudication of paternity under RCW 26.26.540(b).

Here, as stated in Appellant's opening brief, the dispute centers on whether the legislature intended to unconditionally eliminate Russ' existing acknowledged father-child relationship with Mason once Frank timely established his own father-child relationship through the subsequent adjudication. In response, Frank and Meghan argue, without any citation to authority, the "implied intent" behind the two-year statute of limitations contained in RCW 26.26.540(b) is clear – a timely adjudication pursuant to that statute will "eliminate a non-prevailing potential father." Respondent's Brief, page 21. They rely on In re Parentage of M.S., 128 Wn. App. 408, 115 P.3d 405 (2005), to argue that an adjudication of paternity will rebut "a presumption of paternity and also any previous acknowledgment or adjudication." Respondent's Brief, page 23. This argument ignores the specific statutory distinctions between a

presumption of paternity (as in In re M.S.) and an acknowledgment of paternity (as in the instant case).

These statutory distinctions are critical in the instant case. A presumption of paternity is rebuttable through a subsequent adjudication of paternity and, if rebutted, the “presumed” father-child relationship is eliminated. An acknowledgement of paternity, however, is far different, and the “acknowledged” father-child relationship can only be eliminated through rescission or challenge under RCW 26.26.330 or RCW 26.26.335. In this case, the paternity acknowledgment has never been rescinded or successfully challenged. Thus, despite the fact Frank has established, through a timely adjudication, that he is Mason’s biological father, Russ’ previously established father-child relationship with Mason remains.

In the event a timely adjudication does eliminate Russ’ father-child relationship under the UPA, then the common law remedy of *de facto* parent status must arise to fill the “gaps” between the rights afforded to children of unmarried parents and those with married parents. Otherwise, children born outside of a marital relationship suffer grossly disparate treatment in custodial actions because a court’s historically recognized equitable power to ensure the welfare of the child is the paramount consideration in such actions is eliminated.

II. ARGUMENT.

A. THE UNIFORM PARENTAGE ACT (UPA) CLEARLY ESTABLISHES THE METHOD FOR ELIMINATING THE FATHER-CHILD RELATIONSHIP BETWEEN AN ACKNOWLEDGED FATHER AND A CHILD IS THROUGH RESCISSION OF, OR A SUCCESSFUL CHALLENGE TO, THE PATERNITY ACKNOWLEDGMENT.

In their response, Frank and Meghan do not dispute Russ is Mason's acknowledged father as defined in RCW 26.26.011(2). Frank and Meghan do not dispute the trial court has already determined they have no standing to rescind the paternity acknowledgment; although Meghan may have standing to challenge the acknowledgment if she can demonstrate a mistake of fact. CP 191. Instead, Frank and Meghan summarily argue neither "had to follow through with any challenges to the acknowledgment" in order to eliminate Russ' parent-child relationship with Mason. Frank further argues that the timely commencement of his paternity action under RCW 26.26.540 "constitutes a *per se* challenge" to Russ' earlier acknowledgment of paternity. See Respondent's Brief, page 23.

Abandoning all of their earlier arguments before the trial court regarding the legislature's intent behind RCW 26.26.540, Frank and Meghan now summarily argue that the "implied" legislative intent behind RCW 26.26.540 is for an adjudication to "eliminate the non-prevailing

potential father” regardless of the father’s earlier legal status. Respondent’s brief, page 21. However, this argument ignores the important legislative distinctions between presumed, acknowledged and adjudicated fathers.

In In re Parentage of M.S., 128 Wn. App. 408, 413, 115 P.3d. 405 (2005), the distinctions between a presumed, acknowledged, or adjudicated father was critical when determining whether or not a man had a remedy under the UPA to establish a father-child relationship with his girlfriend’s child. In M.S., Kevin Hampson had a sexual relationship with Shawn Snell while she was married to David Snell. Shawn had a child, MS, during her marriage to David, but she told Kevin that MS could be his child. Shawn and David divorced in 2003, when MS was almost 3 years old. As part of the final orders in the divorce, David was ordered to pay child support for MS. In May 2004, Kevin filed a petition to establish MS’s parentage. Both Shawn and David opposed Kevin’s petition because it was untimely under RCW 26.26.530, the statute of limitations for a child with a presumed father. The trial court dismissed Kevin’s petition because it was time barred under that statute. In re M.S., 128 Wn. App. at 410-11.

