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No 67748-9

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

In Re the De Facto Parentage of:

MASON COTTON MILLER, a minor child,

And

RUSS FULTON, Respondent.

vs.

FRANK MILLER, Father/Appellant

And

MEGHAN COTTON, Mother/Appellant,

APPELLANT MILLER'S REPLY TO LEGAL VOICE AMICUS BRIEF

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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

ORIGINAL

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I. INTRODUCTION

In this matter the Amicus Briefs are not relevant and incorrectly apply the law to the facts of this case and should be disregarded.

Under the facts of this case RCW 26.26 gave the Court the ability to deny a paternity test in the *Fulton I* but it was not relevant to the proceeding because Mr. Fulton stipulated to the paternity and only later tried to rescind his stipulation. The issue is not whether Mr. Fulton had a remedy under statutory authority, the issue is only whether the particular facts of this case under statute were contemplated by the Legislature when applying the UPA and the Court of Appeals has already ruled yes on that in the mandated decision by this Court in the previous case.

The UPA infers a relationship with a parent who signs an affidavit of paternity as they become the natural father after 60 days of signing. The only means to disprove the paternity is by use a statutory remedy. RCW 26.26.540, and its relevant provisions, is and was the only remedy to a paternity action when there is a challenge by another male of paternity. The statute did its job in this matter and quickly remedied the situation of two competing father interests.

The only legal question that must be answered pertaining to the facts of this case is not whether Mr. Fulton could continue his

relationship with the child, but whether the UPA was the only remedy and operation of law allowed in Washington to determine the paternity to this child. The answer to that question is: Yes.

The only way paternity is determined under Washington law is first apply a strict statutory inquiry under the UPA. If, after application of the UPA, a specific factual circumstance not contemplated by the statute is confronted, the trial court is permitted to consider common law doctrines to determine paternity. It is Appellants' contention that the trial court erred when it adjudicated Mr. Fulton a *de facto* father/parent to Mason Miller under common law as he had two fit biological parents and any adjudication after August 2009 was clearly contrary to the Laws of the State of Washington.

II. REPLY TO AMICUS BRIEF FROM LEGAL VOICE

(A) Washington's UPA is completely applicable to the facts of this case and a finding of De Facto parentage is contrary to State law

The Supreme Court only adopted the de facto parentage doctrine to correct a "specific statutory shortcoming," in *In Re L.B.* because the woman lacked of remedy to show she was a "parent" in every way but legally. The establishment of the the common law action was only "to fill this statutory gap, [they] created a common law method to establish parentage where, had the respondent been able to participate in traditional family formation,

parentage would have or could have been established by statutory means.” *In re Parentage of M.F.*, 168 Wash.2d 528, 530, 228 P.3d 1270 (2010).

In 2007, the Court of Appeals refined the requirements necessary for a party to make a *de facto* parent claim if there is or has been statutory relief available to the parties involved when it decided *In re Parentage of M.F.*, 141 Wn. App. 558, 170 P.3d 601 (2007). In *In re M.F.*, the Court of Appeals ruled that even if the party seeking *de facto* parent can qualify or meet the five-part test that party must still meet the adequate cause threshold to modify any existing parenting plan in place concerning the child whom they are seeking De Facto parent status. *Id.*

The Supreme Court did not overturn or overrule any requirement to modify a parenting plan and the “best interests of this child” were already determined under the Paternity action filed in April 2009 when the trial court determined Mr. Fulton to “not be the father to Mason.” The facts of this case are not something the legislature did not anticipate when it adopted the UPA and case law does not support the contention that the unmarried father was treated differently than the married father.

(B) De Facto Parent status should not be available to a party who has been determined not a parent under statutory law because the UPA has not void in determining Parentage.

The UPA is completely applicable to the facts in this matter. The argument that the UPA treats acknowledged or unmarried fathers differently is without merit as the UPA does not treat unmarried and married father's differently. Recent cases in Washington support the argument that the UPA is applied equally to presumed, adjudicated and acknowledged fathers.

Under Washington case law an unmarried man who signs the affidavit of paternity "becomes the natural father of [the] child 60 days after a paternity affidavit is filed, and there is no further legal action necessary, required or permitted regarding the legal determination tha the man is the father." *In re Parentage of J.M.K.*, 155 Wash.2d 374, 388-89, 119 P.3d 840 (2005). This ruling prevented an acknowledged father from disestablishing his paternity as he was time-barred. The father was not married to the mother and was denied relief because it was past the time for rescission.

