

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Parentage of:
MARNITA FRAZIER, Child,

JOHN CORBIN,
Respondent,
v.

PATRICIA REIMEN,
Petitioner,

EDWARD FRAZIER,
Respondent.

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ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Hon. John Lucas

PETITIONER'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

One of the principal means by which the State organizes its domestic relations law is by defining who is a parent. The status may derive from biology, marriage, or other operation of law (e.g., adoption). These legal definitions of parent may or may not coincide with other definitions – “natural,” social, cultural, familial, religious, or personal.

For as long as the State has been in the business of defining legal parentage, it has adapted to changes in the reality of how people live, and how people feel about that. Until recently, children born “out of wedlock” were “nullius filius” – children without fathers, a doctrine now vigorously repudiated. Adoption was long considered “unnatural,” since it disregarded biological connection. For many today, parentage achieved by alternative reproductive technologies (ART) evokes similar feelings, and different states have enacted widely variant approaches to ART.

The important point is to see the State’s hand at work in this arena and to identify what today we embrace as the paramount concern of this State function: to provide the child with the love and support necessary to thrive. Of all the purposes served by the State definition of parent, none is more important than this. The de

facto parent doctrine performs an essential safety net role in furthering this purpose. Any retreat from that doctrine will leave a small but deserving number of parents and children without any legal protection for their relationships.

B. ISSUES PRESENTED

1. What must a *de facto* parent petitioner establish in pleadings and proof to be granted a trial on the merits?
2. Is a person who pleads and presents *prima facie* proof of the *de facto* parent factors precluded from the cause of action because he was, during a portion of his *de facto* parentage, also a stepparent?
3. Is the *de facto* parent doctrine limited to lesbian partners who co-parented since the child's birth?
4. Is an unconstitutional statute a nullity and, therefore, not a statutory remedy available to a *de facto* parent petitioner?
5. Is the existence of the nonparental custody petition a bar to the *de facto* parent cause of action, which is an action to establish parentage, not a challenge to a parent's fitness?
6. Was the modification issue waived because not raised below and, in any case, was adequate cause established or, if not, is the remedy remand for joinder?

C. STATEMENT OF THE CASE

Because this case is before the court on summary dismissal, the court presumes Corbin's factual allegations to be true. *In re Parentage of L.B.*, 155 Wn.2d 679, 684 n.2, 122 P.3d 161 (2005). Without reciting them again, suffice to say that the pleadings establish prima facie that Corbin easily satisfies the de facto parent factors set forth in *L.B.*, 155 Wn.2d at 708. See Petition for Review, at 2-6; Br. Respondent, at 2-7; Answer to Motion for Discretionary Review, at 3-8. In short, for all but the earliest months of M.F.'s life, John Corbin has been her Dad.

Pursuant to the trial court's temporary orders, M.F. continues to reside approximately halftime in the Corbin household. She will turn 15 years old in December. Pursuant to a modification of the parenting plan that governs her brothers' residential schedule, they now reside primarily in Corbin's household. *See In re the Marriage of Corbin*, #60224-1-1 (Division One, Aug. 4, 2008).

D. ARGUMENT

1. EQUITABLE REMEDIES ESCHEW CATEGORICAL EXCLUSIONS AND ARE PROPERLY DECIDED ON CLOSE EXAMINATION OF THE PARTICULAR FACTS OF THE CASE.

The Court of Appeals and Reimen repeatedly reduce Corbin to the category of "former stepparent." However, Corbin's former

legal relationship to Reimen is irrelevant to the de facto parent analysis. Whether or not the adults ever married, the salient fact remains that Corbin parented M.F. He did so before the marriage, during the marriage, and for the eight years since the marriage ended.

When the Court of Appeals seized upon the fact of the marriage to derail summarily Corbin's de facto parent petition, it put the cart before the horse. Here, as in all cases involving an equitable remedy, the issues are best left to trial for resolution precisely because the remedy is intensely fact-dependent, as this Court has observed about equitable claims in general.

