

No. 58658-1-I

81043-5

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Parenting 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

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RESPONDENT'S BRIEF

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**A. INTRODUCTION**

Tricia Reimen's argument operates from the premise that a child may only ever have two parents when, actually, that premise is here proved false. Marni has two fathers, a reality that her fathers and her mother caused to happen and a reality that Marni herself understands, accepts, and depends on. The issue here is whether the law can protect Marni's relationship with both her fathers. It can and it does.

**B. ISSUES IN RESPONSE TO APPELLANT'S BRIEF**

1. Did the trial court properly deny the motion to dismiss the *de facto* parent petition?
2. Does the *de facto* parent doctrine categorically exclude stepparents?
3. Does the *de facto* parent doctrine categorically require that the child be born or adopted into the parents' relationship or that the parents be of the same sex?
4. Does the *de facto* parent doctrine, or Washington law generally, forbid a child to have more than two parents?
5. Where a petitioner has established a "solid factual basis" for his claim of *de facto* parentage, did the court properly

enter temporary orders in the child's best interests and set the matter for trial?

**C. COUNTERSTATEMENT OF THE CASE**

Because this case involves review of the trial court's denial of a motion to dismiss, the court presumes John Corbin's factual allegations are true. *Parentage of L.B.*, 155 Wn.2d 679, 684 n.2, 122 P.3d 161 (2005). In adherence to this standard and to correct for misrepresentations in Tricia's brief, John provides a summary counterstatement of facts and directs this court to the pleadings he filed previously.

Marni is the 14-year-old biological and legal daughter of Tricia Reimen and Ed Frazier. CP 313. However, Marni hardly knows Ed. Her parents separated not long after her birth and, though a parenting plan entered in 1995 has her spending substantial residential time with Ed, the plan was never followed. CP 48-50, 135-136, 214-217. Rather, at Tricia's urging and with Ed's acquiescence, John Corbin took on and performed the role of father, not merely stepfather, from Marni's infancy to this very day.

Indeed, from ages one to six, Marni's relationship to John as her father was "exclusive," since she barely saw Ed. CP 235. She was called and called herself by John's last name and she calls

John “Dad” or “Daddy.” CP 65, 238. For most of her life, Marni saw Ed intermittently, rarely if ever overnight, and generally at Tricia’s whim. Id.; CP 133, 236. Marni never saw Ed on a “consistent basis.” Contra Br. Petitioner, at 3. Consequently, Marni’s relationship with Ed was not and is not close, which even Tricia acknowledges. CP 50, 156 (Ed and Marni are just now “building a relationship”).<sup>1</sup>

The fact that Ed and Marni are now becoming acquainted is because of John, who initially, more than a decade ago, believed Tricia’s allegations that Ed was abusive and alcoholic. CP 235. John stepped into the apparently vacant role of father to Marni, changing diapers, bathing her, feeding her, and otherwise tending to her emotional and physical needs, “as any involved, loving father would.” CP 235. Tricia and John married and together had two boys. He has treated all three children identically, as his own.

Tricia and John separated in 2000. CP 237. Their divorce was final in 2002. Since separation, and until August, 2005, all

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<sup>1</sup> As Ed explained in deposition, Tricia did not return phone calls he made, would offer time to him at the last minute (so that he did not have time to rearrange other work or recreational plans), and often did not tell him when Marni was going to be in Wenatchee, where Ed lives. CP 50, 64. Tricia also told tales about Ed to others, including to John and Marni, making Ed out to be an abusive alcoholic who abandoned her and Marni. CP 215, 235. Once Ed put everything together, he concluded that Tricia deliberately alienated him from Marni. CP 64; see, also CP 202.

three children continued to spend substantial residential time with both John and Tricia. CP 237. This arrangement was ordered for the boys under the parenting plan entered pursuant to John's and Tricia's dissolution, but, in respect of Marni, it was voluntarily established and adhered to on an informal basis. CP 237-238. The Chelan County parenting plan was ignored, as it had always been. Marni continued to spend roughly equal periods of time with John, including, for example, every Father's Day. CP 239.

