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No. 58658-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Parenting of:

MARNITA FRAZIER (DOB: 12/15/1993),

Child,

JOHN CORBIN,

Respondent,

v.

PATRICIA REIMEN,

Petitioner,

EDWARD FRAZIER,

Father.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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REVIEW FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE JOHN LUCAS

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 126 S. Ct. 2021 (2006) cannot be read so broadly as to allow a third party to unilaterally step in and demand the same rights as a child's natural parents without regard to an existing parenting plan. This case is not about whether a bond between a stepparent and child should compel the courts to protect that relationship. Rather, it concerns whether this "bond" should elevate the stepparent to the same footing as the parents, when neither is alleged to be unfit or unable to make appropriate decisions for the child.

The stepfather ignores the fact that he had the ability to make his relationship with the child "permanent" when he and the mother divorced. At that time, the stepfather could have obtained visitation under RCW 26.09.240. His decision not to obtain those rights then should foreclose his claim now. By allowing the stepfather to pursue his action as a *de facto* parent, the trial court impermissibly invaded the parents' right to raise their child without undue State interference. The trial court's decision also creates a situation where two conflicting orders will define the child's

residential schedule. This court should reverse and dismiss the stepfather's *de facto* parentage action.

II. REPLY ARGUMENT

A. The Alleged Existence Of A Bond Between Former Stepparent And Child Is Insufficient To Elevate The Stepparent's "Rights" To Those Of The Child's Natural Parents.

The bond between a child and stepparent, while important, cannot elevate the stepparent's rights to those of the child's living natural parents. The stepfather cites a number of cases from other jurisdictions that granted visitation to a stepparent over the objection of the natural parent based on the bond formed between stepparent and child. (Resp. Br. 12-13) But many of these cases recognize that the stepparent's rights are not equal to the natural parent's rights. See ***Simpson v. Simpson***, 586 S.W.2d 33 (Ky. 1979) (Resp. Br. 13) (stepmother not entitled to custody of child when she cannot prove that the natural father was unfit); ***Caban v. Healey***, 634 N.E.2d 540, 543 (Ind. App. 1994) (to the extent not explicitly stated in ***Collins v. Gilbreath***, 403 N.E.2d 921 (Ind. App. 1980) (Resp. Br. 13), stepparents may only pursue visitation rights to a former stepchild, not custody).

Further, to the extent that some of these cases implied that the stepparent's right to visitation was equal to a natural parent, they have been limited by newer cases. For example, in 1982 the Alaska Supreme Court held that a former stepfather was entitled to seek visitation with his former stepson because the stepfather acted *in loco parentis* to the child during his marriage to the mother. **Carter v. Brodrick**, 644 P.2d 850, 855. (Ak. 1982) (Resp. Br. 13). The Alaska Court reasoned, "where one stands *in loco parentis* to another, the rights and liabilities arising out of that reason are, as the words imply, exactly the same as between parent and child." **Carter**, 644 P.2d at 853.

Sixteen years later, the Alaska Supreme Court revisited this question, and rejected the proposition that a psychological parent should have the benefit of the "best interest" standard in custody disputes with a biological parent:

The relationship between the stepparent and the child, no matter how close, does not justify application of the best interests standard; the court may take the relationship into account, however, in deciding whether awarding custody to the biological parent would be detrimental to the child.

J.W. v. R.J., 951 P.2d 1206, 1211 (Ak. 1998) (*overruled on other grounds* in **Evans McTaggart**, 88 P.3d 1078 (Ak. 2004); *see also*

Finck v. O'Toole, 179 Ariz. 404, 880 P.2d 624, 626-27 (1994) (overruling **Bryan v. Bryan**, 132 Ariz. 343, 645 P.2d 1267 (1982) (Resp. Br. 12-13) to the extent that it held that a trial court could award visitation to a stepparent standing *in loco parentis* in a dissolution action); **Steinberg v. Frenz**, 57 P.3d 877, 878, ¶4 (Ok. App. 2002) (noting that **Looper v. McManus**, 581 P.2d 487 (Ok. App. 1978) (Resp. Br. 13) is inconsistent with subsequent legal precedent and affirming trial court's order dismissing stepfather's action for visitation with former stepchild); **Kellogg v. Kellogg**, 435 Pa. Super. 581, 646 A.2d 1246, 1249 (1994) (finding no authority for the proposition that *in loco parentis* status serves to elevate a third party to natural parent status except for purposes of standing, thus tempering the holding in **Spells v. Spells**, 250 Pa. Super. 168, 378 A.2d 879, 882 (1977) (Resp. Br. 13) that *in loco parentis* status confers rights and liabilities that are "exactly the same between parent and child"); **Jones v. Barlow**, 154 P.3d 808, 813 (Utah 2007) (abrogating **Gribble v. Gribble**, 583 P.2d 64 (Utah 1978) (Resp. Br. 13) by holding that a legal parent may freely terminate the *in loco parentis* status of a surrogate parent by removing her child from the relationship, thereby extinguishing all

parent-like rights and responsibilities vested in the surrogate parent).

