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No. 64124-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Parentage of:

MASON MILLER (Fka FULTON), Child,

FRANK MILLER
Respondent,

MEGHAN COTTON
Mother

And

RUSS FULTON
Appellant.

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

RESPONDENT'S RESPONSIVE BRIEF

Kathryn B. Abele
Attorney for Frank Miller, Respondent/Father
20326 Bothell-Everett Hwy G103,
Bothell, WA 98012

Richard L. Jones
Attorney for Meghan Cotton, Respondent/Mother
2050 112th Ave NE, Ste 230
Bellevue, WA 98002-7322

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I. SUMMARY OF ARGUMENT

The real question is not on what it means to be a parent but on whether the facts in this case are so out of the ordinary that the statute in question, RCW 26.26.540, is not applicable. The Petitioner wants this court to believe that this matter is so unique that the statute is ambiguous to this factual situation and, therefore, they have a right to use the common law doctrine of *de facto* parentage, as established in *In Re L.B.* and other related cases. This is simply not the case.

Frank Miller and Meghan Cotton have known each other since junior high and had an intimate encounter during the time that Ms. Cotton was in a relationship with Mr. Fulton. A child was conceived and Frank did not learn that he could have fathered the child until thirteen months after the birth of the child. Frank, after submitting to DNA testing and learning he was the father, took responsibility to care for his son and started seeing him with the help of the mother prior to filing this paternity action. An order adjudicating Frank as father was stipulated to and agreed by all parties on May 20, 2009. Since that time, Frank has established a deep and loving bond with his son. Frank and Meghan both seek to preserve their

parental relationship without interference from any third parties.

This particular factual situation of a biological father asserting his rights of parenthood within two years of an acknowledgement filed is precisely the scenario that the Legislature intended the statute to cover when it was enacted in 2002. RCW 26.26.540 is based upon a bright-line rule of dismissal for a non-acting party or severance of the relationship for the non-prevailing party. Mr. Fulton has no legal relationship with the child, and as such, Frank and Meghan should be allowed to parent their son Mason without interference from Mr. Fulton.

II. ASSIGNMENTS OF ERROR

1. The trial court did not err when it found that the:
“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 did not err when it found that:
“the intention [of the statute] 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 did not err when it would not engage in a de facto parentage analysis “because the statute addresses the issue.”

CP 75

4. The trial court did not err when it made 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 did not err when it entered the following conclusion of law/order:

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 did not err when it entered 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 timely filing a petition for paternity and entry of a subsequent Stipulated Order of Paternity unconditionally eliminate any previously presumed or

acknowledged father under RCW 26.26.540? (Assignments of Error 1, 2, 4, 5, 6).

2. Did the trial court correctly interpret RCW 26.26.540 when it dismissed the acknowledged father from the cause of action filed jointly by the mother and adjudicated/biological father? (Assignment of Error 6).

3. Is RCW 26.26.540 ambiguous to the factual situation such that two competing potential fathers' interests were not contemplated by the legislature thereby allowing the common law remedy of *de facto* parentage to be available to a dismissed acknowledged father within the two-year time limit set by the legislature? (Assignment of Error 3).

IV. STATEMENT OF THE CASE

A. Mr. Miller and Ms. Cotton file a Petition for Paternity and move the court for parental recognition of Frank Jonathan Miller as the father under RCW 26.26.540.

Mason was born to Meghan Cotton on December 21, 2007. CP 269. On December 24, 2007, Russ and Meghan both executed a paternity affidavit acknowledging to the best of Meghan's memory that he was Mason's father. CP 465, 469. Frank did not learn until early January 2009 that he maybe Mason's father. CP 323. Frank was offered an opportunity to

take a DNA test by Meghan and did so on January 31, 2009 and did so willingly. CP 323. The results were 99.9997% that Frank was the biological father to Mason and Frank starting visiting with his son right away. CP 230, CP 519. Meghan ceased to hold out Mr. Fulton as having any type of parental relationship with the child as she realized that she had made a material mistake of fact regarding the father of her child and joined the Petition. CP 341.

