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No. 67748-9-1

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

In re the De Facto Parentage of:

M.M., a minor child,

And

RUSS FULTON, Respondent,

v.

FRANK MILLER and MEGHAN COTTON,
Appellants.

**BRIEF OF AMICUS CURIAE
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COURT OF APPEALS
DIVISION ONE

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INTRODUCTION

In 2005, the Washington Supreme Court recognized the de facto parent doctrine in our state. See *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). Subject to a strict five-part test, this common law doctrine provides a way to preserve a parent-child relationship when a person who has acted in all respects as a child's parent lacks a remedy under applicable statutes. The doctrine recognizes that parentage is more than a simple matter of biology. It is also about *acting* as a parent by providing the day-to-day love, care, and support that a child needs.

This case concerns the parentage of M.M., a four-year old boy. Respondent Russ Fulton and the child's mother Meghan Cotton signed an acknowledgement of paternity that legally established Mr. Fulton as M.M.'s father shortly after the child was born. From M.M.'s birth, Mr. Fulton has acted as M.M.'s parent. But because of a gap in Washington's Uniform Parentage Act (UPA), Mr. Fulton had no statutory remedy to preserve his legal status as M.M.'s parent when Frank Miller, the child's biological father, filed a paternity action 14 months after the child's birth. This left Mr. Fulton with the common law de facto parentage doctrine as the only remedy to maintain his parent-child relationship with M.M.

Mr. Fulton has not filed a brief in this appeal. As a result, it is unclear whether he wishes the trial court's ruling to be affirmed. However, because Legal Voice has a longstanding interest in the de facto parent doctrine and is concerned about the potential application of a ruling in this case to others, we submit this brief at the Court's invitation to explain why we believe the trial court appropriately determined that Mr. Fulton could seek de facto parent status under the facts of this case.

I. IDENTITY AND INTEREST OF AMICUS

Legal Voice, formerly known as the Northwest Women's Law Center, is a non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, education, legislation and the provision of legal information and referral services. Legal Voice has long worked to ensure that the law recognizes and respects the broad range of family relationships. Legal Voice served as co-counsel for the petitioner in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), which recognized the status of de facto parents.

II. STATEMENT OF THE CASE

Legal Voice largely bases its statement of the case on the findings of fact and conclusions of law entered by the trial court. (CP 69-88).

M.M. was born on December 21, 2007 to Meghan Cotton. (CP 80). Ms. Cotton was not married when the child was born.

When Ms. Cotton learned she was pregnant, she first called Frank Miller and told him he was the father of the child. (CP 77). She later called him back and said he was not the father. (CP 78). She ultimately told Russ Fulton that he was the child's father. (CP 77).

Mr. Fulton signed an acknowledgement of paternity for M.M. and was named as the father on the child's birth certificate. (CP 80). Mr. Fulton and Ms. Cotton lived as a family and raised M.M. together for approximately the first year of the child's life. *Id.*

In December 2008, Mr. Fulton and Ms. Cotton separated. (CP 81). M.M. continued to live with Mr. Fulton, who filed a proceeding to establish himself as the child's primary residential parent. *Id.* (This case may be referred to as "*Fulton I.*").

In January 2009, without Mr. Fulton's knowledge, Ms. Cotton and Mr. Miller had a paternity test conducted which indicated that Mr. Miller was the child's biological father. *Id.*

Around April 2009, shortly before trial on Mr. Fulton's petition to establish himself as M.M.'s primary residential parent, Mr. Miller filed a

petition to establish that he was M.M.'s biological father. *Id.* The two cases were eventually consolidated.

In August 2009, the trial court in *Fulton I* entered an order establishing that Mr. Miller is M.M.'s biological father and dismissing Mr. Fulton from the action. *Id.* The court established a parenting plan that would reduce and eventually end Mr. Fulton's residential time with M.M. *Id.* Mr. Fulton unsuccessfully appealed that ruling to this Court. *See In re Parentage of M.J.M.*, 2010 Wash. App. LEXIS 1411 (July 6, 2010).

