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No. 102039-2

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 381293

Spokane Superior Court No. 20-3-02620-32

In re:

CARMEN FOWLER,

Petitioner,

and

KEVIN LINHART,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, CARMEN FOWLER, is the moving party.

II. DECISION BELOW

Petitioner seeks review of the *Opinion*, entered by Division III on March 14, 2023,¹ and the *Order Denying Motion for Reconsideration* entered on April 28, 2023.²

III. ISSUES FOR REVIEW

- A. Whether the *Opinion* conflicts with a decision of the Supreme Court per RAP 13.4(b)(1).
- B. Whether the *Opinion* conflicts with a published decision of the Court of Appeals per RAP 13.4(b)(2).
- C. Whether the *Opinion* involves a significant question of law under the Constitution of the State of Washington or of the United States per RAP 13.4(b)(3).
- D. Whether the *Petition* involves an issue of substantial public interest that should be determined by the Supreme Court per RAP 13.4(b)(4).

¹ Attached.

² Attached.

IV. STATEMENT OF THE CASE

PRELIMINARY CONCESSION. Carmen appealed on April 6, 2021.³ While the case was pending, Erin passed away. Erin's status is therefore moot. The remaining issues pertain only to Kevin.

A. Parties and Witnesses

Carmen Fowler: Carmen is the biological mother of M.F.; her fitness to parent is undisputed.⁴

Carmen abused drugs/alcohol when she was in high school.⁵ She went to treatment in 2006 and was sober for many years, during which she obtained her degree in human services (with a minor in chemical dependency) from Whitworth University and became a counselor.⁶

In 2011, Carmen became pregnant.⁷

³ CP 399.

⁴ RP 454-55.

⁵ RP 204-05, 346.

⁶ *Id.*

⁷ RP 21, 60-61, 206-08.

Arvin Carmen: Arvin is M.F.'s biological father. He is currently incarcerated and has never been a part of M.F.'s life or participated in these proceedings.⁸

Erin Linhart: Erin met Carmen in an AA meeting in 2010 after Erin had gotten a DUI and was subsequently required to attend AA.⁹ Toward the end of 2011, Erin met Kevin.¹⁰

Kevin Linhart: Kevin was Erin's boyfriend until they were married in 2015.¹¹ He has a significant criminal record and a history of domestic violence and substance abuse.

In 2002, Kevin received a conviction for reckless driving.¹²

In 2006, Kevin was charged with robbery, malicious mischief and kidnapping.¹³ He was found guilty of unlawful imprisonment (domestic violence) and malicious mischief

⁸ RP 250, 267-68.

⁹ RP 19, 205-06. Erin attended AA until 2015, the year she married Kevin. RP 20, 61.

¹⁰ RP 21, 60-61, 206-08.

¹¹ CP 1-12; RP 61.

¹² CP 119.

¹³ RP 153-57, 174.

(domestic violence).¹⁴ Kevin pleaded guilty to allegations that he kicked in his ex's television, took a kitchen knife and slashed her furniture, threw her up against a wall, gave her a bloody nose, ripped her shirt, bit her arm, and dragged her out of the house and into a car; when she tried to jump out, he pulled her back into the car by her hair.¹⁵

In 2007, Kevin got a DUI.¹⁶

In 2011, Emily, the mother of Kevin's child, petitioned for a protection order; she asserted that, on August 22, 2011, while Kevin was drunk, he had threatened to take their baby and drive away with him without a car seat.¹⁷ Emily testified that when she tried to stop him, he choked her.¹⁸ She asserted that Kevin had threatened her life and her family's lives, saying he would "beat

¹⁴ Exhibit R-128, pgs. 14-16, 41-52; RP 141-42, 151-55; CP 104-08, 121, 130.

¹⁵ *Id.*

¹⁶ RP 143.

¹⁷ Exhibit R-128, pgs. 33-40; RP 155-57; CP 149.

¹⁸ Exhibit R-128, pgs. 36-38; CP 149-52.

them to death.”¹⁹ She testified that Kevin was frequently abusive to her and to his five minor cousins.²⁰ *Protection* was entered.²¹

Robin Brown: Robin is Carmen’s mother.²²

Christine Sundin: Christine is Erin’s mother.²³

B. Case History

2012

During her pregnancy, Carmen maintained sobriety and was employed running an inpatient treatment center.²⁴ When she was eight months pregnant, she developed a blood clot in her left leg which required her to be on bed rest; she was scheduled for induction at 37 weeks.²⁵

Carmen saw Erin about four times during her pregnancy.²⁶

¹⁹ *Id.*

²⁰ *Id.*

²¹ Exhibit R-128, pgs. 24-28; CP 160.

²² RP 344.

²³ RP 115.

²⁴ RP 211.

²⁵ *Id.*

²⁶ RP 209.

M.F. was born in August of 2012.²⁷ Carmen invited Erin to be present in the delivery room, along with her mother (Robin), her stepmother (Denise) and another friend (Jordan).²⁸ That same day, Carmen named Erin as M.F.'s godmother.²⁹ Erin and Carmen never discussed what the title meant.³⁰

After M.F.'s birth, Carmen was on clotting medication, which required a blood test every other day.³¹ She was not using any alcohol or illicit drugs; however, she was prescribed hydrocodone for the pain in her left leg, which had swollen to twice the size of her right leg.³² Carmen described the pain as so intense that it was difficult to sleep, move, or function.³³

M.F. lived with Carmen in her apartment in Spokane Valley through February of 2013; during that time, Carmen was also working full time, five days a week, and she obtained assistance

²⁷ RP215.

²⁸ RP22, 209.

²⁹ RP22, 212-13.

³⁰ RP22, 54.

³¹ RP24, 215.

³² *Id.*

³³ *Id.*

with work-related childcare from numerous people on her “daycare team.”³⁴ Carmen’s mother, Robin, provided care several days a week.³⁵ Carmen’s friend Tiffany’s mother, Mary, provided care on Fridays.³⁶ Erin’s mother, Christine, provided care two days a week.³⁷ Erin provided childcare in 2012, but she did not babysit on a regular schedule like the rest of the ‘daycare team,’ and it is undisputed the relationship was not parental.³⁸

Erin started dating Kevin in the spring of 2012, and they soon moved in together.³⁹ When Erin was unavailable, M.F. received care from Carmen’s mom, from Erin’s mom, or from Carmen’s step-mom, not from Kevin, who was not a part of the “daycare team.”⁴⁰ Kevin never went to Carmen’s house to visit M.F.,⁴¹ though Kevin was sometimes present in Erin’s home when Erin

³⁴ RP26, 115-19, 216-17, 350, 425.