The stepfather also relies on his claim that he is a “parent by estoppel” under the ALI Principles §2.03 to assert he has rights equivalent to the child’s legal parents. (Resp. Br. 27-30) But even under the ALI’s broad definition of “parent,” the stepfather is not a parent by estoppel. Parentage by estoppel requires the agreement of *both* parents. ALI Principles of the Law of Family Dissolution, §2.03(b)(iv) (2000). As illustrated by the ALI, where the alleged “parent by estoppel” is a stepfather, the legal father has not “agreed” to create parental status in the stepfather if the legal father continues to pay child support, continues to visit the child, and continues to treat the child as his own. ALI Principles, §2.03, p. 118 (Illustration 14). In this case, the biological father continued to pay child support, continued to treat the child as his daughter, and visited her when he was able. (CP 69, 163-64) The stepfather thus is not a “parent by estoppel” under the ALI.

A stepfather is not entitled to the same rights as the child’s natural parents regardless of the closeness of the stepfather and child’s relationship. Our Supreme Court has already recognized that regardless of the close emotional ties between a stepparent

and child, a stepparent must still meet the heightened standard of proving “actual detriment” to the child's growth and development before the court can interfere with a fit parent's decision to maintain custody of his or her child. ***Custody of Shields***, 157 Wn.2d 126, 144-45 ¶¶46-47, 136 P.3d 117 (2006). The alleged existence of a bond between former stepparent and child is insufficient to elevate the stepparent's “rights” to those of the child's natural parents.

B. The Trial Court Erred By Holding That A “Clearly Stepparent Situation” Satisfied Elements Of The *De Facto* Parent Test.

Contrary to the stepfather's claim (Resp. Br. 9), it is not the mother who conflates *de facto* parents and stepparents, but the trial court. Noting the four factors set out by the ***L.B.*** Court to establish standing as a *de facto* parent, the trial court wrongly held that “clearly, a stepparent situation” satisfied each element. (CP 86) The trial court's analysis was focused wholly on the consequence of the former marriage relationship between the parties, holding that the “stepparent situation” by its nature satisfied the first element – requiring the natural parent to consent to the parent-like situation, and the second element – requiring the petitioner and the child to live in the same household. (CP 86) The trial court found that stepfather satisfied the third element – requiring the

assumption of obligations of parenthood without expectation of financial compensation – because "during the time of the marriage they were all a unit, they were all a family." (CP 86) Finally, the trial court concluded that stepfather had "established a bonded, dependent relationship parental in nature . . . just from the fact of the marriage and the length of the marriage." (CP 86)

The trial court erred by equating the relationship that naturally arises between stepparent and stepchild to that of a *de facto* parent to grant the stepparent rights equal to that of the natural parent. The stepfather claims that only in the "exceptional case," where the child and stepparent's relationship continues after the breakup of the marriage, will a stepparent be determined to be a "de facto parent." (Resp. Br. 9-11) But in reality this is not an "exceptional case" at all, especially when there are children of the marriage who are half-siblings to the stepchild. It is not unusual for a parent to allow her child to visit a former stepparent along with half-siblings. If these "exceptional cases" invest rights in the stepparent equal to those of the natural parents, natural parents would be forced to consider cutting off these relationships at the end of a marriage, to avoid being dragged into court later. That is in fact precisely what happened here, where the stepfather

commenced this action only after the parties began litigating over support and residential time for children of the marriage.

Parents must be allowed to make decisions for their children, which they believe are in the child's best interests, without fear that the effect will be to legally cognizable invest rights in a former spouse where there normally would be none. The trial court erred by holding that a "stepparent situation" by its nature satisfied the elements of the *de facto* parent test.

C. Allowing The Stepfather To Proceed With His *De Facto* Parentage Action Ignores The Already Existing Parenting Plan For The Child.