This arrangement abruptly ended when, in the midst of disagreements regarding the boys, Tricia unilaterally suspended time between John and Marni, thus separating Marni not only from John, with whom she had lived for nearly all her life, but also separating her, for two weeks of every four, from her brothers. CP 239-240.

John sought relief by petition as a *de facto* parent, under the newly decided case, ***Parentage of LB***, 155 Wn.2d 679, 122 P.3d 161 (2005). Both Tricia and Ed were made respondents in this action. CP 311-312. John alleged facts supporting the factors that comprise Washington's *de facto* parent doctrine, which follow. CP 314-315.

(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 708 (internal citations omitted). John also supported his allegations with evidence.

Ed has not answered the petition, but has declared his support for John and for John's *de facto* parent claim. CP 51-52, 217. Since communications between he and John began bypassing Tricia, around 2002, Ed has seen more of Marni and has grown in confidence that John is and for eleven years has been Marni's "main father figure." CP 51. Beginning then, and only then, Marni came to understand that she had two dads, one she calls "Daddy Ed" and one, John, she calls "Dad" or "Daddy." CP 238.

In court, John also sought temporary reinstatement of the status quo, that is, returning Marni to the schedule to which the parties had adhered for the five years since separation until Tricia abruptly withheld Marni from John. CP 284-286. As a prerequisite

to adoption of a temporary parenting plan, John asked the court to make a threshold determination that he satisfies the *de facto* parent criteria and asked the court to appoint a guardian *ad litem*.  
Id.

Tricia moved to dismiss the petition for failing to state a claim, under CR 12(b)(6). CP 218-230. On June 7, 2006, Judge Lucas denied the motion. CP 83-87. (An order was entered August 8, 2006. CP 15-18.) Specifically, the court rejected Tricia's argument that the *de facto* parent doctrine may never encompass a stepparent and her argument that the doctrine applies only to same-sex couples. CP 16-17.

Subsequently, Commissioner Waggoner entered a temporary order approving first that, as a procedural matter, John should and did establish the *de facto* parent factors as a threshold similar to an adequate cause determination. CP 21. **See** RCW 26.09.270 (requiring adequate cause threshold for modification of parenting plan); RCW 26.10.032 (requiring adequate cause threshold for nonparental custody). In other words, the court required John to prove a "solid factual basis for sending the matter to trial." CP 21. In finding John to have satisfied this requirement, the commissioner placed special emphasis on the continuation of

the father-daughter relationship subsequent to John's and Tricia's divorce, including both residential time and financial support, at a time when most stepparents would begin to fade from a stepchild's life. CP 22-24. Since a year had passed with no contact between John and Marni, the court ordered a reunification process to begin. CP 26-27.

Following an initial investigation and report on the progress of reunification (CP 7-10), the guardian *ad litem* recommended a temporary residential schedule that would have Marni alternating between John's and Tricia's residence in same fashion as her two brothers, spending roughly equal amounts of time in both homes. CP 10. The court adopted the recommendation. CP 5-6.<sup>2</sup> Tricia sought and was granted discretionary review of these orders, though her motion to stay the temporary residential orders was denied. Additional facts are provided in the argument section as appropriate.

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<sup>2</sup> The guardian *ad litem* also referred the court to her report made in the modification proceeding related to the two boys, under Snohomish County #01-3-00276-9. CP 10. This more extensive report, which includes a substantial amount of information pertaining to Marni, was provided to this Court as an attachment to John's Answer to the Motion for Discretionary Review, at DR 248-286.

## D. ARGUMENT

### 1. CATEGORICAL EXCLUSIONS ARE INCONSISTENT WITH THE *DE FACTO* PARENT DOCTRINE.

Tricia would have this Court rule that the *de facto* parent doctrine excludes as a matter of law “a stepfather ... of a child who has two living parents.” Br. Petitioner, at 13. As a general proposition, Tricia’s argument ignores the equitable nature of the *de facto* parent doctrine, to which categorical exclusions are anathema.