³⁵ RP216, 350.

³⁶ *Id.*

³⁷ RP115, 216.

³⁸ RP22, 54, 64-65, 78, 91, 115-19, 123, 129-30, 148-49, 267, 305, 354, 404-05, 424.

³⁹ RP25-26, 60-61.

⁴⁰ RP23-26.

⁴¹ RP163.

provided care to M.F.⁴² Kevin himself could not clearly remember information about M.F.'s visits at that time because he worked "a lot."⁴³

In February, Kevin signed an agreed residential schedule stating that he had "an ongoing longstanding alcohol addiction and continues with an ongoing long-standing history of domestic violence," and noting his criminal history and driving offenses as well as "a history of extremely violent behavior toward women."⁴⁴ The document included testimony from Emily describing Kevin's extremely violent behavior.⁴⁵ She requested parental restrictions and a protection order.⁴⁶

The same day, a *Final Residential Schedule* was entered by agreement.⁴⁷ In Section 2.1, it entered restrictions on Kevin's residential time because of his history of acts of domestic

⁴² RP26, 163.

⁴³ RP148.

⁴⁴ Exhibit R-128; CP 166-69.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Exhibit R-128; CP 171-72.

violence and confirmed that Kevin had engaged in the abusive use of conflict, had neglected his child, and had a parenting impairment based on long-term substance abuse problems.⁴⁸ Kevin was limited to supervised visitation with his child at Fulcrum Institute until he engaged in evaluation and treatment for anger management, domestic violence, and drug and alcohol abuse and completed the “nurturing father’s program or complete 10 sessions with a certified/licensed parenting coach.”⁴⁹

Kevin did “a couple” visits with his child, but then he stopped because he “couldn’t afford it.”⁵⁰ Since then, he has never made any effort to be a part of his child’s life.⁵¹

Kevin acquired *another* DUI that was deferred.⁵²

2013

At the end of February, when M.F. was about six months old, Carmen recognized that she had become addicted to the

⁴⁸ *Id.*

⁴⁹ Exhibit R-128; CP 174-76.

⁵⁰ RP159.

⁵¹ RP102, 159.

⁵² RP143-44.

prescribed pain medications.⁵³ She realized that she would have a problem when her prescription ended, and she took proactive steps.⁵⁴ She resigned from her job and reached out to her mother, Robin, who agreed to care for M.F. while Carmen sought treatment.⁵⁵ During that time, Robin permitted Carmen to spend time with M.F., but Robin always supervised.⁵⁶

2014

Robin occasionally took M.F. to Erin's house for babysitting after Robin moved to Post Falls in August.⁵⁷ When Carmen found out, she made "clear objections" to Robin.⁵⁸ Carmen did not believe Erin was sober, and she had concerns about Kevin.⁵⁹

In August, Carmen agreed to formally give Robin temporary, non-parental custody so Robin could obtain health care and food

⁵³ RP218-19.

⁵⁴ *Id.*

⁵⁵ RP218-19, 306, 353.

⁵⁶ RP353-54.

⁵⁷ RP354-57.

⁵⁸ *Id.*

⁵⁹ *Id.*

benefits for M.F. and enroll him in daycare. ⁶⁰ Carmen consistently visited with M.F. at Robin's house, and Robin said Carmen was always trying to get more time with M.F. (she would "blow my phone up, she, you know, please, can I see [M.F.]? Please can I come over?").⁶¹

After Robin obtained custody of M.F. (when he was two years old), she would occasionally leave him with Erin or Christine for an overnight so she could have a break.⁶²

Later that year, Carmen was charged with taking a friend's vehicle without permission and ended up in Spokane County jail, and she got clean on October 14, 2014.⁶³ When she was released later that month, Carmen took up residence in Oxford House, a recovery facility, and she reached out to Robin to demonstrate her sobriety and begin reunification with M.F.⁶⁴ Carmen and Robin subsequently functioned like co-parents, sharing time with

⁶⁰ RP338.

⁶¹ *Id.*

⁶² RP354-58.

⁶³ RP221-26.

⁶⁴ *Id.*

M.F. “back and forth.”⁶⁵ During that time, Carmen had no knowledge about the frequency with which M.F. spent time with the Linharts.⁶⁶ Carmen saw the Linharts one time at Robin’s house when they attended M.F.’s birthday party, but every other time she had been at Robin’s house, the Linharts were not present and were not discussed.⁶⁷

2015

Erin and Kevin got married in 2015.⁶⁸ At the time of the wedding, Erin believed the nature of her relationship to M.F. was still as an “auntie,” not as a parent.⁶⁹

Carmen and Robin followed the court-ordered parenting plan that provided Carmen at least three days per week of residential time with M.F.⁷⁰

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ RP61, 78-79, 136, 210, 265.

⁶⁹ RP78.

⁷⁰ RP221-25.

In February, Robin and M.F. moved to Colfax to be closer to Carmen's father and stepmother so they could help Robin care for M.F. one weekend every month.⁷¹

In April, Carmen moved in with her boyfriend.⁷²

In May, Robin had surgery, after which she and M.F. stayed with Carmen in Spokane for approximately three months.⁷³ The Linharts did not see M.F. during this time.⁷⁴

In July, Carmen filed a request to modify, and Robin believed that Carmen filed because "she was not happy that I was still allowing [M.F.] to have visits with the Linharts."⁷⁵ Erin's mother, Christine, paid for a lawyer to defend against Carmen's modification even though Carmen had proven that she had been sober for a year.⁷⁶

⁷¹ RP222, 357, 368, 423-24.

⁷² RP338.

⁷³ RP361-66.

⁷⁴ RP314, 361-66.

⁷⁵ RP226, 339, 359.

⁷⁶ RP360.

After M.F. turned three in August, Robin enrolled him in Head Start daycare in Colfax.⁷⁷ It was not until *after* Robin and M.F. had moved to Colfax and M.F. had enrolled in Head Start, that the Linharts began regular “weekend visits”; it is undisputed that these visits were arranged through Robin, not Carmen.⁷⁸

In September, Carmen and Robin signed a mediation agreement modifying the parenting plan to provide Carmen with residential time.⁷⁹

In October, after a year of maintaining sobriety, Carmen broke up with her boyfriend and relapsed for two weeks.⁸⁰ Carmen moved out of her boyfriend’s house and moved in with Robin and M.F. in Colfax.⁸¹ Two weeks later, she moved into her own place in Spokane.⁸²

⁷⁷ RP 368.