The stepfather makes much of the fact that the biological father has not objected to the stepfather's *de facto* action. (Resp. Br. 30-31) Notably, however, the biological father is not represented by counsel in this new action commenced across the state from the county where he resides and where his daughter's parenting plan is entered. The biological father may very well be unaware of the implications of entry of a parenting plan in the current action. In fact, it appears that the only attorney that the biological father has consulted is the stepfather's attorney, who has drafted declarations for the father's signature. (CP 75-76, 90-93, 165)

The biological father has been described as a “simple” man. (CP 76) He is apparently swayed by the stepfather’s persistent contact and manipulation of the father by making unenforceable promises regarding the father’s residential time with the child if the stepfather obtains his proposed parenting plan. (See CP 75-76, 93-101) The stepfather is also undermining the relationship between the biological parents, warning the father that any positive action by the mother should be rejected. (See, e.g., CP 101 email from stepfather to father: “Ed, We need to talk as soon as possible. It is obvious by [the mother’s] emails that she is being soooooo nice to you, and isn’t it just so special that she has Marni making you and Barb Christmas gifts. Ed, be very careful. I think there are several thing’s [sic] going on that we need to talk about.”)

Even if the biological father does not object to the stepfather’s proposed parental status, the mother does. Her rights should not be overridden merely because the stepfather has formed an alliance with the father. The cases relied on by the stepfather to support his assertion that a child may have more than one parent are inapposite because they do not address the central issue: whether a courts may establish a “third” parent over the objection of one of the natural parents. In *A(A) v. B(B)*, 2007

CarswellOnt.2, ¶¶ 2, 4, 14 (2007) (Resp. Br. 18), three individuals (biological parents and same-sex partner of mother) actively sought an order confirming them all as parents to the child. In **Jacob v. Shultz-Jacob**, 923 A.2d 473, ¶8, 2007 WL 1240885 (Pa. Super. 2007) (Resp. Br. 20), the biological parents stipulated to the third party's *in loco parentis* status and the issue on appeal was visitation and the support obligation of all three parents. In **Cerwonka v. Baker**, 942 So.2d 747, 750 (La. App. 2006) (Resp. Br. 24), the three individuals (presumed father and biological parents) agreed to modify the existing custody order between the legal parents to include the biological father. Finally, in **McDaniels v. Carlson**, 108 Wn. 2d 299, 313-14, 738 P.2d 254 (1987) (Resp. Br. 24), our Supreme Court recognized that where there is both an alleged and presumed father, both of whom with close bonds with the child, the man not determined to be the biological parent could still pursue visitation under RCW 26.09.240 – the third party visitation statute later held unconstitutional in **Parentage of C.A.M.A.**, 154 Wn.2d 52, 109 P.3d 405 (2005).

None of these cases deal with similar facts – a third party seeking to supersede an already existing parenting plan, over the objection of a fit parent, by filing an entirely new *de facto* parentage

action. To the extent the stepfather is allowed to pursue visitation or custody rights with the child, he should have been required to do so by seeking to modify the natural parents' parenting plan in Chelan County. Allowing the stepfather to pursue an entirely new action in Snohomish County ignores the existence of a parenting plan that has already been entered in the child's best interests in her parents' dissolution action.

Further, as the stepfather concedes (Resp. Br. 31), two conflicting parenting plans expose the mother to contempt charges if she complies with one over the other. The stepfather's only response to that risk is that the burden should be on the mother to pursue legal action in the Chelan County action and demand an adequate cause threshold hearing. (Resp. Br. 31) The Supreme Court in *L.B.* could not have intended for the burden to be placed on the child's parents to take legal action to protect the family entity. Nor could the Supreme Court have intended to subject children and their parents to multiple inconsistent parenting plans merely because a former stepparent is able to claim he meets the fact-based test for a *de facto* parent set forth in *L.B.* At a minimum, this court should dismiss the stepfather's Snohomish County action

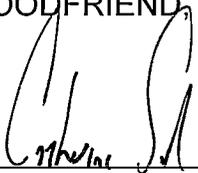
and direct him to pursue modification in Chelan County of the existing parenting plan.

III. CONCLUSION

The trial court's overbroad interpretation of *L.B.* to allow a stepparent to assert "rights" as a *de facto* parent over three years after his divorce from the child's mother was error. The trial court's holding invades the parents' constitutional right to raise their child without undue state interference. This court should reverse and dismiss the stepfather's *de facto* parentage action.

Dated this 27th day of June, 2007.

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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 June 27, 2007, I arranged for service of the foregoing Reply Brief of Petitioner, to the court and counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of June, 2007.



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