

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

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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REVIEW FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
The Honorable Larry E. McKeeman

APPELLANT'S OPENING BRIEF

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I. SUMMARY OF ARGUMENT.

What does it mean to be a parent? Are “parents” created only through genetic ties? In Washington, the answer is no, whether analyzed from a statutory or common law perspective. The definition of “parent” under Washington’s 2002 Uniform Parentage Act (UPA)¹ does not require genetic testing. Further, in 2005, the Washington Supreme Court recognized the common law doctrine of *de facto* parenthood recognizing that “parents” are also created through special committed relationships between adults and the children they unconditionally love and support regardless of genetic matches or legislative enactments².

In this case, Russ Fulton loves and cherishes Mason Fulton, now age 2. When Mason was born, Russ and Meghan Cotton, Mason’s mother, executed a paternity affidavit acknowledging Russ was Mason’s biological father. Thereafter, Mason has known Russ as his “daddy” and primary parent, and the court recognized this fact by entering a temporary parenting plan confirming Russ as Mason’s primary parent. Only after she lost primary care of Mason did Meghan Cotton seek out a new “daddy”

¹ Washington’s Uniform Parentage Act was enacted in 2002 in Title 26.26 RCW.

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

for Mason. Genetic tests conducted without Russ' knowledge ultimately proved Frank Miller, not Russ, was Mason's biological father.

Frank filed a Petition to Establish Parentage under RCW 26.26 when Mason was 16 months old, and Meghan joined in the petition. Two (2) guardian ad litem opined Russ met the common law test for *de facto* parent status and that it was in Mason's best interests to continue his father-child relationship with Russ. However, the trial court concluded that Frank's timely petition to adjudicate Mason's paternity under RCW 26.26.540 unconditionally eliminated Russ' prior parent-child relationship, and, therefore, the court declined to evaluate whether Russ was Mason's *de facto* father.

In recognition of the significant attachment and substantial parent-child relationship between Russ and Mason, all parties agreed to a temporary parenting plan whereby Mason continues to reside primarily with Russ through February 2010. In this appeal, Russ desires to permanently continue his vested father-child relationship with Mason, while Meghan and Frank seek to irrevocably eliminate Russ from Mason's life.

II. ASSIGNMENTS OF ERROR.

1. The trial court erred in entering the following finding:

“...I find that it is most likely that the legislature determined that a transition from an acknowledged psychological father to a biological father could be accomplished without undue harm to the child if it can be established early enough in the child’s life.”

CP 75.

2. The trial court erred in entering the following finding:

“...I find that the [legislative] intention was for the establishment of paternity to determine the rights of competing potential father to the exclusion of the potential father who is unable to establish paternity.”

CP 75.

3. The trial court erred in entering the following finding:

“...there is no justification for this Court to engage in an analysis concerning de facto parentage, because I believe the statute addresses the issue.”

CP 75.

4. The trial court erred in entering the following finding:

“...Mr. Miller is established as the father of Mason, and Mr. Fulton has no remaining legal relationship with Mason under the statute.”

CP 75.

5. The trial court erred in entering the following conclusion of law/order:

The court shall enter an order on parentage:...

Declaring, based upon the best interest of the child, as determined by legislative directive, that FRANK JONATHAN MILLER is the father of the child.

CP 80.

6. The trial court erred in entering the following conclusion of law/order:

Russ Fulton is not the father of this child, and is hereby dismissed from this action.

CP 69.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Does a timely adjudication of paternity unconditionally eliminate an acknowledged father's vested father-child relationship without any inquiry into what is in the best interest of the child? (Assignments of Error 1, 2, 4, 5).

2. Did the trial court err by dismissing an acknowledged father's petition to establish a residential schedule for his child and/or participation as an acknowledged father in a subsequent parentage action solely because another man is adjudicated to be the child's biological father? (Assignment of Error 6).

3. Does the Uniform Parentage Act Provide Prevent A Previously Acknowledged Father From Pursuing The Common Law Remedy Of *De Facto* Parent? (Assignment of Error 3)

IV. STATEMENT OF THE CASE.

A. At Mason Fulton's Birth, Russ Fulton Became Mason's Father Under RCW 26.26.320.

Russ Fulton and Meghan Cotton began an intimate relationship in February 2005 and moved in together shortly thereafter. CP 268, 431, 436, 494. On December 21, 2007, Mason Fulton was born. CP 431. On December 24, 2007, Russ and Meghan both executed a paternity affidavit acknowledging Russ as Mason's biological father. CP 465, 469. By executing a paternity affidavit, Russ and Meghan created a legally recognized father-child relationship between Russ and Mason. RCW 26.26.101(2)(b); RCW 26.26.320. After Mason's birth, Russ performed every parental role as Mason's "daddy," never suspecting Mason was not his son. According to Karin Ballentyne, Mason's Guardian Ad Litem:

[Meghan] fostered [Russ'] parentage of Mason and he supported her during pregnancy and since Mason's birth. They presented themselves to everyone as Mason's parents. For most of Mason's sixteen months, Meghan assured Russ that he was Mason's father. Meghan has represented that she and Russ co-habited as family....Russ provided all support for both Meghan and Mason; it is not disputed that Russ has paid for almost all of Mason's daycare and medical expenses since birth. These were extensive as Mason needed two surgeries in the first year of [his] life. ... [He] underwent major surgery in early September 2008 so that his

cranial bone structure could be repaired. Russ was present for all surgeries. ... Collaterals such as the daycare provider and a parent/child observation confirm that there is a bond between Russ and Mason.

CP 506; see also CP 509-513 (GAL discussion of parenting factors in RCW 26.09.187(3) noting Russ “has been a major attachment figure” since Mason’s birth, and opining research regarding children and their attachment demonstrate need for consistency and that Mason’s best interests served by having Russ as primary residential parent).

B. One Year After Mason’s Birth, Russ Files An Action To Establish a Residential Schedule For Mason And The Court Grants Russ Primary Custody Over Meghan’s Objections.

Russ and Meghan’s romantic relationship ended before Mason was born, but they continued to live together after Mason’s birth. Russ became increasingly concerned about the instability in Meghan’s life and the effect it could have on Mason. Meghan had returned to her job as an exotic dancer when Mason was approximately eight (8) months old, was the subject of a CPS investigation after Mason ingested Tylenol while in her care, and was involved in a new abusive relationship. CP 431-444, 494-495. Thus, in December 2008, days before Mason’s first birthday, Russ timely filed a petition for a residential schedule under Snohomish County Cause No. 08-3-02908-7. CP 462-469; See RCW 26.26.375 (allowing a “parent” executing an acknowledgement of paternity to establish a

residential schedule). In his proposed parenting plan, Russ sought primary residential care of Mason and alleged Meghan's time should be restricted under RCW 26.09.191. CP 422-430.

In her January 2, 2009, response to Russ' petition, Meghan admitted Russ was Mason's father based on the paternity affidavit. CP 397-400. In addition, Meghan filed a civil action against Russ seeking financial support based on their "meretricious relationship." See CP 249-265 (motion for temporary order in Snohomish County Cause No. 09-2-01712-1). In her declarations before the court, Meghan never gave any indication Russ might not be Mason's biological father. Instead, in support of her request for primary care of Mason, Meghan stated:

...for a significant duration of [the meretricious] relationship I held the traditional role of the stay at home "wife" and after the birth of our son "mother." We started trying to have a family early in our relationship, but our first attempt resulted in my miscarriage. Mason was conceived thereafter and born last December. ...