Rather, equity has as its hallmarks flexibility, mercy, and practicality. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 88 L.Ed. 754 (1944), *cited with approval in Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 222, 995 P.2d 63 (2000). Equity is the expression of the court’s duty “to meet and provide real solutions for the real problems of real people.” *Humphries v. Riveland et al.*, 67 Wn.2d 376, 398, 407 P.2d 967 (1965) (Finley, J. dissenting). Thus, the court’s analysis does not begin or end with labels, but explores the actual relationships. *See, e.g., Vasquez v. Hawthorne*, 145 Wn.2d 103, 107, 33 P.3d 735 (2001) (“When equitable claims are brought, the focus remains on the equities involved between the parties.”). *See, also, Gormley v.*

**Robertson**, 120 Wn. App. 31, 83 P.3d 1042 (2004) (applying “meretricious relationship” doctrine to same-sex couple).

The Supreme Court devised the *de facto* parent doctrine to meet and provide real solutions for the real problems of real people.

**Parentage of LB**, 155 Wn.2d 679, 122 P.3d 161 (2005). The doctrine cannot serve that purpose if entire categories of “real people” are excluded from its operation, as Tricia would have it.

- a) Stepparents are not automatically excluded or included in the category of *de facto* parents.

Tricia argues that “floodgates” will open if stepparents are not categorically barred from asserting *de facto* parentage. Br. Petitioner, at 12. This argument fails for at least three reasons. First, and simply, the Supreme Court did not exclude stepparents when it devised the *de facto* parent doctrine. It could have done so and did not, since equity looks past labels and responds to the reality of people’s lives.

Second, the *de facto* parent doctrine does not encompass a flood of stepparents, but will apply only to the exceptional case where a *de facto* parent happens also to be a stepparent. Although Tricia continually conflates them, the categories of *de facto* parents and stepparent are not coextensive under the doctrine or in reality.

Notably, here, John's status as stepfather ended when his relationship to Tricia ended. *See Zellmer v. Zellmer*, 132 Wn. App. 674, 680, 133 P.3d 948 (2006) ("a stepparent's obligation to the child derives only from the circumstance of marriage."); RCW 26.16.205 (stepparent obligated to support only those stepchildren living with him/her). However, John's role as Marni father began before and continued after his marriage to Tricia. That is, it is not the relationship to the legal parent alone that defines the *de facto* parent, as is the case with a stepparent, whose involvement in the child's life may vary wildly. Rather, the equitable doctrine focuses on the relationship between the parent and the child, which exists in part because of the legal parent's encouragement, but also exists independently, surviving a rupture in the relationship of the two adults, as in *L.B.*

Importantly, in other words, *L.B.* makes certain that the nature of the relationship between the adult and the child be parent-like, not stepparent-like, a significant distinction. In Washington, the category of *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." 155 Wn.2d at 709. This quality of permanency of commitment

eliminates the numerous, often important, but usually transitory relationships that children form with many caregivers. Here it is satisfied by the nature of John's initial involvement, where, at Tricia's urging, he willingly undertook to be Marni's father, in place of Ed. But, also, this quality is satisfied by the fact that the relationship between John and Marni did not change over the five years after John and Tricia separated, a fact that surely secures the floodgates, even assuming *arguendo* that many stepparents might satisfy the first four factors.<sup>3</sup> Thus, the doctrine, requiring proof of all five factors, works to preserve for a child the fundamental stability that arises from a relationship with a parent, without causing a flood of *de facto* parents.