In November 2009, Mr. Fulton filed an action in Snohomish County Superior Court seeking status as M.M.'s de facto parent. (CP 82). For clarity, this case is referred to as *Fulton II*. The court ruled that Mr. Fulton could seek status as a de facto parent, held that he satisfied all elements of the de facto parent test, and found that it would be in M.M.'s best interest for Mr. Fulton to be declared the child's de facto parent. (CP 69-88). The court found that Mr. Fulton is a primary attachment figure for M.M. and that they have a strong and loving father-son bond. (CP 82). The court also found that cutting off or impairing the lifetime primary bond between M.M. and Mr. Fulton would likely cause emotional or psychological distress or damage to M.M. (CP 83), noting that "the last thing [M.M.] needs is a traumatic change like terminating his bond with

the one adult who has parented him since birth, Mr. Fulton.” (CP 84).

The court entered a parenting plan in which Mr. Miller would be the child’s primary residential parent, with more limited residential time for Mr. Fulton and Ms. Cotton. (CP 105-118).

Mr. Miller and Ms. Cotton appealed the trial court’s ruling to this Court. Mr. Fulton has not filed a brief in response to the appeal. This Court invited Legal Voice and others to file amicus briefs in this matter.

III. ARGUMENT

1. Washington’s De Facto Parent Doctrine Is Equitable, Flexible, And Child-Centered, And Should Not Be Subject To Categorical Exclusions

Mr. Miller and Ms. Cotton argue that the de facto parent doctrine should be unavailable to Mr. Fulton. In essence, they suggest the doctrine should be categorically unavailable to acknowledged fathers whose paternity is disproved through genetic testing in a parentage action brought under Washington’s UPA.

However, the de facto parent doctrine is an equitable remedy that should be based on the specific facts of each case, without categorical exclusions for an entire class of people. These relationships are unique in that parties create them by means other than biology, marriage or formal adoption. Because these relationships develop through varied and

unforeseeable situations, the test of de facto parentage must be flexible, fact-based, and centered on the child. As this Court has appropriately recognized, “our decisions indicate that each determination of de facto parentage should be made based on the particular facts of each case, rather than by applying sweeping, categorical rules. As an equitable remedy, such a question is properly left to a case-specific inquiry.” *In re Parentage of A.F.J.*, 161 Wn. App. 803, 815, 260 P.3d 889, review granted, 172 Wn.2d 1017 (2011).

The multi-factor de facto parent test adopted by the Washington Supreme Court in the *L.B.* case creates an appropriately stringent standard for establishing a parent-child relationship. To establish de facto parentage, the petitioner must show

(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a de facto parent is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.

L.B., 155 Wn.2d at 707-708 (internal quotations and citations omitted).

As a result of these strict factors, establishing the status of a de facto parent is “no easy task.” *Id.* at 712.

The de facto parentage test articulated in *L.B.* provides legal recognition to real life parent-child relationships that stand on an equal footing with parent-child relationships formed through biology or created by formal adoption as provided by statute. *Id.* at 708. The Supreme Court in *L.B.* specifically recognized that a de facto parent “stands in legal parity with an otherwise legal parent, whether biological, adoptive or otherwise.” *Id.* at 707.

In the present case, the trial court found that Mr. Fulton met all of the factors of the *L.B.* test. Further, the trial court distinguished the case from *In re Parentage of M.F.*, where the Supreme Court declined to extend the de facto parent action to a stepfather. 168 Wn.2d 528, 228 P.3d 1270 (2010). In contrast to *M.F.*, Mr. Fulton and Ms. Cotton formed the original family law unit when the child was born with the full intention that Mr. Fulton was the only legal father, not a stepparent. Mr. Fulton signed an acknowledgement that he was M.M.’s father and intended to act his father for life from the outset, and M.M.’s biological father meanwhile took no action to object. As such, the court appropriately found that *M.F.* does not provide a basis to decline to extend de facto parentage to Mr. Fulton in this case, without unnecessarily limiting the doctrine and

precluding consideration of parents, like Mr. Fulton, who in equity should be considered legal parents.

2. The De Facto Parent Doctrine Should Be An Available Remedy To Preserve The Parent-Child Relationship Between M.M. And Mr. Fulton

Mr. Miller and Ms. Cotton also argue that the de facto parent doctrine should not be available to Mr. Fulton because “[t]here are no gaps in the UPA” with regard to the facts presented in this case. (App. Br. at 20). Their argument appears to be based on the Washington Supreme Court’s ruling in *M.F.*, in which the Court reasoned that “the factors prompting us to recognize a remedy in *L.B.* are not present in this case, as no statutory gaps exist to fill.” *M.F.*, 168 Wn.2d at 532; *see also id.* at 535 (“Because no statutory void exists in this case, as it did in *L.B.*, we decline to extend the de facto parentage doctrine to the facts presented”).