Petitioner's behavior to me and in front of our child has been reprehensible yet he is asking the court to appoint him as the primary parent to raise our son. I do not think that a person who would behave this way toward another with whom he planned a family, purchased a home, support[ed] for the last 3-1/2 years and with whom he has a child, should be given the privilege of raising a child.

CP 384-385 (emphasis added); see also CP 251-254 (declaration in meretricious case).

On January 15, 2009, following a hearing for temporary orders, the court entered a parenting plan placing Mason primarily with Russ and “reserving” Russ’ requests for limitations on Meghan’s residential time. CP 371-382. The court appointed Karin Ballentyne as guardian ad litem. See CP 239. The court also denied the majority of Meghan’s requests for financial relief. CP 289-90.

C. Meghan Contacts Frank Miller and Frank and Meghan File A Paternity Action Under RCW 26.26.540 To Establish Frank is Mason’s Biological Father.

After Meghan’s requests for primary care of Mason and financial support from Russ were denied, Meghan sought out Respondent Frank Miller to determine if he was Mason’s biological father instead of Russ. Without Russ’ knowledge or consent, genetic testing on Frank, Meghan, and Mason occurred in late January 2009 and established Frank, not Russ, was Mason’s biological father. CP 323-325. Two (2) months later, on April 7, 2009, Meghan joined in Frank’s Petition to Establish Paternity “pursuant to RCW 26.26.540. Frank filed his action under Snohomish County Cause No. 09-5-00153-6. CP 335-341. Frank also brought a motion for a temporary parenting plan seeking visitation with Mason one weekend day a week and placing Mason in Meghan’s primary care. CP 321-322; 326-344. In support of his motion, Frank acknowledged that

Russ had been providing care for Mason and that a transition would be difficult for Mason. CP 322, 325.

On April 20, 2009, Russ filed a motion to dismiss Frank's paternity action based on (1) Meghan's timely failure to rescind the paternity affidavit under RCW 26.26.330 and (2) the fact the genetic testing report attached to Frank's petition did not satisfy the statutory requirements under RCW 26.26.415(2). CP 318-320. On April 22, 2009, Meghan went on the offensive to terminate Russ' contact with Mason. First, Meghan filed an amended response to Russ' original petition for a residential schedule. In her amended response, Meghan alleged Russ was not Mason's father. CP 363-366; see also CP 241 (Meghan did not file a motion for leave to amend her response). Second, Meghan filed summary judgment motions in both cases. In both motions, Meghan sought adjudication that Frank was Mason's father "as a matter of law." In addition, Meghan also sought to have Russ' petition for a residential schedule dismissed based on the fact Russ was not Mason's father. CP 246-248 (paternity case); CP 367-369 (residential schedule case).

In response to Meghan's motion for summary judgment, Russ filed another motion to dismiss. In his motion, Russ argued that Meghan was precluded from rescinding or challenging the paternity affidavit under

RCW 26.26.330 and RCW 26.26.335, and that Frank needed to intervene in the existing case rather than file his own paternity action. CP 237-242.

On May 12, 2009, Frank filed a memorandum responding to both Russ' motion to dismiss and Meghan's motion for summary judgment. CP 229-234. In his memorandum, Frank requested

that the court dismiss Mr. Fulton from the Paternity Petition and grant the motion for Summary Judgment in the Parenting Plan action because Mr. Fulton is not the father and there is no evidence in the record that can dispute this material fact.

CP 233³.

D. May 20, 2009 – The Trial Court Denies Meghan's And Russ' Competing Motions To Dismiss.

On May 20, 2009, all parties and the GAL appeared before the trial court for hearing on Meghan's summary judgment motion, Russ' motion to dismiss Frank's parentage case, and Frank's request to dismiss Russ as a party in the paternity case. RP 1-7, 32-33. May 20 was the date Meghan and Russ were originally scheduled for trial. RP 18-19, 47. At this hearing, Russ stipulated the proper chain of custody had been provided for the genetic testing and that Frank was Mason's biological father. RP 7. However, Russ argued he should still be able to proceed to trial and maintain his action for a residential schedule as Mason's *de facto*

³ At this time, Frank did not file an affirmative motion requesting this relief although the trial court appeared to consider his response as an affirmative motion. RP 2-3.

parent under In re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005).

RP 7-10, 20-24.

The GAL agreed Russ should be considered Mason's *de facto* parent. She stated:

I do make a case for de facto parenting. I'm not an attorney, but I have to be aware of the statutes and what standards to apply, which, if Mr. Fulton were to be a de facto parent, then I'm looking at the best interests of the child rather than fitness of the mother and so forth. And so I consider those.

Mr. Fulton has been the primary parent since the January hearing. He has been a consistent and fully involved father. He even has been acknowledged by most of the collateral [witnesses] as a really good father, an appropriate father.

And Ms. Cotton even says that between the two fathers, you know, Russ has shown a great track record and is actually a dependable and good choice for Mason to have as a father. She wants him in Mason's life, she is saying now.

So my investigation has to stay within those parameters. And I do see a strong case for Mr. Fulton to be acknowledged as the de facto...parent. I'm very familiar with L.B. I was part of that case and saw some of the factors. So that's why I went ahead and made the statements that I did because I was part of the work on that case while it was being determined by the [Washington] State Supreme Court.

RP 14-15; see also CP 506-507 (May 19, 2009, GAL Report).

Meghan argued Russ could never be a *de facto* parent because of the two year statute of limitations in RCW 26.26.540. Without any citation to authority, she argued:

[s]ince the UPA was changed in 2002, the legislature made it very clear, when the defined that 24-month period, the standard is no longer best interests of child, de facto parent, none of that within that two-year period.

There is an opportunity, because the child is so young, to transition his attachment, change his attachment to his biological father, which is the child's –The legislature has found that this is a child's absolute right.

RP 16; see also RP 19 (argument that statute precludes *de facto* parent status); RP 40 (argument that legislature picked two year period of time “probably for a lot of reasons” and discussing attachment disorder). Frank similarly argued:

[t]he reason [the legislature] gave a two-year period is because the after two years, those attachments are really strong. And we understand attachment at 18 months old. The fact is, the reason they gave it two years is it's a lot easier for the child to transition and lose that attachment, in other words, than it is past the two years.

RP 13; see also RP 37 (argument regarding attachment disorder).

Ultimately, the trial court denied all the motions before it on May 20, 2009. It denied Russ' motion to dismiss Frank's paternity action finding Frank timely commenced his action under RCW 26.26.540. RP 33; CP 191-193. The trial court denied Meghan's motion for summary judgment and to dismiss Russ' case because she had no standing to rescind the paternity affidavit under RCW 26.26.330 and had not demonstrated a material mistake of fact under RCW 26.26.335. CP 191-193; RP 33, 42-43; see also RP 60-63 (June 3, 2009 hearing). The trial court denied Frank's motion finding a question of fact remained on whether or not Russ

“has standing to remain in [the paternity] case as a *de facto* parent.” CP 192; RP 33-34.

The trial court went on to consolidate both cases under the paternity cause number. CP 193; RP 45. The trial court also ordered a new GAL would be appointed to investigate the legal issues surrounding whether Russ could be a *de facto* parent, and scheduled a review hearing for June 3, 2009, to address what residential schedule should be in place while the new GAL was completing her investigation. CP 192-193; RP 34-36, 40, 49-50; see also RP 64 (June 3, 2009 hearing). Based on the parties’ stipulation, the trial court also entered an agreed order stating “Frank Miller is the biological Father of [Mason Fulton].⁴” CP 216-217.