... equitable claims must be analyzed under the specific facts presented in each case. Even when we recognize "factors" to guide the court's determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence. **In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment.**

Vasquez v. Hawthorne, 145 Wn.2d 103, 107-108, 33 P.3d 735

(2001) (emphasis added). Here, when the ***M.F.*** panel in Division

One identified the "correct starting point" as "whether de facto

parenthood may be applied at all to the circumstances of this case"

(In re Parentage of M.F., 141 Wn. App. 558, 565, 170, P.3d 601 (2007)), it mistook the nature of the equitable remedy, which does not categorically exclude certain kinds of people. Instead, the correct starting and ending points are the five factors a de facto parent petitioner must prove. There is no other threshold requirement or inquiry.

2. CORBIN HAS NO OTHER ADEQUATE REMEDY.

This Court embraced the de facto parent doctrine because the relevant “statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations.” *L.B.*, 155 Wn. 2d at 706. The court’s equitable power is ideally suited to rescuing those parent-child relationships that otherwise would fall through the interstices in the statutory scheme. *Id.*, at 707.

However, the *M.F.* panel contorted the impetus behind *L.B.* into an obstacle, declaring that anyone who could *file* for statutory relief could not avail himself of the equitable doctrine, even if the statutory relief was not the relief sought and even if the statute in question was a constitutional nullity. Thus, in the panel’s view, Corbin was disqualified from the de facto parent doctrine because he could file (though not win) a nonparental custody petition and

could have filed (under an unconstitutional statute) for stepparent visitation.¹

Recently, another panel in Division One flatly disagreed with this approach, questioning why a person claiming to be a parent should be required to seek relief reserved to nonparents (e.g., third parties and stepparents). *In re Parentage of J.A.B.*, --- P.3d ---, 2008 WL 3983878, Wash.App. Div. 1, August 25, 2008 (NO. 59165-7-1, 59169-0-1), at ¶¶ 20. Observing that the nonparental custody statute was equally “available” to the petitioner in *L.B.*, the *J.A.B.* panel recognized that the statute provides an inadequate remedy to one who seeks acknowledgement of parenthood. Indeed, it is the inadequacy of that remedy that in part necessitates the equitable doctrine. *Id.*, at ¶¶ 22.

Nor, in the view of the *J.A.B.* panel, did it matter that the parties there could have married, unlike the parties in *L.B. J.A.B.*, at ¶¶ 23-28. To focus on that fact, or, as the *M.F.* panel did, on the fact that Corbin was once married to Reimen, ignores that the proper focus of the de facto parent doctrine is on the relationship between the petitioner and the child, not on the legal relationship

¹ As noted in the Petition for Review, Corbin actually had no standing under RCW 26.09.240. Thus, this remedy is illusory for two reasons. See Petition for Review, at 15.

between the adults. *J.A.B.*, at ¶ 25. Indeed, it is precisely because no statute contemplates the former relationship that the de facto parent doctrine is necessary. *Id.*

Like the petitioner in *J.A.B.*, Corbin has no adequate remedy at law, no means other than the de facto parent doctrine by which to establish that he is M.F.'s parent.

3. REIMEN'S CONSTITUTIONAL RIGHT IS NOT IMPLICATED BY CORBIN'S PETITION.

Again, because Corbin seeks recognition of parenthood, the *M.F.* panel's concerns about trenching upon Reimen's constitutional right are misplaced. *M.F.*, 141 Wn. App. at 567-568. The fundamental right to parent is not implicated in actions between parents, as it is in actions between parents and nonparents. *L.B.*, 155 Wn.2d at 712 ("the rights and responsibilities which we recognize as attaching to *de facto* parents do not infringe on the fundamental liberty interests of the other legal parent in the family unit"). Should Corbin establish his de facto parenthood, he will stand in parity to Reimen. The idea that his effort to establish parenthood violates Reimen's right makes no more sense than the same principle applied to other parentage actions. Moreover, as in many of those actions, it is the legal parent's own actions that give

rise to the petitioner's parenthood (e.g., ART, sexual intercourse, or, as here, through consenting to and fostering the parent-like relationship). *L.B.*, at 712 (de facto status "can be achieved only through the active encouragement of the biological or adoptive parent"). Contrary to the *M.F.* panel, Corbin's role in these proceedings is not that of a "former stepparent" or other third party. He is petitioning as a de facto parent. *L.B.*, 155 Wn.2d at 709-710. **See, also, *J.A.B.***, at ¶ 21 ("if a person is a de facto parent, he or she is not a "nonparent"). Reimen's constitutional right is simply not implicated. *L.B.*, at 711 (no "constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family").