On appeal, this Court carefully considered the legislative definitions of presumed, acknowledged and adjudicated fathers in order to determine which statute of limitations applied.

A presumed father is "a man who, under RCW 26.26.116, is recognized to be the father of a child until that status is rebutted or confirmed in a judicial proceeding." [RCW 26.26.011(15)]. Under RCW 26.26.116(1)(a), a man is presumed to be a child's father if he and the child's mother are married to each other, and the child is born during the marriage. An acknowledged father is a man who has established a father-child relationship with the child by signing and executing an acknowledgment of paternity. [RCW 26.26.011(1); .330-.375]. And an adjudicated father is "a man who has been adjudicated by a court of competent jurisdiction to be the father of a child." [RCW 26.26.011(2)]. David is not an acknowledged father, but would be MS's presumed father, since MS was born while Shawn and David were married. But under RCW 26.26.630(3)(b), a man becomes an adjudicated father if he is involved in a marital dissolution proceeding and the court's final order provides that he must support the child. When David and Shawn got divorced, the court ordered David to pay child support for MS. Therefore, David is now MS's adjudicated father.

In re M.S., 128 Wn. App. at 413. Because David was an adjudicated father, the applicable statute of limitations was found under RCW 26.26.540 rather than .530. Under RCW 26.26.540, Kevin's petition to establish paternity was timely. Thus, this Court remanded the matter back to the trial court for further proceedings on Kevin's petition. Id. at 414.

Although the facts in M.S. are very distinct from those in the instant case, this Court's analysis is important. To reach the result it did, this Court necessarily gave effect to the plain language of the relevant

statutes. David's status as MS' presumed father remained intact until it was rebutted or confirmed through a subsequent adjudication. See RCW 26.26.011(15) (definition of presumed father as man recognized as father of child *until* presumption is rebutted or confirmed through an *adjudication*); RCW 26.26.116(2) (presumption of paternity may be rebutted *only* by an adjudication). Once David's status as a presumed father was rebutted through the subsequent adjudication, his legal father-child relationship as MS' presumed father was extinguished and a new father-child relationship arose through the adjudication. See RCW 26.26.101(2)(a) (father-child relationship established by unrebutted presumption of paternity); RCW 26.26.101(2)(c) (father-child relationship established by adjudication). Clearly, this Court relied on specific statutory authority for changing David's status and his related father-child relationship with MS.

In the instant case, the specific statutory authority governing Russ' status as an acknowledged father, and his related father-child relationship with Mason is found in RCW 26.26.011(2) and RCW 26.26.101(2)(b). Unlike the statutes governing presumed fathers, these statutes specifically provide that Russ' status as Mason's "acknowledged father" can only be eliminated by rescission of the paternity acknowledgment a successful challenge to the acknowledgment under. See Id. In re M.S., does not, as

Frank and Meghan argue at page 23 of their brief, support a conclusion that a subsequent adjudication of paternity will rebut a presumption of paternity *as well as* any previous acknowledgment or adjudication. The holding in In re M.S. turned on the statutory definition of a presumed father and the clear language that a presumption of paternity is rebutted/eliminated by a subsequent adjudication of paternity. In the instant case, the same analysis must apply. The statutory definition of an “acknowledged father” also contains clear language that the acknowledgement will be eliminated by a subsequent rescission, governed by RCW 26.26.330, or a challenge to the acknowledgment, governed by RCW 26.26.335.