E. Frank Files His Own Motion To Dismiss Russ As A Party To Any Further Proceedings.

On May 26, 2009, Frank filed his own motion to dismiss Russ as a party to the paternity action and to dismiss Russ’ petition for a residential schedule. In his motion, Frank argued Russ no longer had any standing to maintain an action as a *de facto* parent once Frank had been adjudicated as Mason’s father. CP 207-212. In support of Frank’s motion, Meghan filed a report prepared at their request by their own witness, Martha

⁴ Russ later filed a Motion to Vacate the court’s order based on the fact he did not consent to the genetic testing and arguing Meghan and Frank should be estopped from seeking genetic testing. CP 172-182. The court denied the motion based on the previous stipulation. CP 93-96.

Wakenshaw, allegedly an expert on “early child development, attachment and trauma.” CP 547. At the outset of her report, Ms. Wakenshaw qualified her “impressions” as follows:

On May 22, 2009, I had the opportunity to observe the paternal grandparents, Eric and Tina Bohren interact with Mason. I also observed the mother, Ms. Megan [sic] Cotton and the father, Mr. Jonathan [sic] Miller interact with the child in a separate session. The caregivers were referred to me by their respective attorneys and I was given scant background information upon which to form my impressions.

CP 547. Ms. Wakenshaw’s report concluded Mason was “bright and active” and “developmentally on target.” CP 551. While Ms. Wakenshaw noted that Mason had a “strong” attachment to Meghan and the Bohren’s, she did not make the same observation about Mr. Miller. Instead, Ms. Wakenshaw felt Frank’s visitation with Mason should be supervised so his mother could “model appropriate care of Mason.” *Id.*

Ms. Wakenshaw also noted Meghan and Frank both acknowledged that Russ had done a “good job” parenting Mason, and, based on Mason’s development, Ms. Wakenshaw opined that Russ had given Mason a “secure base of attachment,” CP 551-552. Ms. Wakenshaw then went on to opine that having “multiple caregivers” was not in Mason’s best interests and recommended an expedient transition of Mason’s care from Russ to “the biological parents.” CP 551-552. Ms. Wakenshaw based her opinion that Mason would not be harmed by having Meghan and Frank as

his primary parents on her observations that Mason “transitioned easily from the grandparents to his mother and father.” CP 552. Ms. Wakenshaw never observed Russ with Mason, nor observed any transitions between Russ and Frank, Meghan, or the Bohrens.

Mason’s GAL, Karin Ballentyne, filed a supplemental report addressing Mason’s temporary parenting plan as requested by the trial court at the May 20, 2009, hearing. CP 194-196 (public report); CP 515-521 (sealed report); see also RP 34-35, 40, 49-50 (trial court discussing need for temporary parenting plan). In response to Ms. Wakenshaw’s opinion that Mason’s transition away from multiple caregivers needed to be expedient, Ms. Ballentyne stated:

There have been statements made in the declarations presented in this case about cutting off Russ’ time with Mason and being ‘expedient.’ Martha Wakenshaw wrote that, ‘Drawing out a long and protracted transition period from Mr. Fulton to the biological parents could be detrimental for Mason’s well being.’ I believe that these statements do not correspond to the research on attachment and loss of attachment. Dr. Joan Kelly who has published over 85 articles on research regarding child custody, attachment, residential schedules, high conflict families and more, has written that ‘major life changes (separation, divorce, loss of important attachment figures, repartnering) causes an increase in insecurity for attached ‘children’ and ‘significant disruptions of attachment bond causes grief reaction, more psychological problems later in life;’ ‘loss of important attachment figures linked to stress, anger, depression and longer-term psychological harm’ (Kelly and Lamb, Family Court Review, 2000). Research by Kelly & Lamb, 2003; Austin, 2008, a,b says that one of the factions ‘placing more children (under the age of 6) at risk is lost contact with a parent; it creates ‘a significant deprivation for a child.’ For

children from 7 to 24 months, ‘Consolidation of (their) attachment may be weakened or not occur’, if contact is lost with a primary parent. When the child becomes three and has more verbal skills and cognitive development, they are more able to ‘tolerate longer separations.’

CP 520. Based on her superior knowledge of Mason’s interaction and relationship with all parties, Ms. Ballentyne recommended Mason continue to reside primarily with Russ with Meghan and Frank having weekly visitation. CP 195.

F. June 3, 2009 – The Trial Court Reserves Ruling On Frank’s Motion And Appoints A New GAL.

On June 3, 2009, the parties appeared for the scheduled review hearing and to present orders following the May 20, 2009 hearing. RP 52. Frank also requested the trial court hear his motion to dismiss Russ from the paternity case, but the trial court declined to rule on Frank’s motion unless Mason’s interests were represented by a guardian ad litem. RP 63-64. Frank argued Russ “became a non-parent” at the point the trial court adjudicated Frank as Mason’s father and, therefore, had no standing to seek any relief in the paternity case. Frank argued the only method for Russ, as a non-parent, to seek a residential schedule with Mason was through a third party custody petition. RP 65-66. Frank also argued that an “adjudication” of paternity “supersedes an acknowledgement” of paternity and that Russ’ and Mason’s relationship

“must be severed.” RP 73-74. Meghan similarly argued that once Frank was adjudicated to be Mason’s father under RCW 26.26.600, Russ had to be dismissed from the paternity case. Meghan argued Russ no longer had “standing under [RCW] 26.26 to appear in [the] proceedings.” RP 69.

Russ argued that, under L.B. and the recent case of In re Parentage of J.A.B.⁵, he was not precluded from continuing in the case as Mason’s *de facto* parent. Russ further argued that his remedies under the third-party custody statute were not adequate, and the trial court should deny Frank’s motion on the same basis it denied Meghan’s earlier summary judgment motion because both motions sought the same relief. RP 69-72.

The trial court reserved ruling on Frank’s motion. It stated:

This is a unique case in that Mr. Fulton is an acknowledged parent and is not a stepparent or just somebody coming from the outside and saying, hey, I think I can do a better job of taking care of this child. So, it’s not a clear issue, I don’t believe.

I do still maintain that it’s in the child’s best interests here to have an attorney guardian ad litem take a position on this. ... We’re going to have a hearing as soon as we can and as soon as the attorney guardian ad litem is in a position to give the Court a recommendation in that respect.

RP 75-76. The trial court appointed Jeanette Heard as Mason’s new GAL and discharged Karin Ballentyne. RP 76, 109; CP 185-188, 189-190. The trial court also entered a temporary residential schedule

⁵ In re Parentage of J.A.B., 146 Wn. App. 417, 1981 P.3d 71 (2008).

continuing Russ as Mason's primary parent and scheduling residential time for Frank and Meghan after taking into consideration Ms. Ballentyne's recommendations and the parties' input. RP 99-109; CP 190. The trial court scheduled a new hearing for July 17, 2009, to give Ms. Heard adequate time to complete an investigation. RP 76-77; CP 189. At Ms. Heard's request, the July 17, 2009, hearing was later rescheduled to August 13, 2009. RP 112-117; CP 58.