Meghan and Frank filed a joint Summons and Petition for Paternity under RCW 26.26.540 on April 7, 2009, and requested that Frank be named the legal father to Mason and that his name be changed to Mason Miller. CP 335-341. Mr. Fulton was properly served with the Petition for Paternity on April 7, 2009. CP 244-245. Mr. Fulton filed a Motion to Dismiss Paternity action on May 8, 2009 stating that his signing of the paternity affidavit was fraudulently gained. CP 237-242.

On April 22, 2009, Meghan acted in accordance with her knowledge that Mr. Fulton was not the father of her child when she filed an amended response in the original petition for a residential schedule. CP 363-366. Meghan affirmatively

denied and no longer consented to the parental relationship of Mr. Fulton with her son Mason when she amended her response to state he is not the father. CP 363-366. Meghan again affirmatively rescinded her consent of Mr. Fulton being a parental figure in Mason's life when she filed a Motion for Summary Judgment in which she asked to have him dismissed in both the paternity case and the residential schedule case. CP 246-248 (paternity case); CP 367-369 (residential schedule case). Frank filed a memorandum of law supporting Meghan's Motion to Dismiss and Motion for Summary Judgment. CP 229-234. Frank asked that the court dismiss Mr. Fulton as moved for in Meghan's petition. CP 233.

B. Hearing held on May 20, 2009—Trial court denies Meghan and Russ's request for relief; Enters Agreed Stipulated Order of Paternity.

After a hearing on May 20, 2009, the court denied all motions before it, specifically Mr. Fulton's motion to dismiss Frank's paternity action, as it found that to be timely commenced under RCW 26.26.540. RP 33; CP 191-193. The trial court denied Meghan's Motion for Summary Judgment and request to dismiss Mr. Fulton, ruling she has no standing to rescind 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; RP 60-63 (June 3, 2009 hearing). The trial court ruled that there remained a question of fact whether Mr. Fulton had a claim for *de facto* parentage against the mother. CP 192; RP 33-34.

At the hearing all parties signed and agreed to Frank being the adjudicated father when the Stipulation and Agreed Order of Paternity was entered. CP 216-217. Mr. Fulton's counsel, Ms. Sadler, stated in court "We're not going to waste the Court's time and dispute genetic testing. Okay, so he's dad." RP 7: 4-5.

The court reserved all issues before it and appointed a GAL to investigate the legal issues surrounding the question of *de facto* parentage and scheduled a review hearing on June 3, 2009. CP 192-93; RP 34-36, 40, 49-50. An order naming Frank Miller the biological parent was entered on May 20, 2009. CP 216-17.

The trial court consolidated both cases under the paternity cause number 09-5-00153-6. CP 193: RP 45. The trial court did not preclude any party from entering any briefing on entry of a parenting plan. RP 50. The parties agreed to

using CR 7 as the basis for filing timely documents and motions. CP 51.

The court had Ms. Ballentyne file a supplemental GAL report addressing Mason's current needs between the three parties seeking visitation. CP 194-96 (public report); CP 515-521 (sealed report);

B. Frank Miller files a Motion to Dismiss Mr. Fulton as a party.

Frank Miller filed a Motion to Dismiss Mr. Fulton as a party on May 26, 2009. The motion relied upon the stipulation of paternity as an adjudication that superceded any previous court order including an acknowledgment of paternity. CP 207-212. Frank Miller participated in an evaluation with an early child development, attachment, and trauma expert, Martha Wakenshaw, M.A. LMHC. CP 546. The interview with Frank occurred on May 22, 2009, only four months after having been introduced to his son. CP 548. Ms. Wakenshaw noted that "Mr. Miller was particularly vigilant of Mason, and ensured his physical and emotional safety." CP 549. Ms. Wakenshaw also noted that:

"The father has had only a few months of very limited time with Mason, but Mason appeared to be very

ensured his physical and emotional safety.” CP 549. Ms.

Wakenshaw also noted that:

“The father has had only a few months of very limited time with Mason, but Mason appeared to be very comfortable in his presence and bonded with his father.”