⁷⁸ RP28, 94, 112, 127, 162, 230, 338-40, 357, 368, 371, 405- 06, 423.

⁷⁹ Exhibit R-123, pg. 6.

⁸⁰ RP226, 339.

⁸¹ *Id.*

⁸² RP 230; 339.

Robin and the Linharts discussed adoption of M.F. in 2015.⁸³

No one spoke to Carmen about adopting M.F.

2016

In March, Carmen filed for contempt against Robin.⁸⁴ Carmen alleged that Robin refused to comply with their agreement and specifically stated that she was troubled by

⁸⁷ Exhibit R-123, pg. 6. ⁸⁸ RP 226, 339.

⁸⁹ *Id.*

⁹⁰ RP230; 339.

⁹¹ RP28, 387, 405. ⁹² CP 290.

Robin's choice to place M.F. with Kevin each weekend, saying, "I do not feel safe with my child being in the care of Kevin Linhart due to his criminal history, violent history, and

⁸³ RP 28, 387, 405.

⁸⁴ CP 290.

protective orders against him with his own child,” and “I have expressed this many times to Robin.”⁸⁵

In April, Robin filed a petition to modify the parenting plan, and the Linharts filed a petition seeking to terminate Carmen’s parental rights; however, the Linharts never served Carmen with their paperwork.⁸⁶

In August, Robin’s petition to modify was resolved by mediated agreement, which was approved by Judge Anderson.⁸⁷ In September, Carmen moved back in with Robin and M.F. and lived there through the end of the year.⁸⁸ Carmen was not working, and M.F. was in her care three out of every four weekends.⁸⁹ That same month, the Linharts dismissed their petition to terminate.⁹⁰

⁸⁵ CP 290, 293.

⁸⁶ CP 287, 324; RP 318

⁸⁷ RP 228-29.

⁸⁸ RP 230, 339-40, 384-85.

⁸⁹ RP 231.

⁹⁰ CP 324.

In November, Carmen miscarried, and in December, Robin told Carmen that M.F. would go to the Linharts for the holiday, and Carmen became depressed and relapsed.⁹¹ Carmen immediately reported herself to Robin and indicated that she was going to Spokane to enroll herself in a suboxone program.⁹²

2017

In January, Robin and the Linharts sat down together and arranged for Robin to “give” custody of M.F. to the Linharts.⁹³ The Linharts then filed a petition to terminate Carmen’s parental rights and to adopt M.F., and they obtained an immediate temporary order for temporary placement pending the termination hearing.⁹⁴ That was first time Carmen learned the extent to which Robin had involved M.F. with the Linharts.⁹⁵

⁹¹ RP 230-32, 255-56, 317.

⁹² RP 232, 256-57.

⁹³ Exhibit R-131.

⁹⁴ RP 236, 320.

⁹⁵ RP 236, 257, 320; CP 287.

That same month, Carmen got a job at the South Hill Grill.⁹⁶ She maintained that job through trial, and was entrusted with opening the restaurant, managing thousands of dollars of cash per day, possessing the keys to the building and the code to the safe.⁹⁷ Carmen believed that the restaurant job would give her the most flexibility to take a day off if she needed something for M.F. or to attend court.¹⁰⁶

On February 14, 2017, Carmen got sober for the last time; she maintained her sobriety through the present.¹⁰⁷ She texted her mother, Robin, to tell her that she was clean and sober, but Robin ignored her texts.¹⁰⁸ Carmen registered with the CHAS recovery clinic, which involved regular urinalysis screening.¹⁰⁹ In March, Carmen entered an intensive outpatient program at Youth Family Adults Connections.¹¹⁰

In July, Carmen was invited to become a resident of Hillyard Women's Oxford House because she was "a strong woman in

⁹⁶ RP 200; 296.

⁹⁷ RP 200-01.

recovery and promotes integrity” and because she had “social skills that would help benefit the Hillyard Woman’s House to become a more recover-centered house”; Carmen was subsequently voted to be vice president by her peers and was characterized as “an asset” to Oxford of Spokane.¹¹¹

In August, Robin attended a party at the Linharts’ home where she witnessed them drinking and observed pill bottles for Adderall, Xanax, and hydrocodone.¹¹² She asked about their sobriety, after which the Linharts began threatening her and obstructing her contact with M.F.¹¹³ The Linharts then prevented both Robin and Carmen from seeing M.F. for over a year.¹¹⁴

In December, Carmen successfully completed her outpatient treatment, continuously maintaining sobriety since February.¹¹⁵

That same month, after withholding M.F. for nearly a year, the Linharts offered to allow Carmen to see M.F. if she would sign over custody.¹¹⁶ She declined.¹¹⁷

2018

In January, Carmen filed a motion with the court seeking visitation with M.F. and detailing her sobriety and the efforts she had been making over the last year to see her son.¹¹⁸

In February, Carmen filed another declaration indicating that she had been demonstrably sober for over a year, was currently employed, paying child support, enrolled in school, serving as president of her Oxford House, and involved in treatment services as well as a 12 Step program and regular therapy; she confirmed she was still passing her urinalysis tests and was enrolled in medication management for chemical dependency in the CHAS clinic.¹¹⁹ She voiced her concerns about Kevin's criminal history and the restraining order that prevented him from seeing his own child,¹²⁰ and she provided the court with documentation of Kevin's criminal/DV history.¹²¹

That same month, the Linharts, realizing they had no basis to terminate Carmen's parental rights, filed a motion for permission to intervene in the non-parental custody case, which Judge Anderson granted, and she placed M.F. with the Linharts.¹²²

The Linharts then failed to intervene despite having acquired permission to do, so, in July, Carmen filed a summons and petition to modify the parenting plan.¹²³

Later in the summer, the Linharts filed their summons and petition to modify the parenting plan.¹²⁴

In September, Judge Anderson found adequate cause to proceed with both petitions and awarded primary placement to the Linharts and visits to Carmen.¹²⁵

Beginning in December of 2018, Carmen had visits with M.F. at Fulcrum.¹²⁶

2019

Carmen had weekly visits with M.F. from January through March.¹²⁷ In April her time was expanded, and in July of 2019, the parties mediated and agreed that M.F. should have time with Carmen every other weekend and Wednesday overnights.¹²⁸

In November, Kevin sent Carmen threatening texts about sending CPS to her home.¹²⁹