Finally, the proposed exclusion of stepparents, by limitation to same-sex couples, is not supported by the case law. First, in Washington, "[e]quitable claims are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties." *Vasquez v.*

*Hawthorne*, 145 Wn.2d at 107 (emphasis added). Also, in Washington, one of the progenitors of the *de facto* parent doctrine

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<sup>3</sup> In fact, the four factors will generally not be met, since, in most cases involving blended families, the relationship that a parent encourages between a child and stepparent is likely not to be one that effectively supplants the other parent or equates to the role of parent.

involved a stepparent, a case where rigid statutes yielded to necessity, insofar as standing and custody were granted to a stepmother without any clear authorization. *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981); **see, also**, Note, *Jurisdiction, Standing, And Decisional Standards In Parent-Nonparent Custody Disputes-In Re Marriage Of Allen*, 58 Wash. L. Rev. 111 (1982). *Allen* is important in this case for the counter-example it offers to Tricia's claim that applying the *de facto parent* doctrine to a stepparent will open the floodgates. Nothing of the sort happened after *Allen*. There was no flood of stepparent cases, a fact that can only partially be explained by the imposition of a "detriment" standard by the *Allen* court. The category of parent, with its permanent and profound obligations, simply is not one that hordes of people wish to join.

*Allen* and other stepparent cases around the country remind us that sometimes a bond formed between a stepparent and a child will compel the laws solicitude. Indeed, around the country over the past several decades, courts have found ways in unusual cases to allow for some continuation of the relationship between a child and a stepparent, often by providing for visitation. **See, e.g., Carter v. Broderick**, 644 P.2d 850 (Ak. 1982); *Bryan v. Bryan*, 132 Ariz.

353; 645 P.2d 1267 (Ariz. App. 1982); **Collins v. Gilbreath**, 403 N.E.2d 921, 922-24 (Ind. App. 1980); **Simpson v. Simpson**, 586 S.W.2d 33, 35-36 (Ky. 1979); **Looper v. McManus**, 581 P.2d 487, 488-89 (Okla. App. 1978); **Spells v. Spells**, 250 Pa. Super. 168, 378 A.2d 879, 881-83 (Pa. Super. 1977); **Gribble v. Gribble**, 583 P.2d 64, 66-67 (Utah 1978). The factual premise in these cases was that the stepparent had become something more: a surrogate parent. "This concept, expressed in the journals as that of 'psychological parentage,' finds its legal basis either explicitly or implicitly in the common law doctrine of *in loco parentis*." **Carter v. Broderick**, 644 P.2d at 853.

These cases illustrate the strength of the bond that sometimes forms between stepparents and children, such that categorical exclusion of stepparents from the law's protection would be absurd. However, it is important to note that in Washington, the nature of the protection extended, and the nature of the bond protected, differs from these cases, and differs from the doctrines recognized in nearly all the cases cited by Tricia. See Br. Petitioner, at 9-10. Washington's *de facto* doctrine has five factors, including the permanent commitment factor, which, confers on the exceptional petitioner who satisfies this heavy burden parity with

the legal parent. Tricia's failure to hew precisely to the differences between Washington's doctrine and those articulated in other states, and her conflation of the categories stepparent and parent, results in a fundamentally flawed analysis. Simply, Washington de facto parent doctrine may apply to some stepparents, but all stepparents will not be de facto parents.

- b) The *de facto* parent doctrine is not limited to parent-child relationships that begin at the child's birth or adoption.

Tricia suggests another categorical exclusion: the *de facto* parent doctrine will never apply where the child was not born or adopted into the relationship. Br. Petitioner, at 9-10. Again, the Supreme Court did not include this requirement, though it not only could have, but knew it could have: i.e., the court acknowledged that other formulas do include such a requirement. **L.B.**, 155 Wn.2d at 706, n. 24 (referring to a subcategory of the American Law Institute's, or ALI's, "parent by estoppel" doctrine, which is partly defined by the child being born into the relationship). Tricia does not explain why this Court should insert an additional factor into the *de facto* parent test when the Supreme Court declined to do so.

The reason for this omission again can be found in the flexibility that equitable doctrines require, with their focus on the relationships. *See Vasquez v. Hawthorne, supra.* Whether a child is born or adopted into a relationship will not matter to the child who, for all but earliest infancy, has been parented by a person who is not a legal parent.<sup>4</sup> To deny protection of a relationship no less central for not having begun at birth or adoption ignores the court's duty to "endeavor to administer justice according to the promptings of reason and common sense." *L.B.*, 155 Wn.2d at 707.