G. August 13, 2009 – The Trial Court Grants Frank's Motion To Dismiss Russ As A Party To Any Further Proceedings.

On August 13, 2009, the parties and the GAL (Ms. Heard) appeared before the trial court for the hearing on Frank's motion to dismiss. RP 118. At the commencement of the hearing, Meghan formally joined in Frank's motion. RP 118. In support of his motion, Frank acknowledged:

[t]he way the case law is written up, it does – it does establish that [Russ] can stand in parity if he's found to be a de facto parent, but he is not afforded the rights and responsibilities unless they are determined to be in this child's best interests.

And I think that's where the key is. If you determine [what's] in this child's best interests, it won't be. The two people, these two men, are already fighting over who can pick up the child, whether somebody is late, whether he has the right to go to the doctor, who has the right to the doctor's information, who is going to be the primary caretaker, who is going to make decisions about this child. That's not in this child's best interests.

RP 119. Frank argued:

[t]he fact is a de facto parent is somebody who would be in place of, an alternative to [a parent]. I don't believe that the legislature – In setting the two-year limit, I think that they designed that so that if this did occur, the person that's the DNA dad would have all the rights and responsibilities at that point if he asserts himself.

RP 120. Frank thereafter argued that Russ had to be dismissed “and not be determined the de facto parent, because there is another parent that can take his place and is more than willing.” RP 121. When the trial court asked for authority for Frank's argument, Frank cited RCW 26.26.540.

RP 122.

The trial court responded by recognizing two interpretations of the legislative intent behind RCW 26.26.540.

One is the fact that they wanted to give the biological parent the ability to establish his rights to parent the child and the other is that they intended to say, well, two years, that time frame is such that there isn't enough of a bond there that we shouldn't acknowledge someone as being a de factor parent, because that two-year period is the time period we've determined in which things can change without doing harm to the child.

RP 122. Frank acknowledged he had no legislative history to provide the court to determine which of the two interpretations was correct. RP 123. Instead, Frank simply argued Russ could never become a *de facto* parent because Frank filed within the two-year limit in RCW 26.26.540 and wanted to be Mason's parent. RP 124. Frank attempted to distinguish L.B. solely on the basis that the child in L.B. was over the age of four and

well established as having a relationship with the other mother, the facto parent. And I think that's where the Court drew the line; recognizing that a longer-term relationship makes a difference.

RP 125-126. Frank argued L.B. was not applicable because Mason was under the age of two, and, because RCW 26.26.540 was clear and unambiguous, Russ could not proceed further. RP 126-127.

Meghan adopted the same argument, again without any citation to legislative history. She argued:

[f]ocusing on the two-year period of time, Your Honor, I did not read the legislative history, but I have a suspicion that pediatricians and psychologists were involved in the determination of that time period, the reason for that being in a child's development after the age of two, bonds are established with the child.

RP 127. Noting that the "best interests of the child" was of paramount importance, the trial court asked Meghan how it could be in Mason's best interests to deprive him of contact with Russ when the GAL indicated that Russ was the best parent for Mason. In response, Meghan stated:

[t]he statute, Title 26, gives deference to biological parents. We have an unusual set of circumstances here, but I do not believe that given the age of this child, that the case law – That it fits within the existing case law which provides for the pseudo parent.

And I would further point out that if this were to continue too much farther into the future, this Court would be inviting some damage to the child by the confusion it would create between who is who. And this is the point in the child's development, I believe, that that becomes increasingly an issue.

RP 130.

Applying L.B. to the case before the trial court, Russ argued that the fourth factor of the *de facto* parent test identified in L.B., “the length of time sufficient to create a bond with the de facto parent” addressed the developmental issues Frank and John were concerned about. RP 131. Russ argued other courts determined that paternity testing is not in the best interests of children under the age of two because of the psychological bonds between a parent-figure and a child. RP 133. Russ’ argument was supported by the GAL’s opinion that Russ “has been in a parental role for a length of time sufficient to have established with [Mason] a bonded, dependent relationship, parental in nature.” RP 131; CP 485.

Further, Russ argued the two-year statute of limitations in RCW 26.26.540 did not operate to exclude acknowledged fathers from the lives of their children but that it was merely an affirmative defense designed to achieve finality. RP 133, 137. Russ discussed his own “fundamental liberty interest in continuing to maintain his relationship as a father figure and primary parent” despite the fact genetic testing proved Frank was Mason’s biological father. RP 135. Russ argued, from a parenting standpoint:

...the claims made even made here today to cut [Russ] out of [Mason’s] life is, as point out by the guardian ad litem, not in this child’s best interests at this point.

And I will also point out that in Ms. Heard’s report – I’m looking at Page 17, line 11 – ‘but for genetic tests showing that

[Frank] Miller is Mason's biological father, Mason's interests would be best served by naming Mr. Fulton as the de facto father and by Mason remaining in his primary care,'

That would clearly be in Mason's best interests from a viewpoint of parenting. Once [Russ] is determined to be de facto parent and it is very clear that those four factors have been met – clearly those have been met – then [Russ] has a fundamental liberty rights which are within parity of a biological parent. Then the Court gets to analyze (sic) a parenting plan under 26.09.187.

RP 134-135.

Ms. Heard, Mason's GAL, filed her report on August 7, 2009. CP 470-488⁶. In her report, Ms. Heard, like Ms. Ballentyne before her, opined that Russ met all four factors outlined in L.B.. CP 484. However, Ms. Heard recommended that Russ not be found to be Mason's *de facto* parent and that a six-month transitional parenting plan be adopted. CP 472, 487-488. During argument on August 13, 2009, Ms. Heard clarified her recommendation. First, she discussed Ms. Ballentyne's research about children and attachment, and stated

there is a lot of research about children's attachments and the incredible importance of attachment for a child in his or her development at a young age. It sets the basis for the kind of relationships they will have for the rest of their lives. So really the years before two are probably more important than the years after two. And it doesn't take a child reaching the age of two to then be able to bond.

This child has been raised primarily by Mr. Fulton, and he clearly is bonded with to him. Mr. Fulton is the one who's been

⁶ The index to clerk's papers indicates this document is contained at CP 470-489. However, the document provided to Appellant's counsel is only 18 pages long, and, therefore, would be indexed as CP 470-488. The references herein are numbered according to the latter.

there, who's gotten up at night with him, who's met his needs, who's been there when he's happy, has been there when he's sad, who was there with him in the hospital. And I don't think there is any question that Mr. Fulton is his parent in the sense of what a parent is all about.

RP 139. Regarding the "intersection" of the common law *de facto* parent doctrine with the UPA, Ms. Heard advised the trial court she did not believe the UPA intended to prevent a child under the age of two from having a *de facto* parent. RP 140.

The discussion between the trial court and the GAL demonstrated the difficulty the GAL had when making her recommendation was based on Mason's current age; it was not based on the two-year limit contained in RCW 26.26.540 and whatever effect it had on Russ' previous acknowledged father-child relationship with Mason. The GAL said:

Ms. Heard: Clearly the UPA was in effect when L.B. was heard, and so under that view, it was within the legal scenario that was being addressed. But I just – If Mason was older, I would have come down and said Mr. Fulton is the de facto parent, period. It's in [Mason's] best interests to stay with [Mr. Fulton].

I think if Your Honor finds Mr. Fulton to be the de facto parent, we have to figure out an arrangement that these three parents can work with that will not be detrimental to Mason because of the conflict between the parties.

I thought Mr. Fulton's counsel's argument that we have other cases with three parents was an interesting approach, because in fact that's true. And I think that there is a way to do it.