In December, Kevin inexplicably sent Carmen another text asking her not to tell M.F. that they are “haters” and asking, “You know you’re white, right?”; Carmen then blocked his phone.¹³⁰

Carmen and M.F. had Christmas together.¹³¹

2020

In November, Carmen finished paying off all her outstanding child support for M.F.¹³²

In December, the Linharts filed a petition seeking *de facto* parental status.¹³³

2021

In February, Judge Anderson expanded Carmen’s residential time.¹³⁴ That same month, an expedited hearing was held, and Commissioner Swenumson concluded that the Linharts collectively had standing to proceed to trial on their *de facto* petition.¹³⁵

Carmen moved to revise the commissioner’s ruling and specifically asked the trial court to revise the finding that the case should go forward, and a trial should be held.¹³⁶

Trial was held on March 1 and 2.¹³⁷
On March 18, the trial court issued its ruling.¹³⁸

On March 31, the trial court entered an order on Carmen's motion to revise the commissioner's ruling re: standing to proceed to trial.¹³⁹

On April 1, the court entered findings and conclusions indicating that the Linharts had demonstrated all seven factors to be deemed *de facto* parents by a preponderance of the evidence; it awarded the Linharts' primary custody of M.F. and gave Carmen eight days a month with M.F.¹⁴⁰

On April 6, 2021, Carmen appealed.

Decision on Review

On March 14, 2023, Division III entered an Opinion on this matter. The Court concluded:

We first address Carmen Fowler's challenge to the court commissioner ruling granting Erin and Kevin Linhart an evidentiary hearing on their petition for de facto parentage. We liken the court commissioner's initial threshold ruling to a denial of a summary judgment motion, which denial this court does not review after a trial on the evidence. *Leitner v. City of Tacoma*, 15 Wn. App. 2d 1, 18, 476 P.3d 618 (2020),

review denied, 196 Wn.2d 1045, 481 P.3d 553 (2021). **Thus, we decline to address assignments of error surrounding the threshold determination**, although we analyze further the appealability of the court commissioner’s standing decision and rulings attendant to the decision.⁹⁸

We remand for the superior court to readdress the factors found in RCW 26.26A.440(4) based on altered conditions resulting from the death of Erin Linhart. The superior court, at its discretion, may permit additional testimony from the parties and their witnesses.⁹⁹

Carmen moved for reconsideration, and their motion was denied on April 28, 2023.

V. ARGUMENT

A. The Opinion conflicts with a decision of the Washington Supreme Court per RAP 13.4(b)(1).

The Opinion directly conflicts with multiple cases issues by this Supreme Court and the Court of Appeals pursuant to RAP 13.4(b)(1) & (2).

By treating the threshold procedure as equivalent to a Summary Judgment, the Opinion directly contradicts explicit

⁹⁸ Opinion, pg. 10.

⁹⁹ Opinion, pg. 15; emphasis added.

Washington state statutes as well as *In re J.D.W.*,¹⁰⁰ *Walker v. Riley*,¹⁰¹ and, particularly, *In re Parentage of L.B.*,¹⁰² which explicitly states:

"Critical to our constitutional analysis here, a threshold requirement for the status of the *de facto* parent is a showing that the legal parent 'consented to and fostered' the parent-child relationship."¹⁰³ That is, "[t]he State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the *active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the de facto parent and child or children that accompany the family.*"¹⁰⁴ Absent the protection of the threshold hearing, the *de facto* statutory scheme

¹⁰⁰ 14 Wn.App. 2d 388, 417-18, 471 P.3d 228 (2020).

¹⁰¹ 498 P.3d 33 (2021).

¹⁰² 155 Wn.2d 679, 712, 122 P.3d 161 (2005).

¹⁰³ *In re Parentage of L.B.*, 155 Wn.2d 679, 712, 122 P.3d 161 (2005).

¹⁰⁴ *Id.*

would be unconstitutional.

Here, Ms. Fowler exhaustively demonstrated that Mr. Linhart did not and cannot meet the threshold requirement for status as a *de facto* parent, and the Opinion does not deny this. Instead, the Opinion sidesteps the issue and, rather shockingly, forces Ms. Fowler to again defend her parenting rights against a party who cannot even prove the threshold requirement for *de facto* once, much less a second time.

B. The *Opinion* involves a significant question of law under the Constitution of the State of Washington or of the United States per RAP 13.4(b)(3).

“The United States Supreme Court and Washington Supreme Courts have long recognized parents’ fundamental rights to the care and custody of their children.”¹⁰⁵ These rights are protected by the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment and the Ninth Amendment. *Id.*

¹⁰⁵ *Link v. Link*, 165 Wn.App. 268, 271, 268 P.3d 963 (2011).

To give away the custody of a child against the parents will and over the parent's objection without the benefit of appropriate due process is not only blatantly violative of constitutional rights, but it is the very nightmarish specter raised by those who argued against starting down the slippery slope of *de facto* parentage in earlier cases before this Court. Where a court is willing to delegate that right to a third party who was never subject to the initial gate keeping of the court in the form of meeting the threshold requirements violates the rights of the parent.

The constitutional rights of Appellant were violated when *de facto* status was granted by the trial court without making any specific findings as to the third party and without substantial evidence in the record to support any findings.

The appellate court ruling further exacerbates the problem by bypassing this hearing and granting a status that has never been proven. Mr. Linhart was not entitled to an evidentiary hearing in the first place; operating as if one had occurred *and* operating

as if he had been successful in this ghost proceeding is a further violation of the due process rights of Ms. Fowler.

C. The *Petition* involves an issue of substantial public interest that should be determined by the Supreme Court per RAP 13.4(b)(4).

Ms. Fowler seeks reconsideration of this Court's decision regarding standing. In its *Opinion*, the Court likened the initial threshold ruling to a denial of a summary judgment motion, and it declined to address assignments of error surrounding that determination; however, in a *de facto* parenting case the threshold hearing is the primary protection of a parent's constitutional rights, and in that sense, is not at all like the denial of a summary judgment motion. Precisely to the contrary, it is *only* the threshold analysis that makes the *de facto* parenting statute constitutional in the first place. Division III should have reviewed the sufficiency of the facts in the *de facto* petition under a *de novo* standard.¹⁰⁶

¹⁰⁶ *In re L.J.M.*, 15 Wn.App. 2d 588, 597, 476 P.3d 636 (2020), citing *In re J.D.W.*, 14 Wn.App. 2d 388, 417-418, 471 P.3d 228 (2020).