The trial court has already made a determination that the paternity acknowledgment cannot be rescinded. CP 191. To challenge a paternity acknowledgment, a signatory to the acknowledgment (here Meghan) has the burden to prove fraud, duress, or material mistake of fact. RCW 26.26.335. Again, the trial court has already found Meghan has not proven fraud but she may be able to prove a material mistake of fact. CP 191. However, no further proceedings were undertaken pursuant to RCW 26.26.335. Thus, the paternity acknowledgment has not been rescinded or successfully challenged, and Russ’ legal status as Mason’s acknowledged father remains.

B. IF A TIMELY PATERNITY ACTION UNDER RCW 26.26.540 IS A *PER SE* CHALLENGE TO A PRIOR PATERNITY ACKNOWLEDGMENT, THEN THE COMMON LAW REMEDY OF *DE FACTO* PARENT MUST APPLY.

In the instant case, the facts clearly demonstrate Mason's GAL, Jenny Heard, believed it is in Mason's best interest to have continuing contact with Russ despite the fact he was not Mason's biological father. The trial court entered an agreed parenting plan that specifically states the GAL's recommendations regarding Mason's best interests:

The guardian ad litem recommends that Mason continue to have regular, consistent, weekly contact with Russ Fulton.

CP 56. However, Mason's best interests will not be considered at all if this Court adopts Frank and Meghan's argument that Frank's timely commencement of a paternity action under RCW 26.26.540 is viewed as a "*per se*" challenge to Russ' status as an acknowledged father and, once successful, unconditionally eliminates Russ from Mason's life. Such a rule will operate to deprive a child with an acknowledged father of a relationship even if that relationship is in the child's best interest.

This result will also lead to a striking difference between the rights of children born during a marital relationship as opposed those who are not. Under the relevant statutes governing an adjudication action with a

child having a presumed father, a trial court must consider the “best interests of the child” before ordering genetic testing which may disprove a presumed father’s parentage. RCW 26.26.535. Yet, children of “acknowledged” fathers have no such protection regarding what is in their best interests. Once an “individual” timely commences an action under RCW 26.26.540(b),

...the court *shall order* the child and other designated individuals to submit to genetic testing if the request for testing is supported by the sworn statement of a party to the proceeding:

- (a) Alleging paternity and stating facts establishing a reasonable probability of the requisite sexual contact between the individuals; or
- (b) Denying paternity and stating facts establishing a possibility that sexual contact between the individuals, if any, did not result in the conception of the child.

RCW 26.26.405 (emphasis added). The mandatory nature of this statute is even more troubling given that an individual can obtain genetic testing without the acknowledged father’s consent (like here, where Meghan and Frank obtained genetic testing without Russ’ knowledge or permission) to provide the very facts necessary to meet the requirements of RCW 26.26.405(a) to mandate genetic testing. Once those facts are established, an acknowledged father’s objection to the admissibility of genetic testing done without his consent is completely futile regardless of whether the testing would otherwise be in the child’s best interests. See RCW 26.26.570(3)(b) (results are inadmissible if done without consent but are

admissible if done pursuant to RCW 26.26.405). Thus, a child born to married parents enjoys far greater protection of his or her parent-child relationship than a child born to unmarried parents.

Coupled with the fact that the two year statute of limitations under RCW 26.26.540 commences with the filing of the acknowledgement, not at the child's birth, a child with an acknowledged father could be deprived of a meaningful and critical parent-child relationship far after the age of two¹. It is conceivable that unmarried parents may wait several years to file a paternity acknowledgment. However, so long as another man commences a petition to adjudicate parentage within two years of filing the acknowledgment, and states he had sexual intercourse with the child's mother during the period of conception, the court has no authority to deny genetic testing – even if the child is well into his/her teenage years and completely bonded with the acknowledged father. Under Frank and Meghan's argument, those genetic test results would mandate an unconditional elimination of the “non-prevailing potential father” despite

¹ Notably, Frank and Meghan have now abandoned the arguments they presented at trial regarding the legislative intent behind the two year statute of limitations in RCW 26.26.540(b), i.e. that the legislature recognized “it's a lot easier for [a] child to transition and lose that attachment [to the acknowledged father]...than it is past two years.” RP 13; see also. RP 16, 37, 119-120, 122, 127, 130. This is likely because they have now realized these arguments only make sense if the two year statute began running at a child's birth as in RCW 26.26.530 (statute of limitations for a child with a presumed father).

the fact the “potential father” acted as the child’s “father in fact” for the majority of the child’s life.