I'm not sure what else to say. I just think that the case law is not clear enough as to a child this age, which is why I hesitated to come down flat out and say that I believe [Mr. Fulton] is the de facto parent....

The Court: What is your view of RCW 26.26.540 that gives the biological father an opportunity to establish himself as a father and gain the rights attendant with that only? Or does [26.26.540] have the next step with it at the exclusion of the acknowledged father, who should then lose whatever rights the acknowledged father had through the acknowledgement?

Ms. Heard: Well, it doesn't deal with that last piece of it. I think that's when we end up going into court and having the case law we do that says there are other categories parents fall into. It doesn't say it's exclusive, but it doesn't say either. This situation doesn't come up that often.

The Court: No.

Ms. Heard: So it's very difficult.

The Court: Do I get to do a common law analysis, or does this statute end it right here by saying if an action's brought within an appropriate time, biological father is biological father and set aside the acknowledgement and move on?

Ms. Heard: I think you go to a common law analysis, because I think that this Court and every court, in dealing with family law, ultimately is looking at the best interests of a child and standing in the role of a parent. And so I think that the Court has the responsibility to look into that role as well, because that's its ultimate role.

The Court: And if that's true, then under your analysis, Mr. Fulton would be determined to be a de facto parent and we'd be looking at a three-party parenting plan. That's not what you recommended.

Ms. Heard: Right.

The Court: Have you changed your analysis on that?

Ms. Heard: I don't think I've changed my analysis. I just didn't come down on that because I felt in my role, reviewing the case law and the best interests of the child, that I couldn't make law. And because of Mason's age, I thought it was concerning that I didn't have any law I could rely on. So I haven't changed my analysis, I'm just saying this would be my preference. This is what I think is in the child's best interests, but I don't know if the case law supports it.

RP 140-143 (emphasis added).

Prior to giving its oral ruling, the trial court commented on the difficult nature of the case both factually and legally. RP 150. The trial court indicated it believed the key to resolving the issues before it lay with the legislative intent behind RCW 26.26.540, and stated:

[u]nfortunately, there is not any available legislative history concerning this statute. At least if it is available, it wasn't found by any of the parties. Also, there is no case law interpreting this statute. But I believe the intent is key, because if the legislature has addressed the situation that is now before the Court, there is no need to resort to a common law analysis and any determination of a de facto parent.

RP 151.

In reaching its decision, the court analyzed RCW 26.26.540 as follows:

[w]hat is clear about RCW 26.26.540 is that it establishes a two-year period dating from an acknowledgement of paternity during which a person who is not a signatory to the acknowledgement may petition the Court to establish paternity. So it's clear the legislature determined that at any point after that two-year period it would be against the best interests of the child to allow a biological father to establish paternity and thereby disrupt the status quo of the child's relationship with the acknowledged father.

What is less clear is did the legislature intend that such a disruption of the relationship with the acknowledged father is in the best interests of the child if the biological father acts to establish paternity within the appropriate time period, or did the legislature intend only to give the biological father an opportunity to establish paternity which may be shared with the acknowledged father if that person has met the criteria to be a de factor parent or a psychological parent...

It's extremely difficult to define the intention of the legislature without any history being available, but I find that it is most likely that the legislature determined that a transition from an

acknowledged psychological father to a biological father could be accomplished without undue harm to the child if it can be established early enough in the child's life.

They chose two years or shortly thereafter as being the period in which it was early enough. I see nothing that would support a finding that the legislature intended for the child, under these circumstances, to share three residences for 16 years. Rather, I find that the intention was for the establishment of paternity to determine the rights of competing potential father to the exclusion of the potential father who is unable to establish paternity.

RP 151-153 (emphasis added).

Therefore, the trial court granted Frank's motion to dismiss. The trial court found Frank timely commenced an action to determine paternity under RCW 26.26.540, and, based on genetic testing, Frank was Mason's biological father. The trial court concluded Russ had no remaining "legal relationship" to Mason under the statute, and, as such, "there is no justification for the Court to engage in an analysis concerning de facto parenting." RP 153; see CP 80 (order of parentage entered based on "best interests of child as determined by legislative directive").

Thereafter, on August 20, 2009, the trial court entered the orders Russ now appeals. CP 77-80 (Findings of Fact); CP 67-76 (Order of Dismissal); CP 64-66 (Judgment); CP 54-63 (Temporary Parenting Plan). The Temporary Parenting Plan, *agreed* upon by all parties, demonstrates all parties recognized it would be in Mason's best interests to "transition" from Russ' primary care to Frank's primary care over a period of eight (8)

months. CP 55-56. Russ' residential time with Mason after that time is "reserved for further court order" although the plan states "[t]he guardian ad litem recommends that Mason continue to have regular, consistent, weekly contact with Russ Fulton." CP 56.

On September 9, 2009, Russ timely appealed the trial court's August 20, 2009, orders. Neither Meghan nor Frank cross-appeal. On October 13, 2009, Russ filed a motion in this Court to stay the trial court's transitional parenting plan pending appeal. On November 24, 2009, Commissioner William H. Ellis denied the motion to stay.

V. ARGUMENT

A. STANDARD OF REVIEW.

When reviewing dismissal following a motion for summary judgment, the appellate court conducts the same inquiry as the trial court. M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 595, 70 p.3d 954 (2003). The meaning of a statute is a question of law and is reviewed de novo. Potter v. Wash. State Patrol, 165 Wn.2d 67, 78, 196 P.3d 691 (2008); In re Parentage of J.A.B., 146 Wn. App. 417, 422, 191 P.3d 71 (2008); Grieco v. Wilson, 144 Wn. App. 865, 873, 184 P.3d 668 (2008), review granted, 165 Wn.2d 1015, 199 P.3d 411 (2009)⁷.

⁷ The Washington Supreme Court heard argument on this case on May 28, 2009. A decision has not been issued.

In the instant case, this Court must interpret the legislative intent behind the two (2) year limit on the commencement of a parentage action involving a child with an acknowledged father under RCW 26.26.540(2). Although much of the argument in the trial court focused on the availability of the common law remedy of *de facto* parenthood, this Court should first answer the question of whether or not Russ still has standing under the UPA itself, i.e. whether the UPA unconditionally eliminates the vested parental rights of an acknowledged father simply because a biological father appears and files an action within the time limit of RCW 26.26.540.

Although the two questions are intertwined, the remedies provided are very different. If the UPA does not unconditionally eliminate the existing relationship between Russ and Mason, then Russ has a legal right, as an acknowledged father, to proceed directly under the UPA and establish a parenting plan that is in Mason's best interests taking into consideration all parties, including Mason's biological father, Frank Miller. However, if the UPA does unconditionally eliminate the existing relationship between Russ and Mason, then the question becomes whether the common law *de facto* parent remedy is available to Russ. If this Court concludes it is, then Russ will have to establish himself as a *de facto* parent before he can seek a parenting plan that is in Mason's best interests.

No other Washington case has interpreted the effect of the limitations period contained in RCW 26.26.540 in this context.

B. THE UNIFORM PARENTAGE ACT DOES NOT DEPRIVE AN ACKNOWLEDGED FATHER OF HIS VESTED LEGAL FATHER-CHILD RELATIONSHIP SIMPLY BECAUSE A BIOLOGICAL FATHER TIMELY SEEKS TO ESTABLISH HIS OWN FATHER-CHILD RELATIONSHIP.