The problem has now become that Division III declined to perform the analysis required by RCW 26.26A.440 (clearly assigned error and argued by Appellant) and instead proposed to subject Ms. Fowler to a *second* evidentiary hearing without requiring Mr. Linhart to make even *one* proper showing of standing under the statute; thereby, violating Ms. Fowler's constitutional parenting rights not once but *twice!* This is *in addition* to the fact that there is no basis anywhere in Washington law to remand a final parenting plan on appeal to be modified pursuant to a "substantial change of circumstances" absent a proper petition to modify. It is abusive to Ms. Fowler's rights that she be required to go through yet another proceeding with *new evidence*. Why should Mr. Linhart get a second bite at the apple at the expense of Ms. Fowler's constitutional rights when he failed to prove his standing the first time? And what are the restrictions on "new evidence" -- can this "new evidence" have come into being during the period of time *after* the trial? This ruling directly contradicts the purpose of the threshold hearing

and the public policy it is enacted to protect. The statute imposes a heightened standing requirement pursuant to public policy “to ensure that permitting proceedings by *de facto* parents does not subject parents to unwarranted and unjustified litigation.”¹⁰⁷

Division One addressed this concern, saying:

In short, although L.B. did not directly address the issue of standing, it provides **two important guideposts** with regard to whether subjecting a legal parent to a full adjudication would result in “unwarranted and unjustified litigation.” **First, to ensure that de facto parentage litigation does not result in unlawful interference with legal parents’ constitutionally protected interest in the care and custody of their children, the petitioner must at least make a threshold showing that a legal parent consented to and fostered a parent-child relationship between the petitioner and the child.** Second, to balance legal parents’ interests against children’s interests in preserving their relationships with those who have unequivocally parented them, **a petition should be allowed to proceed to a full adjudication if, but only if, the petitioner makes a threshold showing that he or she was a member of the child’s family unit and unequivocally parented the child.** We conclude that these guideposts are the touchstones for whether a disputed fact is “material to the issue of standing” under RCW 26.26A.440(3)(c). **Specifically, to establish standing to proceed to a**

¹⁰⁷ *In re J.D.W.*, 14 Wn.App.2d 388, 404, 471 P.3d 228 (2020).

full adjudication of de facto parentage under RCW 26.26A.440, the petitioner must establish that he or she unequivocally parented the child as part of the child's family unit and that a legal parent consented to and fostered a parent-child relationship between the petitioner and the child.¹⁰⁸

That being the case, Ms. Fowler's constitutional rights were already violated when she was required to defend against Mr. Linhart once at trial without a proper determination of his standing. Division III proposes to violate her constitutional rights a second time by providing Mr. Linhart a second hearing without establishing his standing to proceed to an evidentiary hearing as required by law.

Mr. Linhart failed to prove his standing the first time. He was given a full and fair opportunity to do so at the time, and there is no authority in Washington law that provides him a second opportunity to do now on remand what he failed to do at trial. Because he never proved his standing to proceed to an evidentiary hearing, Ms. Fowler's requests that this Court reverse

¹⁰⁸ *Id* at 409-10.

his status as a *de facto* parent and return the child to Ms. Fowler as required by Washington law.

VI. CONCLUSION

The Opinion profoundly erred when it dismissed the statutory constitutional protections of Ms. Fowler's parenting rights as a mere 'summary judgment-like' procedural convention and then subjected her to a *second* evidentiary hearing on Mr. Linhart's *de facto* status when he has never yet once qualified for any evidentiary hearing.

The undersigned certifies that the foregoing brief contains 4,718 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

RESPECTFULLY submitted this 30th day of May, 2023:

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CERTIFICATE OF ATTORNEY

I certify that on May 30, 2023, I arranged for delivery of a copy of the foregoing PETITION FOR REVIEW to the following:

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*The Court of Appeals
of the
State of Washington
Division III*



March 14, 2023

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CASE # 381293
Erin Linhart, et al v. Carmen S. Fowler
SPOKANE COUNTY SUPERIOR COURT No. 2030262032

Counsel:

Enclosed please find a copy of the opinion filed by the court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a).

If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

A handwritten signature in black ink, appearing to read "Tristen Worthen".

Tristen Worthen
Clerk/Administrator

TLW/sh
Enc.

c: E-mail Honorable .Rachelle E. Anderson

FILED
MARCH 14, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Parentage:)	
)	No. 38129-3-III
KEVIN LINHART)	
ERIN LINHART,)	
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
CARMEN FOWLER)	
ARVIN CARMEN,)	
)	
Appellant.)	

FEARING, J. — Carmen Fowler, the biological mother of Mark, appeals the superior court’s declaration of Erin and Kevin Linhart as de facto parents of the boy. Because Erin Linhart, the de facto mother of Mark, has since died and because the superior court based its award of de facto parentage primarily on the relationship between Mark and Erin Linhart, we remand for the superior court to enter findings of de facto parentage targeted directly to Kevin Linhart and to entertain further testimony at the court’s discretion.

FACTS

Carmen Fowler and Arvin Carmen beget Mark, a pseudonym, in August 2012. The father Arvin Carmen currently serves a long prison sentence and has never been

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present in Mark's life nor participated in this legal proceeding. Mother Carmen Fowler experiences lengthy drug and alcohol abuse.

At Mark's birth, Carmen Fowler named her friend, Erin Linhart, Mark's godmother. Fowler thereafter regularly delivered Mark to Linhart's home for care on weekends. When Fowler struggled with substance abuse, Mark lived primarily with Fowler's mother, Robin Brown. Brown often permitted Mark to stay with Erin Linhart and her husband, Kevin, overnight. Fowler knew that Mark sometimes stayed at Erin and Kevin Linhart's home.

In 2015, Carmen Fowler exerted efforts to spend more time with Mark. We do not know the extent of the success of the efforts. She relapsed in substance abuse in October 2015.

Kevin Linhart has a history of criminal activity and domestic violence. He has not engaged in either since 2011.

PROCEDURE

Erin and Kevin Linhart filed a petition for de facto parentage of Mark. In turn, Carmen Fowler submitted a motion to dismiss the petition. The motion attached a felony judgment and sentence showing Kevin Linhart's convictions for unlawful imprisonment and malicious mischief, with both convictions carrying a domestic violence label. The motion also attached a 2011 protection order entered against Kevin Linhart. The record does not reflect whether the superior court ruled on the motion to dismiss.