- c) The *de facto* parent doctrine may apply where a child has two living parents.

Finally, Tricia suggests a third limitation that the Supreme Court did not embrace: that a *de facto* parent petition must fail where a child has two living parents, or, more broadly, that a child may never have more than two parents. Br. Petitioner, at 10-12. This broad proposition is a dangerous one, since statutory means of establishing the parent-child relationship do not forbid, for example, three-parent adoptions or three-parent childbearing

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<sup>4</sup> This proposed additional requirement suggests a contractual concept of mutuality of intent, as between the adults, which may be relevant to the first of the *L.B.* factors, i.e., whether the legal parent encouraged the relationship. Thus, it is already addressed by Washington's doctrine.

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). It is not impossible that parties, in reliance on these statutes, have formed such relationships. Consequently, an announcement by this Court of a broad prohibition against three parents would wreak havoc with unknown numbers of relationships. **See, e.g., Sharon S. v. Superior Court**, 2 Cal.Rptr.3d 699, 73 P.3d 554 (2003) (reversing appellate division's ruling that second parent adoptions are not permitted under the statute, putting at ease many California families who spent nearly three years fearing that their second-parent adoptions would be undone).

Even the more narrow proposition, that only *de facto* parentage is barred where there are two living parents, is an

unwarranted limitation. At the risk of sounding repetitious, it bears noting again that the Supreme Court did not impose this limitation, though it had before it evidence that the man who contributed sperm to the lesbian couple had since married the biological mother, presumably lived with her and L.B., and signed an acknowledgement of paternity. **See L.B.**, 155 Wn.2d at 181 n.2 (Johnson, J. dissenting) (referring to sperm donor as a father and necessary party).

Nor is it persuasive that our statutes address themselves in terms of a two-parent/father-mother paradigm (Br. Petitioner, at 11), since it is both traditional and most common. But to rely on “this historical perspective not only ignores the present, but also makes too much of the past.” **Gormley**, 120 Wn. App. at 37. It is, after all, “revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.” Oliver Wendell Holmes, **The Path of Law**, 10 Harv.L.J. 457, 469 (1897).

That is, the two-parent/mother-father language is descriptive, not injunctive. Its use predates the developments that gave rise to a need for the *de facto* parent doctrine. Addressing a similar breach between statutory law and reality, the high court in Ontario recently observed:

The possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme. The Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer. This is not surprising given that nothing in the Commission's report suggests that it contemplated that such relationships might even exist.

*A(A) v. B(B)*, 2007 CarswellOnt 2 ([2007] W.D.F.L. 1110)

(01/02/07), at ¶ 21. If Tricia were right, and the father-mother language was mandatory, then single people and same-sex couples could not be parents. What the statutes “presume” regarding the number of parents a child may have, or their gender, (Br. Petitioner, at 11) does not dictate a limitation.

Nor would such a limitation make sense given the developing nature of family relationships. Certainly, when proposing that Marni has three parents, we are not only reflecting her reality; we are on the law’s cutting edge. But that is where *L.B.* places us. To the societal changes of recent decades addressed by the Ontario court cited above might be added the rapidly increased incidence of divorce and remarriage, which leads, occasionally, to relationships that need protection but find none in the legislative scheme. Thus, the question is not whether Marni

has two fathers, but whether the law will protect her relationship with the two fathers she does have.

Not surprisingly, this issue has begun to appear in appellate decisions. Just this year, as cited above, Ontario's highest 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., supra.** 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, but of "the equality of status that declarations of parentage provide." *Id.*, at ¶ 35. Likewise, to treat John or Marni 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.”).