The only basis for these legislative differences is the fact that a child with a presumed father is born during a marital relationship whereas the child with an acknowledged father is born during a nonmarital relationship. Yet, this difference is clearly discriminatory and inconsistent with the intent behind the UPA. The UPA was designed to prohibit discrimination on the basis of marital status and ensure equivalent rights of children born outside the context of wedlock to those born within it. In re Parentage of L.B., 155 Wn. 2d 679, 695, 122 P.3d 161 (2005) (citing RCW 26.26.106).

Thus, the common law remedy of *de facto* parent must apply to the situation presented in this case. Like the parties in L.B., the legislature’s enactment of RCW 26.26.540 cannot be read to absolutely preclude redress for Russ and Mason.

In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law [the uniform parentage act] [is] to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state.

L.B., 155 Wn.2d at 707. Further, Frank and Meghan’s argument that the *de facto* parent doctrine established by L.B. is somehow limited only to

lesbian couples raises profound constitutional concerns regarding discrimination based on sexual orientation. Under this reasoning, heterosexual unmarried parents would not be afforded the common law remedies granted to homosexual unmarried parents. More importantly, children, and the relationships they enjoyed with a adult/parent, would be treated differently solely based on that adult's/parents' sexual orientation. This clearly is an untenable result.

This Court has already opined that the focus should not be on the legal relationship of the adults, but on the actual relationship between the child and the person who has acted as the child's parent in fact. In re Parentage of J.A.B., 146 Wn. App. 417, 425, 1981 P.3d 71 (2008). Frank and Meghan ask this Court to disregard its analysis in J.A.B.. They argue:

In In re J.A.B., the factual situation is so different than this case that it should not be considered. The child was seven when the issue of paternity came about and the mother was unstable. The Court ruled that despite a statutory remedy under RCW 26.10, there was a compelling interest to use the common law *de facto* parentage because a third party custody claim would only confer temporary rights on a party who has been the primary parent for over seven years.

Respondent's brief, page 28. This argument demonstrates a profound misunderstanding of the holding in J.A.B.. In J.A.B., this Court specifically declined to

limit the de facto parent doctrine to those parties who have no legal right to marry, leaving to all others the very limited avenue of the nonparent custody statute.

J.A.B., 146 Wn. App. at 426. The “compelling interest” leading to this conclusion was not the age of the child – or the definition of the relationship between the adult and the child – it was the inadequacy of the remedy contained in the nonparent custody statutes to provide a basis for continuing the relationship between the child and the man who had acted as her parent in fact. Id. This Court stated:

[t]he nonparent custody statute...operates only where there is no available, suitable legal parent. The statute permits nonparent custody only where the child does not currently reside with a legal parent, or the legal parents are shown to be unsuitable custodians. A parent is unsuitable only when unfit, or when placing the child with that parent would cause “actual detriment to the child's growth and development.” The statute is thus aimed at protecting children without fit parents or children whose extraordinary circumstances render placement with a fit parent detrimental to the child's growth and development. The statute focuses on the relationship between the legal parent and the child, not that between the petitioner and the child. Indeed, no statute contemplates the latter relationship, which is why there was no adequate statutory remedy in *L.B.*

More fundamentally, residential placement is not equivalent to parental status. The nonparent custody statute and the de facto parent doctrine have very different purposes. A nonparent custody order confers only a *temporary and uncertain right to custody of a child for the present time because the child has no suitable legal guardian. When and if the legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child.*

J.A.B., 146 Wn. App. at 425-26 (citations omitted, emphasis added). This Court cannot summarily disregard its decision in J.A.B., and that decision leads to a conclusion that Russ should be given the opportunity to establish himself as Mason's *de facto* parent.