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A superior court commissioner presided over a threshold hearing of whether the Linharts had established standing to proceed to a full hearing on the merits of the petition for de facto parentage. During the hearing, the court commissioner commented regarding other cases involving custody of Mark:

The Court has reviewed the third-party custody file as I said at the last hearing. I reviewed parts of it, not the whole thing. I reviewed parts of one of the petitions for termination, not both.

Clerk's Papers (CP) at 348.

As the Court said at the outset of the hearing, I have had time to review this file; parts of the non-parental custody file as well as some parts of one of the petition to terminate files. In doing so, I did note a couple of things.

One, Ms. Fowler did move I believe in 2015 to modify the non-parental custody matter. That was, at the time, before our supreme court changed the—either, well, they changed the law because before that the statute said to change placement under a non-parental custody when you claim detriment there has to be detriment in the home of the non-parental custodian.

When Ms. Fowler brought her petition, at that time, this Court actually heard it. I must have been a pro tem at the time. I heard that matter and decided that there was not detriment in Ms. Brown's home, and I did not do a non-parental or I did not change placement. I did order that the parties attempt mediation. Ms. Fowler had been doing better at the time and that just outright denying her contact with [Mark] was not in [Mark's] best interests. I think I talked about the difference at that hearing, a major modification and a minor modification and what was appropriate and what wasn't.

Be that as it may, there's been several other petitions to modify filed, and there, then Commissioner Anderson now Judge Anderson, found adequate cause for both parties. The Linharts were able to intervene. She allowed them to intervene in the non-parental custody matter since [Mark] had been placed with them. I mean it started out with [Mark] being placed

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with Ms. Brown under the non-parental custody and Ms. Fowler consenting to that placement.

This case is all messy. Not due to anyone's fault here, I'm not saying that, but just where [Mark] has been. Because when, if I look at what the Linharts say and a lot of third-parties say in this matter, when [Mark] was born the Linharts were involved in his life really from day one. It might not have been as a primary parent or a primary custodian, but a lot of people have given declarations saying that he was at their house every Thursday to Sunday.

CP at 364-66.

[Mark] has had visits with [Carmen Fowler] for two years, and I know Judge Anderson just expanded visits under the non-parental case and that is the—because she just did that after hearing some information as well. She's had these cases, not this one but the non-parental for a while, I'm adopting what she did last week as the temporary order in this case. I'm not changing what she's done. I know trial is going to come up on these matters, and the parties will be able to move forward in that manner. I'm glad that Judge Anderson is assigned to this case since she's had consistent contact with it over the years.

CP at 371-72.

The court commissioner ruled that Erin and Kevin Linhart had established each element of de facto parentage for purposes of standing. The commissioner's ruling mirrored the allegations advanced in the Linharts' petition.

Carmen Fowler filed a motion to revise the court commissioner's ruling, arguing that the commissioner erred in entering findings of fact related to the standing determination. The superior court did not rule on the motion until after the conclusion of the full evidentiary de facto parentage hearing, at which time the court ruled that the commissioner's findings were extraneous.

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After the evidentiary trial, the superior court granted Erin and Kevin Linhart de facto parentage of Mark. At the same time, the court ruled that Carmen Fowler was fit to parent her son.

A finding of de facto parentage requires a finding that an existing parent fostered and supported the bonded and dependent relationship between the child and the de facto parent. In its oral ruling, the superior court expounded:

The highly contested factor was section (f) whether another parent of the child fostered or supported the bonded and dependent relationship required under section (e). Now, whether that was supported and fostered by Ms. Fowler is a very contested issue that I heard lots of testimony about. I'm starting from the standpoint, first of all, of the actual wording of the statute, that a parent has to foster and support that bonded and dependent relationship.

From the standpoint of a parent, Ms. Fowler, fostering that bonded and dependent relationship, I have no doubt that Ms. Fowler supported and fostered a bonded relationship between Mr. and Mrs. Linhart and [Mark]. Ms. Fowler chose Erin Linhart to be a godparent. That is a moniker and a denomination that shows an intent for something more than just this is a person that you will know in your life.

A godparent, whether you believe in the spiritual connotation of a godparent, a religious connotation, or simply recognizing that, hey, you are a significant person in my life and I want to elevate you in my child's life, I do find that that's compelling. Ms. Fowler asked for and encouraged Ms. Linhart, both before and after she was married to Kevin Linhart, to provide child care, to be involved in his life and his growth.

Ms. Fowler, when she recognized that she had addiction issues and could not be the parent that her child needed, she did recognize and foster that others needed to step in and help her with that. So, from the standpoint of fostering a bonded relationship, I think that was very clear. Whether she fostered a dependent relationship I think was more of a crux.

Did Ms. Fowler intend that this relationship would be dependent in the nature of a parent-child relationship? Again, I look to the fact that Ms. Fowler recognized she could not parent her child at the time that Mr. and

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Mrs. Linhart were introduced significantly into his life. The relationship was a dependent relationship, because as a parent you know someone has to be the responsible entity for making those decisions for your child.

A three-year-old, a four-year-old is a dependent child. They do look to an adult to provide all of that guidance and structure. While Ms. Fowler desired to be involved in her child's life, she did recognize that at that period of time he needed someone to provide that stability, oversight, and guidance for him. It wasn't until Ms. Fowler got sober the most recent time that she really started exercising her objections towards that relationship. So, from the standpoint of the criteria in the statute, I do think that I have a parent who fostered that dependent and bonded relationship.

The other way I looked at this case, and I do want to make sure this is also part of the record, is that uniquely to this case Ms. Robin Brown did obtain custody of the child. If I were to look at the statute from the standpoint of rather than the term parent, if it were a custodian or the person with the parental authority, that would be Robin Brown.

Because, again, we have a third-party custody where for a period of time Ms. Fowler did not have the ability to make those parental decisions. Ms. Fowler could not be the entity deciding who and where [Mark] was going. That was up to Robin Brown. And Ms. Brown, I want to echo, to her credit, she balanced her grandchild's needs and her daughter's needs and very much wanted Ms. Fowler to maintain a sober lifestyle.

At the point that Ms. Brown gave custody, physical custody, and encouraged the Linharts to be a permanent part of [Mark's] life, Ms. [Fowler] had suffered three relapses in a period of about two-and-a-half years. . . . At that point in time, based on history, it was impossible to look ahead and know that that 2017 sobriety date would be a sobriety date that stuck for Ms. Fowler. So, from the standpoint of the several years that Ms. Brown had parented her grandson, and as the custodian, I find that that also gave her the authority to be the entity to foster and support a bonded and dependent relationship. I have no doubt, the evidence was very clear that Ms. Brown asked for, needed the assistance to parent the child at that time. And she, with her authority as the guardian, fostered that relationship.

