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No. 81043-5

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Parenting of:

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

Child,

JOHN CORBIN,

Petitioner,

v.

PATRICIA REIMEN,

Respondent,

EDWARD FRAZIER,

Father.

SUPPLEMENTAL BRIEF OF RESPONDENT

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& GOODFRIEND, P.S.

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I. SUPPLEMENTAL STATEMENT OF THE CASE

Respondent Patricia Reimen and Edwin Frazier are the biological parents of Marnita ("Marni") Frazier, age 14 (DOB 12/15/1993), the subject of the current action. (CP 157, 313) When Reimen and Frazier divorced in Chelan County in 1995, they agreed to a parenting plan that provided that Marni reside primarily with her mother. (CP 69, 157) Although Marni's parents did not rigidly adhere to the parenting plan, in part because the mother moved to the Puget Sound area, the father paid support, saw Marni (often at her grandparents' home in Wenatchee), and in no way relinquished his parental rights. (CP 69, 214)

The mother married petitioner John Corbin on October 14, 1995. (CP 69, 157) They had two sons during their marriage. (CP 69) When Reimen and Corbin divorced on December 13, 2002 (CP 157), they agreed to a residential schedule for their two sons that did not provide for any residential time for Marni with her former stepfather. (CP 157-58) Nor did Corbin provide support for Marni. (CP 72-73)

The mother allowed Marni to accompany her half-brothers during their residential time with Corbin on many occasions. (CP 160) However, Marni did not always participate in her brothers'

residential time with Corbin, and sometimes traveled to Wenatchee to visit with her father while her brothers visited Corbin. (CP 70, 101, 160-61) In 2005, Reimen's daughter began to resist participating with her half-brothers in their residential time with Corbin. (*See* CP 70-71)

On August 2, 2005, Corbin filed a petition to modify the parenting plan for the parties' two sons. (CP 161) While Corbin's petition for modification of the parenting plan was pending, Reimen moved to modify child support for the boys. (CP 158)

Shortly after an adverse ruling in the child support action, Corbin commenced this "Petition for DeFacto Parent Rights" in Snohomish County Superior Court, seeking court-ordered residential time with Marni. (CP 313) Corbin's *de facto* parentage petition proposed a parenting plan that gave him and Reimen equal residential time, but provided no time for Marni's biological father. (*See* CP 170, 244) Corbin did not propose that he pay child support for Marni.

On discretionary review, Division One reversed the trial court's order denying Reimen's motion to dismiss the *de facto* parentage action. Division One also concluded that, even if petitioner could establish that he is a *de facto* parent, he would still

be required to meet the adequate cause threshold to modify the child's existing parenting plan. This Court accepted review.

II. SUPPLEMENTAL ARGUMENT

A. The *De Facto* Parent Doctrine Does Not Allow A Stepparent Or Third Party Cohabitant To Assert Parental Rights Equal To Those Of The Child's Natural Parents.

This Court adopted, as a matter of common law, the *de facto* parent doctrine because statutory remedies were inadequate to protect important familial interests. The Court of Appeals correctly refused to extend that doctrine because a stepparent seeking parental rights has a statutory remedy under RCW ch. 26.10.

This Court in ***Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005) adopted the concept of *de facto* parentage in a case where a child was planned and born into a relationship between two parties who could not marry, only one of whom was a legal parent. This Court's analysis in ***L.B.*** was premised on the fact that under the Uniform Parentage Act, RCW ch. 26.26, the other party could establish no parental rights to a child she had raised since birth with the biological mother, who was artificially inseminated. 155 Wn.2d at 687-88, ¶ 11. Recognizing that "[o]ur legislature has been conspicuously silent when it comes to the rights of children . . who are *born into* nontraditional families . . . ," ***L.B.***, 155 Wn.2d at

695, ¶ 21 (emphasis added), this Court held that a non-biological mother could maintain a common law *de facto* parentage action when there was no other statutory mechanism to allow her to pursue her parental rights over the objection of the child's only legal parent. 155 Wn.2d at 688-89, ¶ 14.

This Court adopted this common law cause of action in ***L.B.*** to "fill the interstices that our current legislative enactment fail[ed] to cover in a manner consistent with our laws and stated legislative policy." 155 Wn.2d at 707, ¶ 38. In doing so, this Court was concerned that "in the field of familial relations, factual scenarios arise, which even after a strict statutory analysis remain unresolved, leaving deserving parties without any appropriate remedy." 155 Wn.2d at 687, ¶ 11. The Court relied primarily on out-of-state cases with nearly the exact fact pattern present in ***L.B.*** – the child was born or adopted during the relationship between the legal parent and a third party with whom the legal parent agreed to raise the child. 155 Wn.2d at 702-06, ¶¶ 31-36.

The Court of Appeals in this case properly acknowledged the limits to the *de facto* parent doctrine, and acknowledged that unlike the factual scenario in ***L.B.***, the legislature and courts have already contemplated a situation such as this, arising in a blended family

resulting from consecutive marriages in which a stepparent accepted a parenting role with the child of their spouse during the marriage. ***Parentage of M.F.***, 141 Wn. App. 558, 565-66, ¶ 18, 170 P.3d 601 (2007). The Court of Appeals noted that under these circumstances, RCW ch. 26.10 allows a former stepparent to seek residential time with a former stepchild, 141 Wn. App. at 565-66, ¶ 18, and that the stepfather in this case offered "no persuasive argument why the statutes dealing with this subject matter are inadequate to address his situation." 141 Wn. App. at 566, ¶ 20.