4. THE UNUSUAL FACTS OF THIS CASE RENDER FLOODGATE ARGUMENTS BASELESS.

Ignoring the trial court's extensive written findings and conclusions, the *M.F.* panel emphasized an inconsistent statement in the oral ruling where the trial court declared the de facto parent factors to be satisfied by "the fact of the marriage and the length of the marriage." 141 Wn. App., at 564-565. The appellate court's emphasis is puzzling, since "a written order controls over any apparent inconsistency with the court's earlier oral ruling."

Shellenbarger v. Brigman, 101 Wn. App. 339, 346, 3 P.3d 21 (2000). It appears the court took seriously Reimen's warning that floodgates would open – that wholesale suits by stepparents will follow. This fear is quickly extinguished if one heeds the *L.B.* test, proof of which presents “no easy task.” *L.B.*, 155 Wn.2d at 712.²

Moreover, this particular case should calm floodgate fears because of three highly unusual facts. First, Corbin was positioned in his relationship to M.F. as the father, not the stepfather, with M.F. encouraged to call him Dad, to take his last name, and to supplant the legal father. Second, Corbin's assumption of this role was consented to and fostered by both legal parents, by the mother, Reimen, and by the legal father, Ed Frazier. Finally, Corbin's relationship to M.F. continued for years after the Corbin-Reimen divorce, meaning long after he ceased to be M.F.'s stepparent. These facts set this case apart from the vast majority of blended family cases, where children continue their relationship with both legal parents after separation of the parents; where children understand their stepparents to be stepparents, not parents; and where the stepparent-child relationship diminishes and ends

² The claim by Reimen that Corbin's effort to prove de facto parenthood avoids the more difficult test of nonparental custody fails to recognize the difficulty of the *L.B.* test. It is unclear by what yardstick she compares the difficulty of these very different tests, though it is clear that the *L.B.* test is plenty difficult.

following the dissolution of the legal relationship between the adults. If this case is not sui generis, it is very close. There simply are not going to be many cases where both legal parents invite a third person to step into the full parental role, as was the case here. In short, the floodgates are secure, due to the difficulty of the *L.B.* test.

5. THIS CHILD REALLY DOES HAVE THREE PARENTS.

The consequence of the parties' actions in this case is that M.F. has three parents: Reimen, Corbin, and Frazier. It is likely that M.F. has company in this regard, not because of the de facto parent doctrine, but because statutory means of establishing the parent-child relationship permit, for example, three-parent adoptions or three-parent childbearing arrangements. See RCW 26.33.020(4) ("Adoptive parent" means the person or persons who seek to adopt or have adopted an adoptee."); RCW 26.33.140(2) ("Any person who is legally competent and who is eighteen years of age or older may be an adoptive parent."); *State ex rel. D.R.M.*, 109 Wn. App. 182, 34 P.3d 887 (2001) (single people may adopt; statute does not limit adoption to married couples); RCW 26.26.101 (means of establishing parent-child relationship); RCW 26.26.710

and .735 (by operation of statute and agreement, husband, wife and egg donor could all be parents); RCW 26.26.525 (child may adjudicate parentage at any time). By report, such families have been formed in Washington and other states. See Wald, Deborah H., *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, And Parental Conduct In Determining Legal Parentage*, 15 *Am. U. J. Gender Soc. Pol'y & L.* 379-411 (2007).

While true that most statutes speak in terms of a two-parent/father-mother paradigm, reliance on "this historical perspective not only ignores the present, but also makes too much of the past." *Gormley v. Robertson*, 120 Wn. App. 31, 37, 83 P.3d 1042 (2004). Indeed, the de facto parent doctrine exists precisely because present reality demands it. The question is not whether Marni has two fathers, and a mother, but whether the law will protect her relationship with the three parents she does have.