Report of Proceedings (RP) at 458-61.

In its written findings of fact and conclusions of law about de facto parentage, the superior court wrote:

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The Court found that Ms. Fowler no doubt supported the relationship. Ms. Fowler chose Mrs. Linhart to be the child's god-parent, recognizing her as a significant person in the child's life. Ms. Fowler would ask the Linharts to provide childcare for the child. When Ms. Fowler recognized she was struggling with addiction issues, she recognized and fostered others to help care for the child.

The Court also found Ms. Fowler fostered the dependent relationship. As a parent, Ms. Fowler recognized when she was unable to parent, the Linharts had already been significantly introduced to the child. Ms. Fowler knew the child was dependent because as a parent, she recognized someone has to be the entity to make the caretaking decisions for her child and a child of three (3) or (4) years is clearly dependent. The Court found that Ms. Fowler did not begin exercising her objections towards the relationship until her most recent stint of sobriety.

The Court also found unique to this case, that Ms. Fowler's mother, Robin Brown, who had obtained custody of the child with parental authority also foster[ed] and support[ed] the relationship with the Linharts. She encouraged the Linharts to be parents of the child and a large part of the child's life during a time that Ms. Fowler was struggling with her addiction. During that time, it was impossible, based on history, to look ahead and know whether that sobriety would stick. The Court found that Ms. Brown also had authority to foster and support the relationship, and that [she] did in fact do so.

CP at 381-82.

The superior court signed a parenting plan that gave primary custody of Mark to Erin and Kevin Linhart and afforded Carmen Fowler custody every other weekend and every Thursday night thru Friday morning. In a proposed parenting plan, the Linharts had urged the court to find that Fowler had a history of substance abuse. The court entered a finding, under RCW 26.09.191, of past substance abuse by Fowler and noted "Fowler has a long-term problem with drugs, alcohol or other substances that gets in the way of his/her ability to parent." CP at 404. The superior court entered no other findings

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limiting any parent's custody time under RCW 26.09.191. The court noted that, despite the finding of past substance abuse against Fowler:

The [RCW 26.09.191] restrictions . . . do not have to lead to restrictions in parenting time if I don't find that there is a current nexus that would warrant that. The statute also indicates that unless I can find a relationship between those provisions and current parenting, that it doesn't necessarily lead to restrictive time. And I don't find that there is currently a basis for restricted time.

RP at 468. The court based Mark's residential schedule on his young age and the desire to avoid disruption to Mark's weekly schedule and school schedule while maintaining consistent and frequent contact with both sets of parents.

Carmen Fowler appeals the finding of de facto parentage and the parenting plan. Following initiation of the appeal, Erin Linhart unfortunately died.

LAW AND ANALYSIS

On appeal, Carmen Fowler challenges the superior court commissioner's initial ruling that Erin and Kevin Linhart possessed standing to proceed to a full hearing on de facto parentage. She also assigns error to the court commissioner's evidentiary rulings, the court commissioner's review and mention of evidence presented in other proceedings, and the superior court's failure to entertain revision of the court commissioner's ruling on standing. Fowler also challenges the superior court's parenting plan, assuming we affirm the ruling on de facto parentage.

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Standing

We first address Carmen Fowler’s challenge to the court commissioner ruling granting Erin and Kevin Linhart an evidentiary hearing on their petition for de facto parentage. We liken the court commissioner’s initial threshold ruling to a denial of a summary judgment motion, which denial this court does not review after a trial on the evidence. *Leitner v. City of Tacoma*, 15 Wn. App. 2d 1, 18, 476 P.3d 618 (2020), *review denied*, 196 Wn.2d 1045, 481 P.3d 553 (2021). Thus, we decline to address assignments of error surrounding the threshold determination, although we analyze further the appealability of the court commissioner’s standing decision and rulings attendant to the decision.

A party may appeal from a final judgment entered in any action or proceeding. RAP 2.2(a)(1). A final judgment resolves the merits of a party’s legal claims. *Denney v. City of Richland*, 195 Wn.2d 649, 654, 462 P.3d 842 (2020). In other words, a final judgment is “‘a judgment . . . that eliminates the litigation between the parties on the merits and leaves nothing for the inferior court to do in case of an affirmance except to execute the judgment.’” *In re Personal Restraint of Skylstad*, 160 Wn.2d 944, 949, 162 P.3d 413 (2007) (alteration in original) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 851 (2002)).

In a de facto parentage proceeding, a trial court’s affirmative ruling on the threshold issue of standing does not eliminate litigation between the parties. A finding of

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standing permits further proceedings rather than ending them. *See In re Estate of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012). In contrast, a trial court's denial of standing would constitute a final judgment terminating the litigation between the parties.

Analysis of appealability does not end merely because the court commissioner's grant of standing does not constitute a final judgment. This court may review nonfinal trial court orders or rulings if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. RAP 2.4(b).

Given the nature of de facto parentage proceedings, a grant of standing should rarely prejudice a trial court's final determination. A threshold ruling on standing relies on the initial petition for de facto parentage.

[W]hether a petitioner is entitled to a full adjudication proceeding "is a different question than whether the petitioner should *ultimately* be adjudicated a de facto parent." To establish standing, a petitioner must only *allege* sufficient facts to satisfy the statutory requirement. To prevail on the petition, the petitioner must *demonstrate* in a subsequent proceeding that the statutory requirements have been proved.

In re Parentage of L.J.M., 15 Wn. App. 2d 588, 595-96, 476 P.3d 636 (2020) (quoting *In re Parentage of J.D.W.*, 14 Wn. App. 2d 388, 423, 471 P.3d 228 (2020)).

RCW 26.26A.440(3)(c) imposes the same factors for review regardless of whether the superior court or its court commissioner renders a threshold standing determination or grants or denies the petition for de facto parentage after a full hearing. Nevertheless, the

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superior court bases the final ruling on an evidentiary hearing, not on the petition. In this case, the superior court's final judgment made no reference to the initial ruling on standing. Thus, the initial ruling granting standing did not prejudice the final judgment.

We decline to address Carmen Fowler's challenge to the court commissioner's evidentiary rulings and contention that the commissioner improperly took judicial notice of other court proceedings concerning custody of Mark. Since the superior court, when analyzing de facto parentage, reviewed most of the same factors attendant to standing, we also decline to address Fowler's complaint that the superior court did not decide her motion for revision until the end of the evidentiary hearing.