CP 550. In Ms. Wakenshaw’s opinion, “Mason would most likely adjust more rapidly to his biological parents with a clean separation from Mr. Fulton.” CP 552.

D. Hearing on June 3, 2009 – Trial Court appoints a new GAL and Entry of Order on Summary Judgment.

A hearing to review the case, to enter a GAL order and present orders from the hearing held on May 20, 2009 was heard on June 3, 2009. RP 52. The report by Ms. Ballentyne suggests:

frequent contact (with father) in low conflict situations as it is linked to “better adjustment in younger children and boys. (Amato & Rezak, 1994; Pruett et al, 2003; Stewart et al, 1997; Whiteside & Becker, 2000).

CP 519. The report states Mason “has spent many nights at Frank’s home with and without Meghan there.” CP 519. The report provides a suggestion that only a “few months” is needed for the child to feel secure with the new parent. CP 519.

Frank argued in his Motion to Dismiss that Mr. Fulton did not have any standing to maintain an action for *de facto* parentage after the adjudication because consent by him was never given. CP 207-212.

Frank asked the court to hear his Motion for Dismissal but the court declined to rule until the child was represented by a guardian ad litem. RP 63-64. The argument presented concerned the adjudication of Frank Miller as father on May 20, 2009. RP 65-66. Frank argued that an “adjudication of paternity supercedes an acknowledgement of paternity” and that Russ’s relationship with the child “must be severed.” RP 73-74. The mother, Meghan made the same argument under RCW 26.26.600 that Mr. Fulton should be dismissed from the paternity case as he no longer has “standing under [RCW] 26.26 to appear in [the] proceedings.” RP 69.

Ms. Wakenshaw, in her report prepared as an expert for Frank and Meghan, stated that “having ‘multiple caregivers’ was not in Mason’s best interests” and recommended and expedient transition of Mason’s care to the biological parents. CP 551-552. The opinion was based upon her expertise in the

field of early childhood trauma and the observation that Mason “transitioned easily.” CP 552.

Frank moved for dismissal and argued that RCW 26.26.540 is unambiguous. RP 73. Frank reasoned that under the statute any adjudication supersedes any previous court order or acknowledgment and that non-prevailing party should be dismissed as a matter of law. RP 73. Frank pointed out to the court that all *de facto* parentage cases involve children who are over the age of two and that the two-year rule is definitive for the court and it must dismiss Mr. Fulton. RP 72-75. The court offered that if it “could control it’ this case would not drag on for a year. RP 75.

Ms. Ballantyne recommended a proposed schedule to include Frank and found him “to be, you know, a straightforward person, who’s turned his life around from the mistake he made years ago and is on a good track.” RP 101. The court questioned if there was a way to get Frank more time with the child over the next six weeks and noted that he did not need to be supervised. RP 101-102. The court noted that Frank:

“bears no fault in coming into this child’s life late, because he was following what he believed. As soon as

he realized that he was possibly the father, he took actions to determine that question, and acted appropriately afterwards to have the child with him as much as he could, to get advice from his parents, and now, I understand, to take parenting classes. All of this is positive and appropriate.”

RP 103. The court then entered a temporary plan that allowed Frank to have residential time with his son that increased over the next few weeks. RP 104-107.

The court reserved ruling on Frank’s motion to dismiss Mr. Fulton from the paternity case. RP 69. The trial court appointed Jeanette Heard as Mason’s new GAL to look into the *de facto* parentage claim and discharged Karin Ballentyne. RP 76, 109; CP 185-188, 189-190. A hearing was scheduled for July 17, 2009, so that Ms. Heard had time to investigate and prepare her report. RP 76-77; CP 189. Ms. Heard requested a continuance and the hearing was rescheduled to August 13, 2009. RP 112-117; CP 58.

E. August 13, 2009 – Frank’s Motion to Dismiss Mr. Fulton as a Party is Granted.

All parties appeared before the court on August 13, 2009. RP 118. Frank reminded the court of his Motion to Dismiss. RP 118. Meghan formally joined in Frank’s motion. RP 118. The court questioned Frank on *de facto* parentage and

it was argued that the statute was controlling to this factual situation and if Frank filed within two years then he is “determined the legal parent.” RP 122.