Such recognition is beginning to appear in reported cases. For example, an appellate court in Pennsylvania recently acknowledged that sometimes there are three parent figures in a child's life, when it apportioned a child support obligation among two parents and one party *in loco parentis*. *Jacob v. Shultz-*

Jacob, 923 A.2d 473, 482 (Pa.Super. 2007).³ The court rejected the argument that “the interjection of a third person in the traditional support scenario would create an untenable situation, never having been anticipated by Pennsylvania law.” 923 A.2d at 482. Rather, the court expressed confidence in the trial court’s ability to formulate fractional shares of support for the parties and embraced its own duty, “in the absence of legislative mandates,” to “construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have vis-à-vis each other.” *Id.*

In the same pragmatic vein, an Ontario court confirmed a child’s relationship with three parents, exercising its *parens patriae* power to address a gap in legislation written without contemplating the kinds of parenting relationships occurring today. *A(A) v. B(B)*, 2007 CarswellOnt 2 ([2007] W.D.F.L. 1110) (01/02/07). In doing so, the court protected a child “who is obviously thriving in a loving family that meets his every need.” *Id.*, at ¶ 2. Any other result, would have deprived the child, not only of an important relationship,

³ In Pennsylvania, the status *in loco parentis* affords to a third party “the opportunity to litigate fully the issue of whether that relationship [with the child] should be maintained even over a natural parent’s objections.” *Id.* at ¶ 10 (internal citations omitted). However, unlike Washington’s *de facto* parent doctrine, the “*in loco parentis* status does not elevate a third party to parity with a natural parent in determining the merits of custody dispute.” *Id.*

but of “the equality of status that declarations of parentage provide.”
Id., at ¶ 35.

Likewise, to treat Corbin or M.F. differently than the parties in *L.B.* injects precisely the kind of inequalities in treatment that are now statutorily banned and constitutionally prohibited. See *Parentage of Calcaterra*, 114 Wn. App. 127, 56 P.3d 1003 (2002) (UPA’s primary goal “is the equalization of the rights of all children”); *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (“persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” [internal citations omitted]); U.S. Const., amend. 14; Const., art. 1, § 12 (“granting to any citizen [or] class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens.”).

Another development in the law important in this area is the emerging recognition that the child has an interest at times independent of the parents’ interest. The parent-child bond, after all, does not belong to the parent alone. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (“the relationship between parent and child is constitutionally protected”) (emphasis added). Twenty years ago, the Washington court recognized that “[t]he trend is for a greater recognition of the fact

that these impressionable and emotionally and psychologically fragile infants are not chattels or playthings or mere desiderata but have rights of their own which should be protected." *In re Clark*, 26 Wn. App. 832, 839, 611 P.2d 1343 (1980).

Indeed, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), cited in *Troxel v. Granville*, 530 U.S. 57, 89 n. 8, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (Stevens, J. dissenting). And, increasingly, courts have recognized that "biological relationships are not exclusive determinations of the existence of a family." *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). As recently observed by former Justice Bridge:

... decisions about a child's welfare should be premised to a greater degree than our current precedent allows on the concept that a child has a fundamental right to a stable and healthy family life. That right should include independently valued protections of a *child's* relationship with siblings and with adults other than his or her biological parents with whom the child has formed a critical bond. See, e.g., *In re Parentage of L.B.*, 155 Wash.2d 679, 122

P.3d 161 (2005); *In re Celine R.*, 31 Cal.4th 45, 1 Cal.Rptr.3d 432, 71 P.3d 787 (2003) (discussing the importance of stable sibling relationships).

Custody of Shields, 157 Wn.2d 126, 151, 136 P.3d 117 (2006). In this case, the child has a voice and an advocate in the guardian *ad litem*, who has recommended protection for the child's relationship to Corbin. To ignore that voice would be to ignore that the child's welfare is the court's principal concern, since "[w]hen the issue is a child's parentage, 'the best interests of the child control.'" *Marriage of Swanson*, 88 Wn. App. 128, 136, 944 P.2d 6 (1997), *citing* *McDaniels v. Carlson*, 108 Wn.2d 299, 309-10, 738 P.2d 254 (1987).