1. Under The UPA An Adjudication of Paternity Does Not Unconditionally Eliminate An Existing Acknowledged Father-Child Relationship.

In L.B., our Supreme Court reiterated the constitutionally protected liberty interests parents have to care for and control their children without unwarranted state intervention.

It is well recognized that ‘[t]he liberty interest . . . of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court.’

L.B., 155 Wn.2d at 709 (quoting Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion)). Our Supreme Court went on to recognize there are no

constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family. Neither the United States Supreme Court nor this court has ever held that "family" or "parents" are terms limited in their definition by a strict biological prerequisite.

L.B., 155 Wn.2d at 711. In the instant case, the legislature defined father-child relationships to include both acknowledged and adjudicated fathers.

RCW 26.26.101(2). Whether the legislature intended for an adjudicated father to unconditionally eliminate an acknowledged father-child relationship is a question of legislative intent.

The purpose of statutory construction is to discern and give effect to legislative intent. In re Custody of Smith, 137 Wn.2d 1, 8, 969 P.2d 21 (1998), aff'd sub nom, Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). A court will not construe unambiguous language and “it ‘assume[s] that the legislature means exactly what it says.’” In re Custody of Smith, 137 Wn.2d at 8 (citing State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991))).

Here, this analysis begins with examining RCW 26.26.101(2) which provides a non-exclusive statutory list of ways a man can establish a father-child relationship. That statute provides:

- (2) The father-child relationship is established between a child and a man by:
 - (a) An un rebutted presumption of the man’s paternity of the child under RCW 26.26.116;
 - (b) The man’s having signed an acknowledgement of paternity under RCW 26.26.300 through 26.26.375, unless the acknowledgement has been rescinded or successfully challenged;
 - (c) An adjudication of the man’s paternity;
 - (d) Adoption of a child by the man;
 - (e) The man’s having consented to assisted reproduction by his wife under RCW 26.26.700 through 26.26.730 that resulted in the birth of the child; or

(f) A valid surrogate parentage contract, under which the father is an intended parent of the child, as provided in RCW 26.26.210 through 26.26.260.

RCW 26.26.101. In this case, there is no dispute Russ Fulton had a legal father-child relationship with Mason Fulton by virtue of the signed acknowledgment of paternity, and, therefore, Russ was not a “legal stranger” to Mason at the time Frank Miller commenced his paternity action. Russ’ acknowledgment of paternity has not been rescinded⁸ or successfully challenged⁹. RCW 26.26.101(2)(b); see also CP 191(trial court denies Meghan’s motion to rescind acknowledgment and finds Frank has no standing to rescind acknowledgment).

An acknowledgement of paternity is “equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all the rights and duties of a parent.” RCW 26.25.320 (emphasis added); see also RCW 26.26.011(7) (“determination of parentage” defined as signing valid acknowledgement of paternity); RCW 26.26.630 (determination of parentage is binding on all signatories to acknowledgment of paternity). Thus, based on Russ’ valid acknowledgment of paternity, Russ became Mason’s parent and established a father-child relationship with Mason.

⁸ RCW 26.26.330

⁹ RCW 26.26.335

See RCW 26.26.011(12) (“Parent’ means an individual who has established a parent-child relationship under RCW 26.26.101). Once Russ became Mason’s parent, his rights as a parent were vested unless terminated. RCW 26.26.111. As a parent, Russ properly sought a parenting plan under RCW 26.26.375 and established himself as Mason’s primary parent. CP 371-382.

Frank timely filed a petition to establish his own parent-child relationship with Mason under RCW 26.26.540(2). That statute provides:

Proceeding to Adjudicate Paternity – Time Limitation: Child Having Acknowledged or Adjudicated Father.

...

(2) If a child has an acknowledged father or an adjudicated father, an individual, other than the child, who is neither a signatory to the acknowledgment nor a party to the adjudication, and who seeks an adjudication of paternity of the child must commence a proceeding not later than two years after the effective date of the acknowledgment or adjudication.

RCW 26.26.540(2). The title and language of the statute clearly demonstrate the purpose of the statute is only to identify a time limit for “an individual” to seek an adjudication of paternity. What happens to the existing acknowledged father and the existing father-child relationship is not addressed by this statute.

The statutes governing adjudication are similarly silent regarding the effect an adjudication of paternity has on an acknowledged father’s existing father-child relationship. Although paternity of a child having an

acknowledged father may be disproved by genetic testing under RCW 26.26.600(1), this simply requires “the man excluded as the father...must be adjudicated not to be the father of the child.” RCW 26.26.600(4) (emphasis added). “Father” is not defined in the UPA, but “parent” is. “‘Parent’ means an individual who has established a parent-child relationship under RCW 26.26.101.” RCW 26.26.011(12). Therefore, the fact the legislature recognized genetic testing may exclude a man as a biological “father” under RCW 26.26.600, is not equivalent to excluding that man as a “parent.”

The remaining sections of RCW 26.26.600 are also silent regarding whether a subsequent adjudication terminates the existing acknowledged father-child relationship. Other statutes governing adjudication are similarly silent. For example, following the timely request for an adjudication of paternity, the court “shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child.” RCW 26.26.625(1). This order then establishes an “adjudicated father” and the resulting father-child relationship. RCW 26.26.011(2); RCW 26.26.101(2)(c). Nothing in the remaining sections of RCW 26.26.625 require the court to terminate the existing acknowledged father-child relationship.

Thus, under the plain language of the UPA, a child may have both an “acknowledged” father as well as an “adjudicated father” unless the acknowledgment itself is “rescinded or successfully challenged.” Compare RCW 26.26.101(2) (outlining the non-exclusive ways to establish a father-child relationship) with RCW 26.26.101(2)(b) (identifying the exclusive method to rescind or challenge an acknowledgement of paternity). Finally, this conclusion is supported by RCW 26.26.630. Under that statute, a “determination of parentage” is binding upon

- (a) All signatories to an acknowledgement or denial of paternity as provided in RCW 26.26.300 through 26.26.375; and
- (b) All parties to an adjudication by a court acting under circumstances that satisfy the jurisdictional requirements of RCW 26.21.075.

RCW 26.26.630 (emphasis added). Again, a “determination of parentage” is specifically defined as “the establishment of the parent-child relationship by the signing of a valid acknowledgement of paternity under RCW 26.26.300 through 26.26.375 or adjudication by the court.” RCW 26.26.011(7) (emphasis added).

The statutory method for eliminating an acknowledged parent-child relationship is clearly defined under RCW 26.26.101(2)(b). In 2002, if the legislature had wanted to allow a subsequent timely adjudication of paternity under RCW 26.26.540(2) to eliminate an existing acknowledged

father-child relationship, it could have said so in the definition found in RCW 26.26.101(2)(b) or elsewhere in the statutes governing adjudication. It did not.

When a statute is clear, the court will apply a statute as written. In re Custody of Smith, 137 Wn.2d at 8. “Courts do not amend statutes by judicial construction, nor rewrite statutes to avoid difficulties in construing and applying them.” In Re C.A.M.A., 154 Wn.2d 52, 69, 109 P.3d 405 (2005) (citations omitted). Because Russ’ acknowledgment was valid at the time Frank commenced his petition, Russ remains Mason’s father and the trial court erred in terminating that relationship solely because Frank timely filed an action to adjudicate Mason’s parentage under RCW 26.26.540.