The court recognized two interpretations of the intent behind RCW 26.26.540 with the focus on the two-year time frame, to establish parental rights and to ensure that there would be no harmful effects to the child if there were a change during the time allotted under the statute. RP 122. It was argued by Frank that *In re L.B.* was distinguishable here because it involved a child over the age of two and the statute is not ambiguous to the facts of this case. RP 122, 127.

Frank expressed to the court that he had, as the adjudicated parent, “constitutionally-protected” rights as a parent. RP 122.

The court noted that under RCW 26.26.540

“we do not get to the issue of a de facto parent unless we are in a situation that the legislature has not gone, because we need to rely on common law principles to use the de facto parent analysis, and that only applies in areas where the legislature has not contemplated a particular situation.”

RP 136

Ms. Heard’s report “primarily address[ed] the issue of de facto parentage.” CP 470. Ms. Heard considered all

relevant reports and factors and ultimately recommended that Mr. Fulton not be named a *de facto* parent. CP 470.

In the GAL report, Ms. Heard noted that “Mason and Mr. Miller are clearly connected with each other. They interact and enjoy each other [and that] Mason often squealed with excitement” when describing the father and son together. CP 482. Ms. Heard recommended a six-month transition plan for Mason to be placed in the primary care of Frank Miller. CP 477-478.

In Ms. Heard’s report, she expressed the following legal analysis concerning the UPA.

“we are within the statutory time frame of two years to challenge a paternity affidavit, and Mr. Miller has commenced a proceeding regarding Mason. It is possible that the legislature chose two years in order to protect children from the instability caused by disputes over paternity more than two years after it has been determined with apparent certainty.”

CP 486, 489. Frank also expressed to the court that the statute is not ambiguous. “It’s straightforward. It’s not been appealed . . .” RP 146. Frank argued that “if it’s unambiguous, then it’s not open to judicial interpretation, which gets us down to the two years.” RP 146. Meghan argues that the *de facto* “circumstances were judicially created in some regards and

initially without regard to the biological father.” RP 148. Meghan points out to the court that the case law on the issue of *de facto* parentage addresses factual situations “clearly different than the one we have here.” RP 148. Meghan argues that the case law, with regard to this factual situation, “may be at odds with the statute.” RP 148.

The trial court ruled on all remaining issues before it. RP 149-154. The court analyzed RCW 26.26.540 in reaching its decision and found that,

“the intention [of the statute] was for the establishment of paternity to determine the rights of competing potential fathers to the exclusion of the potential father who is unable to establish paternity.”

RP 153. The trial court reasoned that because the statute was clear in its intent to dismiss a non-prevailing party “it need not engage in an analysis concerning *de facto* parentage.” RP 153. The court granted the summary judgment motion of Mr. Miller and established his parental rights as father to the exclusion of Mr. Fulton when it [ruled that he] has “no remaining legal relationship under the statute.” RP 153.

On August 20, 2009, the trial court entered orders dismissing Mr. Fulton, naming Mr. Miller the father, allowing for an amendment of the birth certificate, and parenting plan

that transitioned Mason into the primary care of Frank Miller. CP 80, CP 81, CP 82, and CP 83. Under the terms of the Parenting Plan, Frank has sole-decision making and was named custodian of the child. CP 83. The plan was to be a six-month transition. CP 83.

Mr. Fulton attempted to have his visitation stayed when he filed a motion in this court but Commissioner William H. Ellis denied the request on November 24, 2009.

V. ARGUMENT

A. STANDARD OF REVIEW

The appellate court is required to conduct the same inquiry when reviewing a dismissal upon a summary judgment motion. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). Statutory interpretation is reviewed de novo. *In re Parentage of L.B.*, 121 Wn. App. 460, 473, 89 P.3d 271 (2004) citing *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002), citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002); *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003).