In sum, where a familial bond critical to a child's well-being requires recognition that there are three parents, this Court should not subscribe to false zero-sum arguments. This Court already has once endorsed a more flexible approach. *McDaniels v. Carlson*, 108 Wn.2d at 313 (recognizing biological and presumed fathers). Other courts around the country likewise demonstrate a flexible pragmatism. *See, also, Sinicropi v. Mazurek*, — N.W.2d —, 2008 WL 2596217 Mich.App., July 1, 2008 (declining to revoke presumed father's acknowledgement despite acknowledgement of biological father); *Cerwonka v. Baker*, 942 So.2d 747, 753

(La.App. 3 Cir., 2006) (three parents awarded joint custody); *In re Jesusa V.*, 32 Cal.4th 588, 599, 85 P.3d 2, 8 (2004)

(acknowledging parental rights in presumed and biological fathers);

LaChappelle v. Mitten, 607 N.W.2d 151, 161 (Minn.App. Mar 14,

2000), *cert. den.* 531 U.S. 1011, 121 S.Ct. 565, 148 L.Ed.2d 485

(2000) (recognizing parental/custodial rights/obligations in three

adults); *Geen v. Geen*, 666 So.2d 1192 (La.App. 3 Cir., 1995)

(recognizing three parents: mother, biological father, legal father,

and confirming custody in latter); *Smith v. Cole*, 553 So.2d 847

(La., 1989) (discussing dual paternity); *Finnerty v. Boyett*, 469 So.

2d 287 (La. Ct. App. 1985) (recognizing biological and presumed

fathers). *See, also, ALI Principles*, § 2.03(1)(b)(iv) (allowing for

recognition of parent by estoppel where there are two legal

parents).

Though unusual, there is nothing inherently problematic about families headed by parents who number more (or less) than

two. *See, Bix, Brian, The Bogeyman of Three (or More) Parents,*

U. Minn. Law School, Legal Studies Research Papers

(<http://ssrn.com/abstract=1196562>). Indeed, *L.B.* proceeds from

the recognition that people build their relationships to suit

themselves, not a state-mandated template. To acknowledge the

need to protect these relationships is not to declare open season on structure or an end to boundaries. Clearly, concerns about proliferating parents are bonafide, even if exaggerated at times. As the court is well aware, sometimes it seems that two parents is one too many. Accordingly, this Court emphasized the boundaries it gave our state's *de facto* parent doctrine, instructing on the need for precision (i.e., not to confuse terms and statuses, including, presumably, not to conflate stepparent with *de facto* parent or *de facto* parent with psychological parent); adding a "permanent commitment" factor to the test adopted by most other states; and emphasizing that proof of the factors would be difficult (proving a *de facto* parent claim "no easy task." *LB*, 155 Wn.2d at 712).

In any event, whatever additional complexity may arise from the recognition of three parents is substantially outweighed by the cost of sundering a parent-child relationship. M.F. has spent virtually her entire life in the care of her mother and the man who has functioned as her father, Corbin. These parties – Reimen, Frazier, and Corbin – constructed this relationship. The *de facto* parent doctrine offers the only means to prevent its destruction by Reimen.

6. WHETHER THERE OR TWO OR THREE PARENTS,
THE CHILD'S BEST INTERESTS GOVERN THE
PARENTING PLAN.

Fears of three parents often are grounded on concerns about multiplying custody disputes. See Wald, at 408-410. Certainly, such disputes can and likely will happen. But the law provides a means to deal with such circumstances. Under Washington's Parenting Act, which eschews a hierarchical and bipolar custody/visitation model in favor of a cooperative model predicated on residential time, there is no legal or practical impediment to a three-way parenting plan. Certainly, a trial court will have considerable discretion in fashioning a plan that accommodates the needs of the child within the reality of her life, guided, as this Court observed in *L.B.*, by the child's best interests. 155 Wn.2d at 708-709 (parent's rights and responsibilities determined by child's best interests, citing RCW 26.09.002⁴). The

⁴The statute provides:

Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth,

fathers in this case already have modeled precisely how well such an arrangement can work. Frazier long ago ceded his parental functions to Corbin and he supports the continuation of that arrangement (i.e., Corbin remaining the primary father figure in M.F.'s life). Indeed, Frazier's involvement in M.F.'s life has increased since Corbin and he began communicating directly (bypassing Reimen). In short, the parties already are functioning in a three-way "parenting plan." Fears about theoretical difficulties in constructing a parenting plan in the child's best interests should not hinder preservation of this child's relationship to her de facto father.

E. CONCLUSION

For the foregoing reasons, John Corbin asks this Court to reverse the decision of the Court of Appeals and to remand this matter to the superior court for trial on his de facto parent petition.

Dated this 15th day of September 2008.

RESPECTFULLY SUBMITTED,



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Attorney for Petitioner

health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.