The Court of Appeals upheld *In re Parentage of C.S.*, 134 Wn. App. 141, 139 P.3d 366 (2006) the paternity of a presumed father based up the time limits of the statute. In *In re Parentage of C.S.* that case involved a presumed father who wanted to disestablish his paternity to that of an alleged father (with DNA testing results) after the two-year statute of

limitations under the UPA had expired. *In re Parentage of C.S.*, 134 Wn. App. at 148. The Court did not treat the presumed father any differently than a acknowledged father and properly ruled that the “[T]here is no void in the law of parentage: The Uniform Parentage Act “governs every determination of parentage in this state.” *Id.* at 153.

This case was decided after *In re L.B.* and the court reasoned because the UPA was applicable and not ambiguous they “[saw] no basis for a common law claim. The common law claim of *de facto* parent should never have been available to Mr. Fulton as the UPA is unambiguous to the manner in which courts in Washington State must deal with two competing paternal interests outside the context of gay or lesbian relationships.

The gap in the UPA suggested by the Legal Voice does not exist as to the legal situation presented in their brief concerning an acknowledged father’s right to have a court deny DNA testing under statute. The Court of Appeals in *Fulton I* analyzed the statute and its protections when affirming the decision to dismiss Mr. Fulton as “not the father.” EX. 33.

The argument that Mr. Fulton being unable to “deny genetic testing” is not accurate in this matter. The fact is Mr. Fulton stipulated to the paternity of Mr. Miller and the need to

have a genetic test or have the court deny or order one was not necessary in this case.

The issue of DNA tests under the 2002 version of RCW 26.26 was dealt with by this Court in 2005. In *In re the Parentage of M.S.*, the court ruled that the statute stating paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing does not preclude adjudication as a means of rebutting presumption of paternity.” *In re the Parentage of M.S.* 128 Wn. App. 408, 413, 115 P.3d 405 (2005). These ruling clarify that the UPA, in our case, did not treat the three types of father’s differently.

The argument that *In re Parentage of J.A.B.* is applicable to this factual situation is not accurate and the argument misplaced. The child in that case was 7 years old when the issue of paternity came up and had lived with the “de facto” parent since the child was 4 months old. The bio-dad in that matter never objected to the role of the “de facto” parent and allowed the relationship for 7 years. The use of the statute for paternity was time-barred in this matter making common-law the only viable resolution given the mother’s mental illness and the need to adjudicate the paternity between the competing males. *In re J.A.B.*, 146 Wn. App. 417, 1981 P.3d 71 (2008).

The case before this court is completely distinguishable from *In re J.A.B.* because the petition for paternity was timely filed and adjudicated the correct father for this child and any applicable common law was unnecessary.

When the legislature enacted the UPA in 2002 and directed that the acknowledged father be dismissed if a biological father makes a claim within the statutory time period, it presumed that the relationship between the child and the former acknowledged father would be severed. It is common sense to sever the relationship as early as possible in young child's life as to cause the least amount of disruption or trauma just, as Judge McKeeman stated in his ruling on August 13, 2009. Ex. 25; pg 1-4. Acceptance and adjudication of Mr. Fulton's *de facto* parentage claim made after his dismissal from the paternity action completely disregards and undermines the legislative intent to quickly resolve paternity matters with an accurate determination of paternity. *State v. Santos*, 104 Wash.2d 142, 147-48, 702 P.2d 1179 (1985).

"The 'best interests' is irrelevant in this matter as prior to the *De Facto* petition filed by Mr. Fulton the best interest of this child were already determined. After the the determination of paternity the "best interests" is not proper as it is only allowed to be used when determining custody between parents because custody "between a parent and a nonparent, ... a more stringent balancing test is required to justify awarding custody to the

nonparent. Great deference is accorded to parental rights, based upon constitutionally protected rights to privacy and the goal of protecting the family entity." *In Re the Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001), citing *Allen*, 28 Wn. App. at 645-46 (emphasis added).

The Court in this case completely disregarded the law concerning paternity and custody. The relationship between Mr. Fulton and this child is not the test as "the correct starting point is not whether the de facto parent test has been met" but, rather, whether that test is applicable here; the de facto parentage test is relevant only if we first decide "that the de facto parentage doctrine applies to the circumstances presented in this case." *M.F.*, 168 Wn.2d at 534.

Common law doctrines cannot supercede or amend a clear and unambiguous statute and *RCW 26.26* and its relevant provisions are very clear as being applicable in this matter and therefore the Court erred in determining Mr. Fulton another father to this child.

III. CONCLUSION

III. CONCLUSION

The Court should grant the relief requested and void all orders in this matter as Mr. Fulton did not have a right to make any common law claim given the previous statutory remedy applied and mandated under *Fulton I*.

DATED this 7 th day of May 2012.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on May 8, 2012, I served the Reply brief to

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