Just this week, an appellate court in Pennsylvania likewise 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**, --- A.2d ----, 2007 WL 1240885 (Pa.Super.), 2007 PA Super 118.<sup>5</sup> 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.” ¶ 24. 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.*

These cases both operate from the unassailable premise that times change, that people build their relationships to suit

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<sup>5</sup> 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.*

themselves, not a state-mandated template. **See, also, ALI Principles**, § 2.03(1)(b)(iv) (allowing for recognition of parent by estoppel where there are two legal parents). 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. See Br. Petitioner, at 12-13 (but referring to stepparents, not *de facto* parents). As the court is well aware, sometimes it seems that two parents is one too many. Accordingly, the Supreme 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).

But, whatever risk or cost may arise from recognition of three parents, the risk or cost of failing to recognize a parent-child relationship will in some cases, as in this one, require flexibility in

the law. Or else the deprivation, on both sides, child and parent, will be profoundly harmful.

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). For example, our Supreme Court has recognized a child's independent constitutional interest in accurate determinations of parentage. ***State v. Santos***, 104 Wn.2d 142, 143-144, 702 P.2d 1179 (1985).

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 Washington Supreme Court 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 John. To ignore that voice would be to ignore that the child 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. Our Supreme Court already has once endorsed a more flexible approach. **McDaniels v. Carlson**, 108 Wn.2d at 313 (recognizing biological and presumed fathers). **See, also, 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); **Finnerty v. Boyett**, 469 So. 2d 287 (La. Ct. App. 1985) (recognizing biological and presumed fathers).

Moreover, 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. The fathers in this case already have modeled precisely how well such an arrangement can work.

d) The *de facto* parent doctrine is already sufficiently limited.

Altogether, Tricia would have this Court believe that the Supreme Court was wrong when it declared that proving a *de facto* parent claim would be “no easy task.” ***LB***, 155 Wn.2d at 712. In fact, the doctrine is sufficiently limited by the definition the court adopted. Notably, Washington’s appellate caselaw already presents plentiful examples of failed efforts to establish the doctrine, but no successes apart from ***L.B.*** itself. ***See, e.g., Adoption of R.L.M.***, --- P.3d ----, 2007 WL 1241545 (Div. 1) (child’s aunt fails to prove factors); ***Dependency of D.M.***, 136 Wn. App. 387, 149 P.3d 433 (2006) (aunt and her domestic partner fail to prove factors); ***Blackwell v. State Dept. of Social and Health Services***, 131 Wn. App. 372, 378, 127 P.3d 752 (2006) (claim by husband and wife foster parents to *de facto* parentage fails for lack of proof of the criteria); ***see, also In re Custody of Shields***, 157 Wn.2d 126, 133, 136 P.3d 117 (2006) (supreme court noting that stepmother did not claim *de facto* parent status without declaring that she would be prohibited from doing so). As these cases

demonstrate, the courts are perfectly capable of restricting application of the *de facto* parent doctrine to those cases where a petitioner carries the difficult burden of satisfying the **L.B.** test. This Court should reject efforts to impose additional categorical limits and rely, instead, on adjudication of these claims on a case-by-case basis, as with other equitable doctrines.

2. WASHINGTON'S *DE FACTO* PARENT DOCTRINE IS UNIQUE, BOTH LIKE AND UNLIKE SIMILAR DOCTRINES IN OTHER STATES.

In her analysis of Washington's *de facto* parent doctrine, Tricia ignores the Supreme Court's caution regarding the need for precision in this area, despite that "[o]ur cases, and cases from other jurisdictions, interchangeably and inconsistently apply the related yet distinct terms of *in loco parentis*, psychological parent, and *de facto* parent. **L.B.**, 155 Wn.2d at 168 n.7. In particular, care must be taken when comparing varieties of common law relief granted by courts in states around the country, including Washington. It is worth noting, for instance, that even with "uniform" statutes, variations exist among the states, as any review of the Uniform Parentage Act will reveal. Obviously, where individual states are developing their own common law, considerably greater variation can and does exist. Accordingly, the

**L.B.** court's admonition to take care in the use of the terms, and in cross-jurisdictional comparisons, would be well-heeded here.