2. The Legislative History Does Not Support The Trial Court’s Conclusion The Legislature Intended To Unconditionally Eliminate An Acknowledged Father-Child Relationship Solely Based On A Timely Adjudication Of Paternity Under RCW 26.26.540.

Given the unambiguous language of the statutes as discussed above, this Court need not resort to an analysis of legislative intent. Wash. Public Util. Dist’s Utils. Sys. v. Public Util. Dist. No. 1, 112 Wn.2d 1, 6-7, 771 P.2d 701 (1989). However, in the event this Court decides to engage in this analysis, there was no evidence before the trial court to support its conclusion in this case. In the instant case, the trial court erroneously

expanded the effect of RCW 26.26.540 far beyond that of a statute of limitations and unconditionally eliminated Russ' vested father-child relationship with Mason. It is "no slight thing to deprive a parent of the care, custody, and society of a child or a child of the protection, guidance, and affection of the parent." In re Dependency of T.L.G., 126 Wn. App. 181, 198, 108 P.3d 156 (2005)(quoting State v. Rasch, 24 Wash. 332, 335, 64 P. 531 (1901)). Thus, when a court is being asked to disestablish paternity,

case law indicates that the 'best interests of the child standard' governs the determination of all petitions to disestablish paternity, regardless of which section of the Uniform Parentage Act applies.

In re Marriage of Wendy M., 92 Wn. App. 430, 435, 962 P.2d 130 (1998); see also McDaniels v. Carlson, 108 Wn.2d 299, 312, 738 P.2d 254 (1987)(trial court should consider impact upon child before allowing disestablishment of paternity).

In this case, the trial court never engaged in any analysis of what was in Mason's best interests before eliminating Russ' existing acknowledged father-child relationship with Mason. Instead, the trial court wrestled with the lack of legislative direction, examined the plain language of RCW 26.26.540, and, at the urging of Frank and Meghan, focused on Mason's age at the time Frank commenced his paternity action to conclude

I find that it is most likely that the legislature determined that a transition from an acknowledged psychological father to a biological father could be accomplished without undue harm to the child if it can be established early enough in the child's life.

They chose two years or shortly thereafter as being the period in which it was early enough.

RP 152-153 (emphasis added). Thus, the trial court concluded, without any evidence, it was in Mason's best interests to eliminate his relationship with Russ based solely on "legislative directive." CP 80; compare RP 153 (after eliminating relationship between Russ and Mason, court admonishes parties and states "disruption of the established loving relationship Mason has with [Russ] would not be in Mason's best interests...").

First, the trial court's analysis of RCW 26.26.540 is not supported by the available legislative history. The legislative history surrounding the enactment of Washington's UPA provides no information to conclude the legislature chose the two-year statute of limitations found in RCW 26.26.540 based on any information regarding a child's needs, attachment theory, or psychological bonding. Rather, the legislature discussed the need for finality and for giving acknowledged fathers the right to seek parenting plans without commencing a paternity action. See House Bill Report on 2SHB 2346, 57th Legislature, Regular Session (Wash. 2002)(discussing bill as passed legislature); Senate Bill Report on 2SHB 2346, 57th Legislature, Regular Session (Wash. 2002) (discussing bill as

reported by Senate Committee on Judiciary); Final Bill Report on 2SHB 2346, 57th Legislature, Regular Session (Wash. 2002) (discussing bill as enacted).

Second, the trial court's decision appears to be mistakenly based upon Mason's age at the time Frank commenced the action, rather than on the plain language of the statute itself. RCW 26.26.540 requires that an adjudication of paternity be commenced within two years of filing the paternity acknowledgment, not two years of a child's birth. Compare RCW 26.26.530 (statute of limitations for child having a presumed father is two years from child's birth). Thus, it is conceivable an acknowledgment could be filed when a child was age five, and another individual, could seek an adjudication of paternity within two years thereafter. Certainly, the psychological bonding between an acknowledged father and a five, six, or seven-year old child would require something more than an unconditional elimination of the acknowledged father-child relationship. Compare In re Parentage of Q.A.L., 146 Wn. App. 631, 637, 191 P.3d 934 (2008) (trial court cannot dismiss parentage action on statute of limitations grounds because child has a constitutional right to be represented and GAL must be appointed to examine rights and relationships between child and acknowledged father and alleged father before disrupting those relationships); with RP 151 (trial court states "it's

clear the legislature determined that at any point after that two-year period it would be against the best interests of the child to allow a biological father to establish paternity and thereby disrupt the status quo of the child's relationship with the acknowledged father). Thus, Mason's age does not answer the question regarding the legislative intent behind RCW 26.26.540.

Finally, within the UPA, the legislature has recognized that existing parent-child relationships of one year or more in duration require a court determine what is in the best interests of the child before eliminating any existing relationships.

In any dispute between the natural parents of a child and a person or persons who have (a) commenced adoption proceedings or who have been granted an order of adoption, and (b) pursuant to a court order, or placement by the department of social and health services or by a licensed agency, have had actual custody of the child for a period of one year or more before court action is commenced by the natural parent or parents, the court shall consider the best welfare and interests of the child, including the child's need for situation stability, in determining the matter of custody, and the parent or person who is more fit shall have the superior right to custody.

RCW 26.26.130(8) (emphasis added). Thus, the legislature has recognized the special care the court must take before eliminating an established parent-child relationship of one year or longer in duration. It is inconsistent for the legislature to conclude a foster parent-child relationship of a year in duration deserves special consideration but an

acknowledged father-child relationship of two years in duration (or potentially longer depending upon when the paternity acknowledgment was filed) can be unconditionally eliminated without further inquiry into what is in a child's best interests.

The trial court's decision to unconditionally eliminate Russ' acknowledged father-child relationship solely because Frank sought to establish his own father-child relationship was error. This Court must remand this case back to the trial court to proceed to determine whether eliminating the "established loving relationship" between Mason and Russ is in Mason's best interests.

B. THE COMMON LAW *DE FACTO* PARENT DOCTRINE IS AVAILABLE TO RUSS TO CONTINUE HIS PARENT-CHILD RELATIONSHIP WITH MASON.

Even if this Court concludes Frank's timely petition under RCW 26.26.540 eliminates Russ' status as an "acknowledged" father under RCW 26.26.101(2)(b), and his corresponding father-child relationship, it does not end the inquiry. The equitable principals at the heart of L.B., and the *de facto* parent doctrine, are eroded by unqualified exclusions such as the one the trial court adopted in this case. Russ must still have the opportunity to establish himself as Mason's *de facto* parent under the common law.

In 2005, our Supreme Court exhaustively analyzed the UPA, to determine whether it was the exclusive means “of obtaining parental rights and enforcing parental responsibilities.” In re Parentage of L.B., 155 Wn.2d at 696. In its analysis, the Supreme Court reaffirmed the historical equitable power the courts in this State have invoked “to respond to the needs of children and families in the face of changing realities.” L.B. 155 Wn.2d at 166. The historical equitable power of the court was of significant importance in the Supreme Court’s decision to conclude the UPA did not preempt common law rights.

A study of Washington's common law confirms that, particularly in disputes touching on the rights and protection of minors, Washington courts have historically exercised broad equitable powers in considering cases regarding the welfare of children; this is especially evident in early custody disputes. In this context, in defining the scope of our courts' authority, we have previously established that

the superior courts of this state are courts of general jurisdiction and have power to hear and determine all matters legal and equitable in all proceedings known to the common law, except in so far as those have been expressly denied; that the jurisdiction of a court of equity over the persons, as well as the property, of infants has long been recognized; and that the right of the state to exercise guardianship over a child does not depend on a statute asserting that power.