In this case, the Court must review and interpret the legislative intent behind the two-year limitation a biological and acknowledged father must adhere to when contesting parentage of a child. In the many hearings concerning this case, the Petitioner (Fulton) focused on his claim of *de facto* parentage because he signed an acknowledgment of paternity and participated in the child's life for fourteen-months prior to Mr. Miller filing his petition for paternity. Respondents Miller and Cotton argued that the statute is unambiguous and that the UPA unconditionally eliminated any previously acknowledged or presumed father when a biological father is adjudicated the father after a filed acknowledgment. This court is asked to answer the question of whether the Legislature, when it enacted the UPA in 2002 under RCW 26.26.540, wrote the statute in such a manner that it is ambiguous and inapplicable to the competing interests of these two men as to allow Mr. Fulton to use the common law doctrine of *de facto* parentage.

The appellant wants this court to implement a common-law remedy for this factual situation which RCW 26.26.540 was intended to cover. The statute clearly addresses the procedure a biological father must follow with regard to

establishing paternity when there is an acknowledged father. If the UPA does not unconditionally eliminate the non-prevailing party (through adjudication) then the statute becomes moot as the only party whose rights are lost or affected are those of a biological father who did not act timely. If this court were to find that the statute does not dismiss the non-prevailing party then every biological father who asserts his rights under RCW 26.26.540, within the time limits set, could be subjected to a new claim of *de facto* parentage by an acknowledged father that under RCW 26.26.600(4) must be dismissed. Certainly the probability of continued litigation after the establishment of paternity does not offer the child subject to the litigation the stability and certainty that the Legislature intended for the child by adopting a bright-line statute of limitations.

B. THE UNIFORM PARENTAGE ACT DOES SEVER ANY PREVIOUSLY ADJUDICATED, PRESUMED, OR ACKNOWLEDGED FATHER'S RELATIONSHIP WITH THE CHILD WHEN A BIOLOGICAL FATHER TIMELY SEEKS AND ESTABLISHES PATERNITY THROUGH AN ADJUDICATION.

1. *Under RCW 26.26.540, An Adjudication Of Paternity Unconditionally Eliminates Any Existing Acknowledged/Presumed Father's Parental Relationship To The Exclusion of Any Other Common Law Remedy.*

The Uniform Parentage Act (2002) controls all actions regarding paternity in Washington State. The controlling statute in this action is RCW 26.26.540. The statute requires that an action to adjudicate the parentage of a child having an acknowledged or adjudicated father must be commenced within two years of the acknowledgment or adjudication.

"If the language of the statute is clear and unequivocal, the court must apply the language as written." State v. Olson, 148 Wn. App. 238, 243, 198 P.3d 1061 (2009). The court must also combine all related provisions together so as to "achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes." State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000); State v. Tejada, 93 Wn. App. 907, 911, 971 P.2d 79 (1999). When interrupting a statute this court must do so in a way that best advances the legislature's intent and avoiding a strained or unrealistic interpretation. Id.

[Under] the provisions of the Uniform Parentage Act, [a] court must read the statute in a manner consistent with its purpose and the intent of the legislature. In re Parentage of Calcaterra, 114 Wn. App. 127, 56 P.3d 1003 (2002) *citing*

Gonzales v. Cowen, 76 Wn. App. 277, 281, 884 P.2d 19 (1994). A statute's language must be "susceptible to more than one reasonable interpretation' before it will be considered ambiguous, In re Parentage of L.B., 121 Wn. App. 460, 473, 89 P.3d 271 (2004) citing Harmon v. D.S.H.S., 134 Wn.2d 523, 530, 951 P.2d 770 (1998) and only when a statute is determined to be ambiguous can the appellate court look to the rules of statutory interpretation in order to ascertain and give effect to the intent and purpose of the Legislature. In re L.B., 121 Wn. App. at 473; Harmon, 134 Wn.2d at 530, 951 P.2d 770, citing State v. Bash, 130 Wn.2d 594, 601-02, 925 P.2d 978 (1996); State v. Hennings, 129 Wn.2d 512, 522, 919 P.2d 580 (1996).