De Facto Parentage

Carmen Fowler challenges the trial court's grant of de facto parentage to Kevin Linhart. Fowler limits her challenge to Kevin's parentage status because of Erin Linhart's recent death. Fowler complains that the superior court erred by evaluating Erin and Kevin Linhart collectively to determine de facto parentage. Fowler emphasizes that Erin and Kevin maintained different relationships with Mark, and, in the superior court's collective findings, the court principally relied on Mark's relationship with Erin. Fowler highlights the superior court's mention of Erin Linhart being the godmother.

The opening and closing subsections of RCW 26.26A.440 declare:

- (1) A proceeding to establish parentage of a child under this section may be commenced only by an *individual* who:
 - (a) Is alive when the proceeding is commenced; and

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(b) Claims to be a de facto parent of the child.

....

(4) In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, the court shall *adjudicate the individual* who claims to be a de facto parent to be a parent of the child if the *individual* demonstrates by a preponderance of the evidence that:

- (a) The *individual* resided with the child as a regular member of the child's household for a significant period;
- (b) The *individual* engaged in consistent caretaking of the child;
- (c) The *individual* undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
- (d) The *individual* held out the child as the individual's child;
- (e) The *individual* established a bonded and dependent relationship with the child which is parental in nature;
- (f) Another parent of the child fostered or supported the bonded and dependent relationship required under (e) of this subsection; and
- (g) Continuing the relationship between the *individual* and the child is in the best interest of the child.

(Emphasis added.) Carmen Fowler underscores the use of the word “individual” throughout this controlling statute, and she contends the statute requires each petitioning parent to establish de facto parentage on his or her own. According to Fowler, the evidence did not independently establish Kevin to have fulfilled the requirements of de facto parentage under the controlling statute. In response, Kevin Linhart posits that Fowler reads the statute too literally and narrowly.

We discern no need to decide whether each petitioner, when two spouses petition together, must establish the elements of RCW 26.26A.440. Erin Linhart has died, which death significantly alters the circumstances under which Mark resides in the Linhart household. We agree with Carmen Fowler that the superior court’s ruling favoring the

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Linharts focuses more on the relationship between Mark and Erin Linhart than Kevin. For this reason, we remand to the superior court to enter findings of fact specific to Kevin Linhart and whether he independently fulfills the elements of RCW 26.26A.440(4).

Because we anticipate some of the arguments being forwarded on this appeal to be faced by the superior court on remand, we address those arguments.

Carmen Fowler maintains that Erin and Kevin Linhart knew their caretaking responsibilities were not permanent because they filed a de facto parentage petition to make such responsibilities permanent. We reject this hyperliteral argument. If we adopted this contention, no de facto parentage petition could ever succeed.

Carmen Fowler argues that a de facto parent should live in the same household as a legal parent for a significant period of time. We agree that living in the same household as a legal parent suggests that “parental responsibilities are permanent, rather than temporary or transitory.” *In re Parentage of L.J.M.*, 15 Wn. App. 2d 588, 599 (2020). We disagree that cohabitation with a legal parent is the only means of satisfying this element.

Carmen Fowler argues the only evidence that Kevin Linhart engaged in caretaking of Mark is evidence that Linhart did “boy stuff” with him including football and go-karting. Fowler quotes a passage of testimony by Kevin, wherein he mentions Mark enjoys sports and Mark becomes more attached to him than Erin when he wishes to play. Fowler argues that playing is not a function specific to parenting. We disagree. Linhart

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engaged in a caretaking function when he played with Mark. *In Re Parentage of J.D.W.*,
14 Wn. App. 2d 388, 418-19 (2020).

Carmen Fowler challenges the superior court's implied conclusion that, because she deposited Mark with her mother Robin Brown during the time that she abused substances, Fowler impliedly consented to Brown's fostering of a parenting relationship between Mark and the Linharts. We agree that, based on the language of RCW 26.26A.440(4)(f), Kevin Linhart must show that Fowler, not Brown, fostered Kevin's relationship with Mark. All parties acknowledge that Brown had nonparental custody of Mark.

Kevin Linhart argues that, because Mark's father was absent, the trial court could have based the de facto parentage finding on the father's fostering and support of the relationship. This court has held that a parent who consents to a caretaking arrangement may then by inaction foster a continuing parent-like relationship. *Walker v. Riley*, 19 Wn. App. 2d 592, 606, 498 P.3d 33 (2021). We do not wish to extend this holding to a scenario in which a parent is totally absent from a child's life and plays no part in any decision making. For element (f) to possess teeth, it must require some meaningful connection between an existing parent and de facto parent.

Attorney Fees and Sanctions

Both parties request attorney fees on appeal on the theory that the other party advances frivolous arguments or misstates the record. We conclude that each party

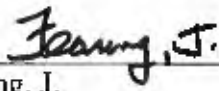
No. 38129-3-III,
In re Parentage of M.F.

advanced important and legitimate contentions. We deny each party an award of reasonable attorney fees and costs.

CONCLUSION

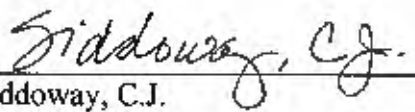
We remand for the superior court to readdress the factors found in RCW 26.26A.440(4) based on altered conditions resulting from the death of Erin Linhart. The superior court, at its discretion, may permit additional testimony from the parties and their witnesses.

A majority of this panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.




Fearing, J.

WE CONCUR:



Siddoway, C.J.



Pennell, J.

Tristen L. Worthen
Clerk/Administrator

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*The Court of Appeals
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April 28, 2023

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CASE # 381293
Erin Linhart, et al v. Carmen S. Fowler
SPOKANE COUNTY SUPERIOR COURT No. 2030262032

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Tristen Worthen
Clerk/Administrator

FILED
APRIL 28, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

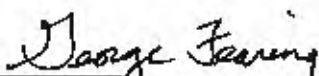
In the Matter of the Parentage:)	
)	No. 38129-3-III
KEVIN LINHART)	
ERIN LINHART,)	
)	
Respondent,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	
CARMEN FOWLER)	
ARVIN CARMEN,)	
)	
Appellant.)	

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 14, 2023, is hereby denied.

PANEL: Judges Fearing, Siddoway, Pennell

FOR THE COURT:



GEORGE B. FEARING,
Chief Judge

THE LAW OFFICE OF JULIE C. WATTS, PLLC

May 30, 2023 - 4:56 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Erin Linhart, et al v. Carmen S. Fowler (381293)

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