Id. at 697-98 (quoting, In re Welfare of Hudson, 13 Wn.2d 673, 697-98, 126 P.2d 765 (1942); see also State ex rel. Burrows v. Superior Court, 43 Wash. 225, 228, 86 P. 632 (1906) (Washington trial courts are "court[s] of

general equity jurisdiction" with "all the powers of the English chancery court") (citing CONST. art. IV, § 6)).

Fundamental to a court's exercise of its equitable power was the "paramount and controlling consideration of the welfare of the child." Id. Thus, the Supreme Court ultimately concluded:

[i]n 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 of minor children, at times making such awards to persons not biologically related to the child, but who nevertheless have unequivocally "parented" them. ... Equally important, there is no indication, in its enactments on the subject, that our legislature intended to provide the sole means of obtaining child custody, and our state's jurisprudence strongly suggests the continued viability of common law custodial actions.

Id. at 698-699 (internal citations omitted). As such, our Supreme Court concluded the UPA was not the exclusive means for a person to establish parental rights and embraced the common law remedy of *de facto* parenthood. See Id. at 709 (UPA was "intended to supplement and clarify parentage actions and not to supplant the common law equity powers of our trial court").

In the instant case, the trial court's decision erroneously denies the common law remedy of *de facto* parenthood identified in L.B. to acknowledged fathers if a biological father timely commences an action to establish his paternity under RCW 26.26.540(2). However, "[i]n the

absence of an explicit statement declaring a remedy to be exclusive, [courts] require clear evidence that the legislature intended to abrogate the common law.” Potter, 165 Wn.2d at 81 (citing L.B., 155 Wn.2d at 695 n.11). As discussed in the previous sections herein, nothing in RCW 26.26.540(2), or the corresponding statutes governing an adjudication of paternity, indicates the legislature expressly intended this result. Thus, the common law remedy established in L.B. must be available to address this “gap” in the UPA and give Russ and Mason the ability to continue their legal acknowledged father-child relationship.

Decisions subsequent to L.B., have assessed the availability of the *de facto* parent doctrine in situations not involving same sex couples. For example, in In re Parentage of M.F., one panel of this Court concluded the common law action for *de facto* parent is not available to a step-parent because the nonparental custody statutes in RCW 26.10 provided an adequate statutory remedy for a stepfather to establish parental rights relating his former stepdaughter. In re Parentage of M.F., 141 Wn. App. 558, 170 P.3d 601 (2007), review granted, In re Parentage of Frazier, 163 Wn.2d 102, 197 P.3d 752 (2008).¹⁰ However, a subsequent panel of this Court reached the opposite result when considering the adequacy of the

¹⁰ The Washington Supreme Court heard oral argument on this case on March 10, 2009. A decision has not been issued.

nonparental custody statutes in a situation involving unmarried individuals as in the instant case. In re Parentage of J.A.B., 146 Wn. App. 417, 1981 P.3d 71 (2008).

In J.A.B., the petitioner sought to establish parental rights over his long time girlfriend's son after the relationship between the petitioner and his girlfriend ended. The petitioner had no legal relationship with the child. The trial court initially determined that the petitioner met the criteria in L.B. and found he was the child's *de facto* parent. In re J.A.B., 146 Wn. App at 420-421. Although the trial court also found both biological parents were unfit custodians, the trial court did not award custody of the child to the petitioner based on the nonparental custody statutes. Instead, the trial court ruled that the petitioner's right to custody was derived from the common law. Id. at 422. The trial court then entered a parenting plan designating the petitioner as the child's primary parent and awarding residential time to both biological parents. The biological mother appealed. Id.

On appeal, when analyzing whether the petition could maintain a *de facto* parent petition, a different panel of this Court considered the earlier decision in M.F., and stated:

Nor can we see a distinction, for purposes of [*de facto*] analysis, between blended families resulting from consecutive marriages and blended families resulting from nonmarital relationships. In

L.B., no marital relationship existed between the petitioner and the biological parent because none was possible. In *M.F.*, the petitioner had been a legal stepparent. Here, Benjamin and Reich never married but presumably could have. These differences in relationship history have great consequence under *M.F.*, apparently on grounds that the legislature contemplated consecutive marriages even if it did not contemplate less traditional family arrangements.

But these are differences in the legal relationships of the adults. We are unable to see their relevance to the question here: whether a person who is not the legal parent of a child is in fact the child's parent, and should be recognized as such by a court of equity.

The nonparent custody statute does not address that question at all. Rather, it 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.*

J.A.B., 146 Wn. App. at 425-26 (citations omitted).

In the instant case, the inadequacy of any remedy under the nonparental custody statutes is even more compelling. Russ, unlike any of the petitioners in L.B., M.F., or J.A.B., had a vested legal relationship with Mason as his acknowledged father. Russ had already exercised his parental rights and sought a parenting plan he believed was in Mason's best interests. The court had already exercised its equitable powers and

determined a continuing relationship between Russ and Mason was in Mason's best interests. Thus, after slightly modifying the language of this Court in J.A.B., the question becomes whether a person who is a *former legal parent* of a child is in fact the child's parent and should be recognized as such in a court of equity? If this Court in J.A.B. found the nonparental custody statutes provided an inadequate remedy for a person with no legal relationship to a child, certainly that inadequacy must also extend to a person with an existing legal relationship to a child.

Here, the trial court never answered this question. Instead of first determining whether Russ met the criteria of a *de facto* parent, it simply concluded RCW 26.26.540 unconditionally eliminated Russ from Mason's life. No express evidence exists to support the trial court's conclusion the legislature intended to eliminate Russ', and Mason's, rights under the common law to maintain a parent-child relationship the court has already found to be in Mason's best interests. Absent such evidence, the trial court erred and this Court must remand to the trial court for further proceedings to determine whether Russ is Mason's *de facto* parent, and, if so, to establish a parenting plan that is in Mason's best interests.

C. RUSS SHOULD BE AWARDED HIS COSTS AND ATTORNEY'S FEES.

In an action to adjudicate parentage, the court may award a party filing fees, reasonable attorneys' fees, costs, and other reasonable expenses. RCW 26.26.625(3). For a year, Russ has been forced to fight to preserve his father-child relationship with Mason. He does not seek to eliminate Frank or Meghan from Mason's life; rather, he seeks to continue to be a part of Mason's life on equal footing with Frank and Meghan. Continuing this relationship is clearly in Mason's best interests.

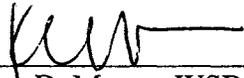
VII. CONCLUSION.

For the foregoing reasons, Russ Fulton respectfully requests this Court reverse the trial court's decision unconditionally eliminating him as Mason's acknowledged father. This Court should remand this matter back to the trial court so the trial court can establish a parenting plan that is in Mason's best interests under the UPA.

In the alternative, this Court should reverse the trial court's decision and remand this case for the trial court to determine if Russ is Mason's *de facto* father under the common law remedy established by the Washington Supreme Court in In re Parentage of L.B..

Respectfully submitted this 4th day of January 2010.

BREWE LAYMAN
Attorneys at Law
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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 4th day of January, 2010, I caused a true and correct original along with one copy of the foregoing document to be delivered by US mail to the following:

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

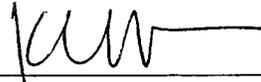
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Karen D. Moore, WSBA 21328