For example, Tricia cites in support of her argument the American Law Institute's *de facto* parent doctrine, without, however, acknowledging that Washington's doctrine simply is not described by the ALI, and certainly is not the equivalent of the ALI's "*de facto* parent" doctrine. In particular, Tricia neglects to acknowledge that our Supreme Court has itself observed that Washington's "*de facto* parent" doctrine resembles the ALI's "parent by estoppel" doctrine, not the ALI's "*de facto* parent" doctrine. **L.B.** 155 Wn.2d at 176 n.24.

The ALI describes three different parental statuses: *legal parent*, *parent by estoppel*, and *de facto parent*. **ALI Principles**, § 2.03.<sup>6</sup> Washington's *de facto parent* is not precisely described in the **ALI Principles** at all, though it more resembles a subcategory of *parent by estoppel* (i.e., the fourth type of *parent by estoppel*). Significantly, for purposes of Tricia's comparison, the ALI's *de facto parent* doctrine does not require proof that the individual "fully and completely" undertook "a permanent, unequivocal, committed, and

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<sup>6</sup> The ALI's definitions of these statuses are included in an appendix to the Supplemental Response re Motion for Discretionary Review, to aid in comparison.

responsible parental role in the child's life." **LB**, 155 Wn.2d at 708.

Rather, this particular requirement is found in one of the ALI's

*parent by estoppel* definitions (of which there are four):

*A parent by estoppel* is an individual who, though not a legal parent, lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

**ALI Principles**, § 2.03(1)(b)(iv) (emphasis added). The **ALI Principles** treat *parents by estoppel* as equivalents to *legal parents*, even where two legal parents are contemplated, a point Tricia leaves out of her discussion. **See ALI Principles**, § 2.18, at 384-85 (giving "some preference" to *legal parents* and *parents by estoppel* over *de facto parents*), incompletely quoted by Tricia, Br. Petitioner, at 18.

As a comparison of the various definitions reveals, Washington's doctrine is more like the ALI's *parent by estoppel* doctrine, as the Supreme Court acknowledged, and, in particular, has both more, and more stringent, requirements than the ALI's *de facto parent* definition. As a result, in the ALI's judgment, an

individual meeting the *parent by estoppel* criteria, whatever the label attached, should be treated as an equivalent to a legal parent.

*A parent by estoppel* is afforded all of the privileges of a *legal parent* under this Chapter, including standing to bring an action and the right to have notice of and participate in an action brought by another under § 2.04, the benefit of the presumptive allocation of custodial time provided for in § 2.08(1)(a), the advantage of the presumption in favor of a joint allocation of decisionmaking responsibility afforded by § 2.09(2), the right of access to school and health records specified in § 2.09(4), and priority over a *de facto parent* and a nonparent in the allocation of primary custodial responsibility under § 2.18.

**ALI Principles**, § 2.03, Comment b, at 110-111. **See, also, ALI Principles**, § 2.08(1)(a) (treating as equivalents *legal parents* and *parents by estoppel* for purposes of allocating custodial responsibility), at 178; § 2.09(2) (treating as equivalents *legal parents* and *parents by estoppel* for purposes of allocating decisionmaking responsibility), at 236; § 2.09(4) (treating as equivalents *legal parents* and *parents by estoppel* for purposes of access to school and health records), at 237.

Importantly, our Supreme Court decided in **LB** that this parental status, which we call *de facto parent*, also is a status equivalent to *legal parent*, as is *parent by estoppel* in the ALI scheme. **See LB**, 155 Wn.2d at 708 (“*de facto parent* stands in

legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise”). When the analysis is grounded in the substance behind these labels, it is clear that the **ALI Principles** support the result reached in **LB** and the result reached by the trial court in this case. At least for purposes of proceeding to a trial, John is a Washington *de facto parent*, or an ALI *parent by estoppel*. He is, in any case, a parent in parity with Tricia. For that reason, he does not need to satisfy the detriment standard, as a third party petitioner would, and Tricia’s argument to the contrary is simply wrong. Br. Petitioner, at 13-19.<sup>7</sup>

3. THE EXISTING PARENTING PLAN IS NOT A BARRIER TO THE *DE FACTO* PARENT ADJUDICATION, SINCE ALL PARTIES ARE JOINED IN THIS PROCEEDING.