In this matter Frank Miller and Meghan Cotton filed their joint Petition for Paternity on April 7, 2009, within fifteen months of the acknowledgment entered December 24, 2007. CP 335-341; CP 465, 469. Frank properly served Mr. Fulton and Meghan rescinded her consent (by joining) to Mr. Fulton being a parent to Mason. CP 244-245. The parents moved the court for an adjudication on paternity and to enter a parenting

plan in the best interests of the child without interference from a non-parent third party. CP 335-341.

If this court believes that the statute is not clear with its implied intent to eliminate the non-prevailing potential father, then in order to discern legislative intent, this court must look to the legislative history of the statute as well as to other statutes dealing with the same subject matter. *In re L.B.*, 121 Wn. App. at 473.

There is one case where this Court reviewed the two-year time limitation. In *Hampson v. Snell*, this court upheld the two-year time limitation when it ruled that a biological father had a right to seek his rights against an already existing adjudicated/acknowledged/presumed father. *Hampson v. Snell*, 128 Wn. App. 408, 115 P.3d 405 (2005).

In *Hampson*, the biological father had an intimate relationship with his married neighbor and a child was born to the marriage of the neighbor. During the dissolution the presumed father became an adjudicated father when a child support order was entered. The biological father petitioned for paternity within two years of the adjudication, which was when that child was four. The appellate court ruled he had an

absolute right to seek paternity under the time-limitation of the UPA. *Hampson v. Snell*, 128 Wn. App. 408, 415, 115 P.3d 405 (2005). The court in *Hampson* ruled on the statute of limitations written into the statute, but it reviewed a similar factual situation consisting of two men claiming to be a father to a child and understood that the statute enacted by the Legislature contemplated this very situation.

The argument posed by Appellant Fulton that the acknowledgment of paternity has not been rescinded or challenged has no merit. RCW 26.26.600 is very clear as to what a court is ordered to do when it has an acknowledged father and a subsequent adjudication determines another person to be the father by biological tests results. Under the statute, the court shall apply the following rules to adjudicate the paternity of a child:

(1) The paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man to be the father of the child.

(2) Unless the results of genetic testing are admitted to rebut other results of genetic testing, the man identified as the father of the child under RCW 26.26.420 must be adjudicated the father of the child.

(4) Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man

excluded as the father of a child by genetic testing must be adjudicated not to be the father of the child.

RCW 26.26.600. Emphasis added.

The statutory construction within the UPA states that an adjudication under RCW 26.26.630 rebuts a presumption of paternity and also any previous acknowledgement or adjudication. This court has already determined that RCW 26.26.600(1) does not trump nor does it defeat RCW 26.26.116(2)'s clear statement that a presumption of paternity may be rebutted by an adjudication. *Hampson v. Snell*, 128 Wn. App. at 414-15.

Neither Frank nor Meghan had to follow through with any challenges to the acknowledgement. The fact that Frank filed a Petition to Establish Paternity when there was already an acknowledged father constitutes a *per se* challenge to the acknowledgment. Additionally, the court properly applied the statute when it determined that the biological tests provided by Frank showing his parentage to be 99.9997% was sufficient evidence to adjudicate him the father. CP 230. Mr. Fulton agreed to the paternity of another father when he signed the Stipulated and Agreed Order of Paternity. CP 216-217.

Because Mr. Fulton willingly agreed to Mr. Miller's paternity, he absolutely extinguished any rights awarded him under the acknowledgment of paternity and the judge properly ruled that, "FRANK JONATHAN MILLER' is the father of the child and any acknowledged father or adjudicated father named in the proceeding is not the father." CP 65. The court entered a final judgment and order on the paternity of Mason as allowed under RCW 26.26.130 where it states a "judgment and order of the court determining the existence or nonexistence of the parent and child relationship shall be determinative for all purposes." (Emphasis added).

In this case, the statute is very clear in its intended purpose. The statute unconditionally eliminates the party who does not file his petition timely or the adjudicated or acknowledged when the petitioning father files timely. It is one or the other. The court did not err when it properly dismissed Mr. Fulton and as such acted within the proper statutory constraints.