While Legal Voice does not agree with the reasoning of the *M.F.* decision, the *M.F.* Court’s focus on whether a “statutory gap” existed in that case should not preclude the application of the de facto parent doctrine here. A close examination of Washington’s Uniform Parentage Act (UPA) shows that a significant gap existed in the statute when Mr. Fulton’s paternity was challenged in 2009, which prevented Mr. Fulton from preserving his parent-child relationship with M.M.

This gap was created in April of 2002, when the Washington Legislature adopted a version of the UPA that spoke incompletely to situations where (as here) an acknowledged father's paternity is challenged by a man claiming to be the child's biological father. This statutory gap left Mr. Fulton and other "acknowledged fathers" (e.g., unmarried men who signed acknowledgements of paternity for a child) without explicit remedies under the UPA if their paternity was challenged by another man claiming to be the child's biological father.

In 2011, the Washington Legislature took a step toward addressing this gap when it amended the UPA to provide that a court may deny genetic testing to disprove the paternity of an acknowledged father. *See* 2011 Wash. Laws 283 §§ 33-34. But this statutory remedy did not exist at the time Mr. Fulton's parent-child relationship was challenged. Under these circumstances, the de facto parent doctrine is an appropriate remedy to preserve the parent-child relationship between Mr. Fulton and M.M., particularly in light of the history of Washington's UPA.

a. History of the UPA

The Uniform Parentage Act (UPA) was initially developed in 1973 as model legislation by the National Conference of Commissioners on

Uniform State Law (NCCUSL).¹ *See* Unif. Parentage Act, 9B U.L.A. 287 (1973).² Washington first adopted the UPA in 1976. *See* 1975-76 Wash. Sess. Laws (2d Ex. Sess.) 1969.

In 2000, NCCUSL promulgated an updated version of the UPA. *See* Unif. Parentage Act, 9B U.L.A. 237 (2000). In April of 2002, the Washington Legislature largely adopted NCCUSL's 2000 version of the UPA. *See* 2002 Wash. Laws 302.

However, in November of 2002, shortly after Washington had adopted NCCUSL's 2000 version of the UPA, NCCUSL amended the model law – largely because of complaints that the 2000 version did not treat children of unmarried parents equally. In its Prefatory Note to the 2002 amendments, NCCUSL explained:

The amendments of 2002 are the end-result of objections lodged by the American Bar Association Section of Individual Rights and Responsibilities and the ABA Committee on the Unmet Legal Needs of Children, based on the view that in certain respects the 2000 version did not adequately treat a child of unmarried parents equally with a child of married parents. Because equal treatment of nonmarital children was a hallmark of the 1973 Act, the objections caused the drafters of the 2000 version to reconsider certain sections of the Act. Through extended discussion and a meeting of representatives of all entities involved, a determination was made that the objections had merit. As a result of this process the

¹ NCCUSL is also known as the Uniform Law Commission (ULC). For consistency, we refer to the organization as "NCCUSL" in this brief.

² Available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.htm>

amendments shown in this Act were presented by mail ballot to the Commissioners and unanimously approved in November 2002.

Prefatory Note, Unif. Parentage Act (2002)³; *see also In re Parentage of J.M.K.*, 155 Wn.2d 374, 377 n.1, 119 P.3d 840 (2005) (“After Washington state adopted the UPA of 2000, the Commissioners revised that version of the UPA in 2002 in part because it treated children of an unmarried couple differently than those of a married couple.”).

Although NCCUSL amended its model UPA in November of 2002 to correct its unequal treatment of children of unmarried parents, the Washington Legislature did not adopt those amendments until nine years later in 2011. *See* 2011 Wash. Laws 283. As a result, for many years (including those relevant to this dispute), Washington’s UPA was based upon a flawed version of the model law.

b. The Statutory Gap in Washington’s UPA for Acknowledged Fathers

As NCCUSL recognized, its 2000 version of the model UPA (which became Washington’s 2002 UPA) was flawed because it treated children of unmarried parents less favorably than children of married parents. Among other problems, this version of the UPA did not provide

³ Also available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm>

equal treatment to children of unmarried parents when the paternity of an acknowledged father was challenged by another man.

Washington's 2002 UPA provided that when a different-sex married couple had a child, the husband would be presumed to be the child's father. *See* RCW 26.26.116(1) (2002). This presumption could be rebutted through genetic testing. RCW 26.26.405 (2002).