As this Court recognized in ***L.B.***, it has long been the law in this state that a stepparent cannot avoid the requirements of these statutes by relying on a *de facto* parentage cause of action to assert parental rights over a former stepchild. This Court relied on ***Custody of Stell***, 56 Wn. App. 356, 365, 783 P.2d 615 (1989) and ***Marriage of Allen***, 28 Wn. App. 637, 649, 626 P.2d 16 (1981), in ***L.B.***, for the proposition that "Washington common law recognizes the significance of parent-child relationships that may otherwise lack statutory recognition." 155 Wn.2d at 693, ¶ 20. In both ***Stell*** and ***Allen***, a third party who was the psychological parent of the child was required to meet the detriment standard before the court could place the child with the third party over the objection of a fit

biological parent. ***Stell***, 56 Wn. App. at 365; ***Allen***, 28 Wn. App. at 649.

As the United States Supreme Court has recognized, "the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country." ***Michael H. v. Gerald D.***, 491 U.S. 110, 131, 109 S. Ct. 2333, 105 L.Ed.2d 91 (1989). As a matter of public policy, this Court should not equate the relationship that naturally arises between stepparent and stepchild to that of a *de facto* parent in order to grant a stepparent rights equal to those of a natural parent.

B. Stepparents And Other Third Party Cohabitants Must Prove Actual Detriment Before The Court Can Interfere With The Natural Parents' Rights To Make Decisions For The Child.

Allowing a former stepparent to assert parental rights through a *de facto* parentage action would greatly expand the doctrine far beyond the circumstances described in ***L.B.*** Such a broad interpretation of ***L.B.*** would create a common law cause of action for any ex-spouse or cohabitant who ever shared a household with his partner's children, opening the floodgates to custody litigation and subjecting parents and their children to multiple parenting plans established under constitutionally suspect criteria.

Petitioner makes much over the bond between him and his former stepchild. But the bond between a child and stepparent, while important, cannot elevate the stepparent's rights to those of the child's living natural parents. This 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" under RCW ch. 26.10 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); ***Custody of Smith***, 137 Wn.2d 1, 20, 969 P.2d 21 (1998), *aff'd sub. nom.* ***Troxel v. Granville***, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000).

In ***Smith***, this Court rejected a live-in boyfriend's attempt to obtain visitation with his former girlfriend's son without first making a threshold showing of detriment. In one of three cases considered by this Court in ***Smith***, the mother's former boyfriend had begun a relationship with the mother shortly after her son's birth and lived with the mother and her son for four years. 137 Wn.2d at 5. The boyfriend sought to formally establish a residential schedule after the mother impeded visitation with her son after allowing visitation for over a year after the relationship ended. *See* ***Visitation of***

Wolcott, 85 Wn. App. 468, 470, 933 P.2d 1066 (1997), *dismissal affirmed,* ***Smith***, 137 Wn.2d at 5. This Court recognized "that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," but nevertheless held that there must be a "threshold requirement of a finding of harm to the child as result of the discontinuation of visitation" before a court could constitutionally interfere with a fit parent's fundamental right to control her child's residential time with nonparents. ***Smith***, 137 Wn.2d at 20.

In ***Shields***, decided seven months after ***L.B.***, this Court once again held that a former stepparent can obtain custody only by first showing harm or detriment. In ***Shields***, after the death of the child's father, a stepmother sought custody of her stepson, who had resided primarily with her and the father for nearly half of the child's life. This Court held that the stepmother had standing to seek third party custody under RCW 26.10.030, but that she was still required to show that placement with the mother would result in actual detriment to the child. ***Shields***, 157 Wn.2d at 144, ¶ 46. because under the "heightened standard" recognized by this Court, "a court can interfere only with a fit parent's parenting decision to maintain

custody of his or her child if the nonparent demonstrates that the placement of the child with the fit parent will result in actual detriment to the child's growth and development." ***Shields***, 157 Wn.2d at 144, ¶ 46.

Division One's decision in this case was compelled by this Court's decisions in ***Shields*** and ***Smith***. Stepparents and other third party cohabitants must prove actual detriment before the court can interfere with the natural parents' rights to make decisions for their child.

C. Any Change To The Parenting Plan Of A Child Who Has Two Living Parents Must Be Pursued Through Modification, Not A Common Law *De Facto* Parentage Petition.

Even if the former stepfather is allowed as a *de facto* parent to petition for visitation rights, he must do so by seeking to modify the child's current parenting plan. Before a parenting plan can be modified, the adequate cause threshold requires a showing that there has been a substantial change in circumstances since the prior parenting plan was entered; that the modification is in the best interests of the child and is necessary to serve the best interests of the child; and that 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; *or* that the child's present

environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be cause by a change of environment is outweighed by the advantage of a change to the child. *See* RCW 26.09.260(1), (2).

Respondent does not believe this Court intended to subject children and their parents to multiple inconsistent parenting plans based on its *sui generis de facto* parentage analysis in ***L.B.*** At a minimum, this Court should hold that a third party who claims to be a *de facto* parent to a child who already has an existing parenting plan should be required to meet the adequate cause criteria set forth in RCW 26.09.260.

III. CONCLUSION

This Court should affirm the Court of Appeals.

Dated this 15th day of September, 2008.

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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 September 15, 2008, I arranged for service of the foregoing Supplemental Brief of Respondent, to the Court and the parties to this action as follows:

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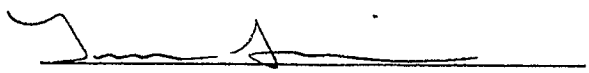
DATED at Seattle, Washington this 15th day of September, 2008.



Tara D. Friesen