2. *All common law remedies as existing in Washington case law for de facto parentage are not applicable to this case's facts as the statute addresses this particular factual situation and does not offer the non-prevailing party any other remedies.*

In In re L.B., the Supreme Court set out the standards necessary for a court to invoke common law principles. The common law must be “consistent with Washington statutory law, [and only then can a] Washington court adopt and reform the common law. In re L.B., 155 Wn.2d 679, 688-689, 122 P.3d 161 (2005). In order to use common law a court can only implement common law under RCW 4.04.010 if there:

“in the absence of governing statutory provisions, the courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law.”

RCW 4.04.010; In re L.B., 155 Wn.2d at 688-689 citing Bernot v. Morrison, 81 Wash. 538, 544, 143 P. 104 (1914) (citing Sayward v. Carlson, 1 Wash. 29, 23 P. 830 (1890)). Washington courts have also construed this statute to permit the adaptation of the common law to address gaps in existing statutory enactments, providing that the common law may serve to 'fill interstices that legislative enactments do not cover.' In re L.B., 155 Wn.2d at 689 citing Dep't of Soc. & Health Servs. v. State Pers. Bd., 61 Wn. App. 778, 783-84, 812 P.2d 500 (1991) (citing RCW 4.04.010), cited with approval in Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, 150 Wn.2d 237, 245, 76 P.3d 248 (2003). There are

no gaps in the UPA with regard to the factual situation of two competing males stating they are the father to one child and thereby prevents the petitioner to seek any *de facto* parentage claim. The cases that Washington Appellate and Supreme courts have reviewed are not applicable in this matter.

The facts of this case are distinguishable from the *de facto* parentage cases reviewed in Washington Courts recently. In *In re L.B.*, there were two lesbian women in a long-term relationship to which a child was born into that relationship through artificial insemination with a male friend. The couple held the child out for over six years as the child to both women. The Court used common law principles because the “moving mother” had no statutory remedy as a parent. The court surmised that “the equitable power of our courts in domestic matters permits a remedy outside of the statutory scheme, or conversely, whether our state's relevant statutes provide the exclusive means of obtaining parental rights and responsibilities.” *In re L.B.*, 155 Wn.2d at 688 citing *Accord In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 667, 681-83, 533 N.W.2d 419 (1995).

The parties in *In re L.B.* did not have any remedy with regard to the non-birth mother because RCW 26.26.540 did not address the particular factual situation of two-lesbian women as parents given the definition of father and mother, not mother/mother. The Court concluded that common law “can only fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy.” *In re L.B.*, 155 Wn.2d at 707. The Court went on to state that when “statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations” then common law can be used to resolve the issues. *Id.* at 706-07.

The Appellant argues that *In re JAB* and *In re MF* are applicable to this case because they established a *de facto* parentage for non-parent and a step-parent. Again the facts and applicable statutes are distinguishable from the factual situation in this matter. In *In re M.F.*, the case revolved around establishing a *de facto* parentage claim after final orders in a dissolution were entered five years prior which excluded the step-child. The Appellate Court overturned the lower court’s decision that the step-parent was a *de facto* parent even though

Common law is not allowed as a remedy in this matter and as such the court did not err in dismissing Mr. Fulton and denying him any relief under the common law principles of *de facto* parentage.

3. *The case law and statutes under the UPA with regard to Disestablishment of Paternity and Adoptions are not applicable to this cases' factual situation.*

The appellants' argument that when there is a disestablishment of paternity the court must look into the "best interests of the child standard" prior to any disestablishment is without merit in regard to the facts of this case. In *In re the of Wendy M.*, the appellant court ruled that without another father to step in the court will not disestablish paternity without looking into the best interests of the child. *In re Marriage of Wendy M.*, 92 Wn. App. 430, 431, 962 P.2d 130 (1998); *see also McDaniels v. Carlson*, 108 Wn.2d 299, 312, 738 P.2d 254 (1987). These cases again are distinguishable because both involved a factual pattern where there was not a "biological father" to assume the parental role and the court would not act unless it was in the best interests to "bastardize" the child.

Neither Frank nor Meghan sought to disestablish paternity of Mason. In fact the two parents wanted to establish

paternity with a biological father ready to step into his role as a father thus the court did not have to look into the best interest standard established in McDaniels and In re Marriage of Wendy M.