Washington's 2002 UPA also provided a relatively simple way for unmarried different-sex parents to establish the paternity of a child. It provided that a man and the child's mother could sign an acknowledgement of paternity, which would establish the acknowledged father as the child's legal parent. RCW 26.26.300 - .375 (2002). Like the presumption of parentage applicable to married fathers, the paternity of an acknowledged father could be disproved through genetic testing. RCW 26.26.405 (2002).

However, in cases where another man sought to challenge the paternity of a presumed (i.e. married) father, Washington's 2002 UPA provided that the court could deny genetic testing to disprove the established relationship between the presumed father and his child. *See* RCW 26.26.535 (2002). By contrast, Washington's 2002 UPA did not provide similar explicit authority for a court to deny genetic testing in

cases where another man challenged the paternity of an acknowledged (i.e., unmarried) father. *See id.*

This disparity treated children of unmarried parents less favorably than children of married parents. For a married presumed father, the UPA provided that a court could protect a father-child relationship from being disrupted by denying genetic testing that could disprove the father-child relationship. But if the paternity of an unmarried acknowledged father was challenged, the UPA failed to provide courts the same explicit authority to deny genetic testing. This left children like M.M. and fathers like Mr. Fulton without remedies under the UPA if their parent-child relationship was challenged by an alleged father.

This disparity in treatment of children born to unmarried acknowledged fathers was also inconsistent with other provisions of Washington's 2002 UPA, which expressly provided that the law must treat children of unmarried parents and children of married couples the same. *See RCW 26.26.106 (2002)* ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.").

As discussed above, NCCUSL acted quickly to respond to complaints that its 2000 version of the UPA treated children of unmarried

parents unequally – including this problem. NCCUSL’s 2002 amendments to its 2000 model UPA explicitly provided courts with the authority to deny genetic testing in cases where the paternity of an unmarried acknowledged father like Mr. Fulton was challenged – the same authority that the UPA provided in cases involving married presumed fathers. In its comments to Section 608 of the amended UPA (which corresponds to RCW 26.26.535), NCCUSL explained:

This section incorporates the doctrine of paternity by estoppel, which extends equally to a child with a presumed father or an acknowledged father. In appropriate circumstances, the court may deny genetic testing and find the presumed or acknowledged father to be the father of the child.

Unif. Parentage Act § 608 cmts. (2002 amendments) (emphasis added).

Similarly, NCCUSL’s comments to Section 609 (which corresponds to RCW 26.26.540) of the amended UPA noted:

The 2002 amendment adding subsection (c) authorizes the court to deny genetic testing in accordance with the principles enumerated in § 608 in a fact situation in which equity justifies a denial. For example, if there is an untimely challenge by a third party to the paternity of an acknowledged or adjudicated father long after an actual father-child relationship has been formed, the court has discretion to refuse to order genetic testing.

Unif. Parentage Act § 609 cmts. (2002 amendments) (emphasis added).

In short, NCCUSL amended its model UPA in November 2002 to provide explicit authority for courts to deny genetic testing that could

disprove the paternity of an acknowledged father. This change was consistent with the law's promise of equal treatment of children born to unmarried parents. But unfortunately for Mr. Fulton, it was not until 2011 that the Washington Legislature incorporated NCCUSL's 2002 amendments to Washington's version of the UPA.⁴

As amended in 2011, Washington's UPA now explicitly authorizes a court to deny genetic testing to disprove the parentage of an acknowledged father like Mr. Fulton. *See* RCW 26.26.535 - .540. Specifically, Washington's UPA now provides that a court may deny genetic testing that could disprove an established parent-child relationship if: (1) the conduct of the mother or father or the presumed or acknowledged parent estops that party from denying parentage; and (2) it would be inequitable to disprove the parent-child relationship between the child and the presumed or acknowledged parent. RCW 26.26.535(a)(i)-(ii).

In determining whether to deny genetic testing of an acknowledged father, Washington's UPA now provides:

⁴ *See* Final Bill Report, E2SHB 1267 (2011) (noting that Washington had not previously adopted NCCUSL's 2002 amendments and that this legislation adopted some of the changes made by NCCUSL), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/House%20Final/1267-S2.E%20HBR%20FBR%202011.pdf>.