In J.A.B., this Court extended the common law *de facto* parent remedy to a man who had no previous legal relationship with a child because the third-party custody statutes were an inadequate remedy to protect the established parental relationship between the man and the child, and, presumably, the welfare of that child. As such, this Court should also extend the common law remedy to a man, like Russ, who has (or had) a legal relationship with a child as the child's acknowledged father. To do otherwise ignores the deference Washington courts have given to the best interests of the child involved in a custody disputes.

In sum, historically, with the paramount considerations of the child properly at the center of such disputes, Washington courts have not hesitated to exercise their common law equitable powers to award custody to persons not biologically related to the child, but who nevertheless have unequivocally "parented" them.

In Re Parentage of L.B., 155 Wn.2d at 698-99.

Finally, allowing Russ the opportunity to establish himself as Mason's *de facto* parent will not impermissibly infringe upon Frank or Meghan's constitutional rights to parent their child without interference. Our Supreme Court has held the common law *de facto* parent remedy does

not infringe on the constitutional liberty interest of a parent. See In re Parentage of L.B., 155 Wn.2d at 712 (because first of four *de facto* parent standards requires consent of natural or legal parent, common law remedy does not infringe on the fundamental liberty interests of other legal parent in family unit). More importantly, the last of the four *de facto* parent standards will limit the availability of the doctrine to only those individuals acting in a parental role “a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.” See Id. at 708 (identifying all *de facto* parent standards). This last standard also acknowledges the constitutional right both a child and a non-parent have to maintain a parent-child relationship that originated with a legal parent’s consent but, thereafter, continues to exist independently of that consent. See e.g., Id. at 709, n. 27 (court recognizes persuasive constitutional argument regarding rights of children and their parents in fact to maintain parent-child relationship). No child should be forced to suffer the loss of a significant parent-child relationship solely because of a change in the legal relationships, or the legal labels, of the adults around them.

III. CONCLUSION.

Giving an acknowledged father an opportunity to establish himself as a *de facto* parent of a child in order to continue an existing parent-child

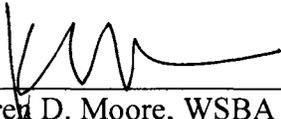
relationship eliminates the disparate treatment between children born to married parents and those born to unmarried parents. A child's interest in the emotional attachment and familial relationship that arises from daily interaction with, and nurturing by, an acknowledged father cannot be unconditionally severed. The law must allow a court flexibility to ensure all children will continue to receive the love and support they need as they grow and mature. In this way, courts will maintain the historical deference to a child's best interest as opposed to the best interest of competing adults.

For the foregoing reasons, Russ Fulton respectfully requests this Court reverse the trial court's decision unconditionally eliminating Russ and Mason Fulton's prior father-child relationship solely because Frank Miller timely commenced a paternity action under RCW 26.26.540(2).

Respectfully submitted this 8th day of March, 2010.

BREWE LAYMAN
Attorneys at Law
A Professional Service Corporation

By



Karen D. Moore, WSBA 21328
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 8th day of March, 2010, I caused a true and correct original along with one copy of the foregoing document to be delivered to the following:

Richard D. Johnson
Court Administrator
The Court of Appeals of the State of Washington
Division I
One Union Square
600 University Street
Seattle, Washington 98101-4170
BY: ABC Legal Messenger

I also caused a true and correct copy of the foregoing document to be delivered to the following:

Attorney for Respondent - Frank Miller
Kathryn B. Abele
Abele Law Office
20326 Bothell Everett Hwy G103
Bothell, WA 98012
BY: US Mail

Attorney for Respondent – Meghan Cotton
Richard L Jones
Attorney at Law
2050 112th Ave NE, Ste. 230
Bellevue, WA 98004-7322
BY: US Mail

Guardian Ad Litem for Mason Fulton

Jeannette Heard
Attorney at Law
3228 Broadway Ave
Everett, WA 98201
BY: Hand-Delivery

Dated this 8th day of March, 2010 at Everett, Washington.



Karen D. Moore, WSBA 21328