A number of Tricia’s complaints are grounded in the rights of Ed Frazier, Marni’s biological and legal parent, as, for example, when she complains that John’s proposed parenting plan “provided no time for the father.” Br. Petitioner, at 5; see, also, at 7-8 (temporary orders make “no effort to accommodate or even recognize the existence of Marni’s existing Chelan County

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<sup>7</sup> To allow John to prove his *de facto* parent claim is not to evade the constitutional deference due a fit parent’s decisions. **L.B.**, 155 Wn.2d at 712. For some reason, Tricia mischaracterizes John’s claim as being similar to that in nonparental custody cases (Br. Petitioner, at 13-19), ignoring the Supreme Court’s analysis of the constitutional issue in **L.B.** 155 Wn.2d at 709-710.

parenting plan.”). In advancing these arguments, obviously, Tricia ignores that she herself marginalized Ed as a parent to Marni and that, to the extent their relationship has recently grown, it is due to John’s and Ed’s cooperation. Indeed, Ed trusts John to continue this effort to the degree that he apparently has felt no need to answer John’s petition formally, but has made clear his support for John’s *de facto* parent claim.

However, Tricia complains further that she may be exposed to charges of contempt if two inconsistent parenting plans exist as a consequence of the *de facto* parent adjudication (i.e., one arising from that adjudication and the 1995 plan from Chelan County). Her remedy would be to require John to satisfy the adequate cause threshold for modification. Br. Petitioner, at 19-20. It is not clear how the addition of this new requirement would alter the outcome in this case, since the Snohomish County Commissioner imposed an adequate cause threshold requirement already and since the *de facto* parent factors plainly satisfy the modification standard. RCW 26.09.260.<sup>8</sup> The original parenting plan was never followed, which

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<sup>8</sup> In pertinent part, RCW 26.09.260 provides:

(1) ... the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the

is a very substantial change in circumstances. Marni was integrated into John's family with the consent of both Tricia and Ed, also a change in circumstances. The evidence is growing that Tricia's home is detrimental to Marni's well-being. And, in any case, it was Tricia who caused a rupture in Marni's life by suddenly and unilaterally terminating her residential time with John, a rupture the trial court's temporary orders have sought to repair.

In other words, it would seem impossible for a court to find a "solid factual basis" for *de facto* parentage and not to find a substantial change of circumstances.

In any case, Tricia's concern regarding multiple, inconsistent orders, even where she has herself completely ignored one of those orders, is answered by the fact that Ed is a party to the

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prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.□□□

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:□□□(a) The parents agree to the modification;□□□(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;□□□(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or□□□(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.□

proceeding. Consequently, the rights and obligations of all three adults and the rights of Marni may be addressed in unison, superseding the Chelan County order. Surely, this approach, which maintains Marni's best interests as the principal goal, is preferable to deleting one of her fathers from her life, as Tricia would have it.

**E. CONCLUSION**

The law must keep up with how people live their lives and cannot force a false order on family relationships. Yes, for good reason, the law must know where, or to whom, to look to ensure that children receive the support and love they need to prosper. In most cases, the relationships between caregivers and child will fall into a conventional and statutorily defined category. But not always. Historically and presently, the law is confronted with relationships deserving of protection which do not fit neatly into an existing box. Our court has provided a remedy for those few relationships that rise to the level of a parent-child relationship, but fall outside the box. The relationship between John and Marni is one such example.

For the foregoing reasons, John Corbin respectfully asks this Court to affirm the trial court's decision denying the motion to

dismiss and to remand this case to the Snohomish County Superior Court for trial.

Dated this 7<sup>th</sup> day of May 2007.

RESPECTFULLY SUBMITTED,

  
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