[T]he court shall consider the best interest of the child, including the following factors:

- (a) The length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged parent was placed on notice that he or she might not be the genetic parent;
- (b) The length of time during which the presumed or acknowledged parent has assumed the role of parent of the child;
- (c) The facts surrounding the presumed or acknowledge parent's discovery of his or her possible nonparentage;
- (d) The nature of the relationship between the child and the presumed or acknowledged parent;
- (e) The age of the child
- (f) The harm that may result to the child if parentage is successfully disproved;
- (g) The nature of the relationship between the child and any alleged parent;
- (h) The extent to which the passage of time reduces the changes of establishing the parentage of another person and a child support obligation in favor of the child; and
- (i) Other factors that may affect the equities arising from the disruption of the parent-child relationship between the child and the presumed or acknowledged parent or the chance of other harm to the child.

RCW 26.26.535(2); *see also* RCW 26.26.540 (providing that these factors shall also be considered in cases where an alleged father challenges the paternity of an acknowledged father).

If the Legislature had acted two years earlier to adopt these changes to the UPA, Mr. Fulton may well have won a motion to deny the genetic testing that ultimately severed his parent-child relationship with M.M. Parent-child relationships should not depend on this sort of happenstance. That is why the de facto parent doctrine is needed.

c. The De Facto Parent Doctrine Is An Appropriate Remedy to Fill This Statutory Gap

The Washington Supreme Court recognized in its *L.B.* decision that “Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and their families in the face of changing realities” and “have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely.” *L.B.*, 155 Wn.2d at 691; *see also id.* at 701 (noting “the recognized and accepted role of the judicial branch of our government in resolving family law disputes, especially when the legislative enactments speak to an issue incompletely.”). As the Court explained, it recognized the de facto parent doctrine “to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy.” *L.B.*, 155 Wn.2d 707.

Here, Washington’s UPA did not speak completely to how the parentage of an acknowledged father like Mr. Fulton should be resolved

when his paternity was challenged by Mr. Miller. Essentially by oversight, the UPA adopted by Washington in 2002 provided courts with no explicit authority to deny genetic testing when the paternity of an acknowledged parent was challenged; instead, that authority was provided only when the paternity of a married, presumed father was challenged. This resulted in the law treating children of unmarried parents unequally – despite a stated legislative policy that a child born to parents who are not married to each other must have the same rights under the law as a child born to parents who are married to each other. RCW 26.26.106 (2002).

As a result, there was a statutory gap in 2009 when Mr. Fulton’s parent-child relationship with M.M. was severed. The de facto parent doctrine provides an appropriate remedy to fill this statutory gap.

3. The Court’s Ruling Did Not Create An “Unnecessary” Third Parent for M.M.

Mr. Miller and Ms. Cotton also suggest that extending de facto parent status creates an “unnecessary” third parent for M.M. (App. Br. at 28). However, this Court has already recognized that in appropriate cases, the de facto parent doctrine may be used to provide a child with a third legal parent. *See In re Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008).

Here, the trial court found that preserving M.M.'s relationship with Mr. Fulton is in the child's best interests. As the trial court recognized, Mr. Fulton is "the one person who has parented [M.M.] throughout his life" (CP 88) and "cutting off or impairing the lifetime primary bond between [M.M.] and Russ Fulton at this time would likely cause emotional or psychological distress or damage" to the child. *Id. at 83.*

This findings are not surprising. Considerable research demonstrates that "children can and do form close emotional bonds in multiple relationships." Jason D. Hans, *Stepparenting After Divorce: Stepparents' Legal Position Regarding Custody, Access, & Support*, 51 *Fam. Relations* 301, 301 (2002). It has also long been recognized that "children need to experience secure attachments for optimal development." *Id. at 306.* Indeed, there is "near consensus . . . for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships." Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 *Va. L. Rev.* 879, 902 (1984). As the Washington Supreme Court has noted, "[c]hild development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is

not the natural parent.” *McDaniels v. Carlson*, 108 Wn.2d 299, 310, 738 P.2d 254 (1987).

As a result, it was not improper for the trial court to find that M.M. should have three legal parents.

IV. CONCLUSION

For the foregoing reasons, the trial court’s decision holding that Mr. Fulton is M.M.’s de facto parent should be affirmed.

Respectfully submitted this 26th day of April, 2012.

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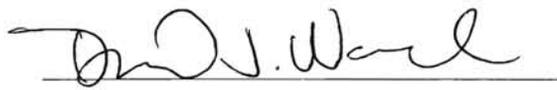
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DECLARATION OF SERVICE

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