The Appellant reliance on the adoption portion of the UPA is also misplaced. The adoption statute is based upon an agreement that three parties enter into stating prior to any change of custody that this arrangement is in the best interests of the child. Under RCW 26.26.130 (8) when an adoptive parent or social service agency has/placed the child for over one year in the adoptive household and there is a dispute between the natural parents and adoptive parents then the court must look at the best interests of the child. The dispute here is not over an adoption and the child was not placed in the care of Mr. Fulton by a social service agency. This case is over who is the father and whether Frank has a right to care for his son without interference from a third party. Frank did not give Mr. Fulton permission to raise his son or enter into any contract to give up his parental rights so the use of this statute is misplaced.

A fit parent has a fundamental right to the care, custody, and control of a child without intervention by others, including the courts. *Troxell v. Granville*, 530 U.S. 57, 60, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The State may interfere with the natural parents constitutional rights only if (1) the parent is unfit or (2) the child's growth and development would be detrimentally affected by placement with an otherwise fit parent[.] *In re Marriage of Allen*, 28 Wn. App. 637, 647, 626 P.2d 16 (1981). While Washington courts have long recognized, "that [a child] might be better educated, and better clothed, and have a more pleasant home with some one else than the parent [it] can have no weight with the court as against the natural rights of the parent." *In re Neff*, 20 Wash. 652, 655, 56 P. 383 (1899). A nonparent's capacity to provide a superior home environment to that which a parent can offer is not enough to outweigh the deference that is constitutionally owed to a natural, fit parent. *In re Custody of Shields*, 157 Wash.2d 126, 144, 136 P.3d 117 (2006). The fact that Mr. Fulton believes he is a better parent cannot be the basis for his appeal.

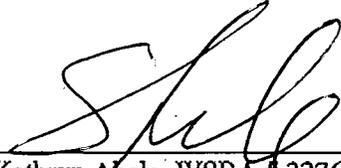
C. FRANK AND MEGHAN SHOULD BE AWARDED THEIR COSTS AND ATTORNEY'S FEES

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 now Frank and Meghan have had to defend their position as the constitutionally protected parents in order to maintain their parental relationship without interference from a third-party. The parents have limited financial means and have had to endure numerous hearing, pleadings, and two other custody cases in order to maintain their parental relationship with their son.

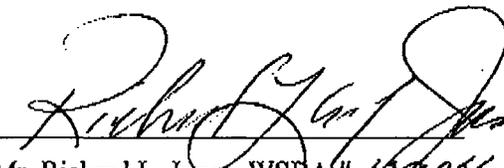
VI. **CONCLUSION**

For the foregoing reasons, Frank Miller and Meghan Cotton respectfully requests this Court deny the appeal and allow the trial court decision to stand dismissing Mr. Fulton and allow these two parents to establish a final parenting plan in the best interest of their child, Mason.

DATED this 18th day of February 2010 at Bothell,
Washington.



Kathryn Abele, WSBA #32763
Attorney for Respondent Miller



Mr. Richard L. Jones, WSBA # 10904
Attorney for Respondent Cotton

DECLARATION OF SERVICE

Pursuant to the authority of RCW 9A.72.085, I do certify as true under penalty of perjury under Washington law that on this day, February 18, 2010, I delivered a true copy of this document, with all attachments, to:

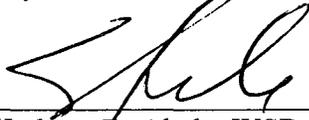
Richard D. Johnson
Court Administrator
The Court of Appeals of the State of Washington
Division I
One Union Square
600 University Street
Seattle, Washington 98101-4170

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

Attorney for Petitioner-Karen Moore
333 Cobalt Bldg
3525 Colby Ave.
Everett, WA 98206
BY: Hand Delivery

Guardian Ad Litem for Mason Fulton
Jeanette Heard
Attorney at Law
3228 Broadway Ave
Everett, WA 98201
BY: Hand Delivery

DATED this 18th day of February, 2010 at Bothell, WA



Kathryn B. Abele, WSBA # 32763