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NO. 86188-9

SUPREME COURT
THE STATE OF WASHINGTON

IN RE THE INTEREST OF:

A.F.J.;

JACKIE JOHNSTON,

Petitioner,

v.

MARY FRANKLIN,

Respondent.

FILED
SUPREME COURT
STATE OF WASHINGTON
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AMICUS CURIAE BRIEF
OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. IDENTITY AND INTEREST OF AMICUS

This amicus brief is submitted by the Department of Social and Health Services. The Department is the petitioner in thousands of dependency actions each year, and is also responsible for placing dependent children in foster care – temporary out-of-home care with relatives, licensed foster parents, or other approved individuals – while their parents are provided an opportunity to correct the parenting deficiencies that resulted in the foster care placement.

Contrary to Respondent Mary Franklin's assertions, the Court's decision in this case could have an impact well beyond custody cases; it could affect the rights of both parents and children in dependency cases by recognizing a parental right in those who serve as temporary caregivers – whether licensed or not – for dependent children. Permitting foster caregivers to rely on a temporary foster care placement to establish *de facto* parent status would significantly diminish parents' rights in dependency cases.

Despite her argument and her interpretation of the facts, Mary Franklin's position in this case is not similar to that of the *de facto* mother in *In re L.B.* Unlike the *de facto* mother in *L.B.*, Ms. Franklin did not plan the child's birth with his mother, and she co-parented the child for just

weeks – not years – before the state intervened, at Ms. Franklin’s request. While the child was the subject of a dependency proceeding, the child’s mother could not consent to and foster a parent-like relationship between her son and Ms. Franklin, and Ms. Franklin did not undertake a permanent parental role in the child’s life.

II. ISSUE

Is the *de facto* parent doctrine available to a person who cares for a child for a short time before a dependency is established, then continues as temporary caregiver during the dependency?

III. INTRODUCTION

The Department asks this Court to hold that the *de facto* parent doctrine is not available to those who care for children in dependency proceedings, solely by virtue of their status as the temporary foster care placement of the child

The question posed in this appeal raises significant policy concerns – the answers to which could affect the very nature of this state’s dependency proceedings. In a dependency, the goal of the proceeding is to safely reconstruct the family unit, during which time children are placed in temporary placements while their parents attempt to remedy their parental deficiencies. Placements with relatives or others who have an existing relationship with the child are strongly encouraged in order to

reduce trauma experienced by children who are removed from their parents' care. It would undermine the remedial nature of dependency proceedings if a temporary caregiver could become a *de facto* parent, with all of the concomitant rights of a parent, merely because a child was placed with her during a dependency proceeding.

IV. STATEMENT OF THE CASE

A.F.J. was born to Jackie Johnston on November 20, 2005. CP at 558. The mother's pregnancy was not intended. CP at 709. During the first three to four weeks of his life, the baby lived with his mother while she was in inpatient treatment for drug abuse. CP at 655-56. During that time, Mary Franklin, the mother's on-again, off-again paramour, sometimes brought the infant to her home for overnight visits. *Id.* By January 2006, Ms. Johnston had left treatment and, along with her infant son, was staying with Ms. Franklin. CP at 574.

Ms. Franklin called the Department's Child Protective Services (CPS) on January 22, 2006 to express her concern for the safety of the baby. CP at 910-11. Ms. Franklin reported that when she came home from work, she found Ms. Johnston unconscious on the bed with her two-month-old infant next to her. *Id.* Ms. Johnston explained to the CPS social worker that she had taken a Xanax and had fallen asleep with the baby on the bed with her. CP at 911. Four days later, Ms. Johnston told

CPS that she also used cocaine, and that she had last used it just two days earlier. CP at 913. On January 26, 2006, the Department filed a dependency petition, took the child into protective custody and placed him in a foster home. CP at 893.

Within a week – at the initial shelter care hearing – the Department placed A.F.J. in foster care with Ms. Franklin. CP at 655. On April 5, 2006, the juvenile court ordered the dependency– finding that there was no parent capable of adequately caring for the child. CP at 909-20. The court also found that it was contrary to the child’s welfare to return home because he had no parent available to adequately care for him; it then placed the child in the custody of the Department, authorizing it to place him with “a Responsible Adult Placement with the mother’s paramour, Mary Franklin.” CP at 915, 912-13.

Ms. Franklin needed to become a licensed foster parent for the child to continue to be placed with her. *See* CP at 915. Her application to become licensed was granted, and she began receiving foster care maintenance payments. CP at 273.

On May 8, 2007, the Department filed a petition to terminate the mother’s rights, alleging that she had not remedied her parental deficiencies. CP at 1059-66. Meanwhile Ms. Franklin filed a nonparental custody petition under RCW chapter 26.10, and also alleged that she was a

de facto parent to A.F.J. CP at 1-14. The court decided the custody matter in May 2009. CP at 701-03. The trial court in that action found that “Jackie Johnston is a fit parent” and that there was “no detriment” to the child for Ms. Johnston to remain his custodial parent.¹ CP at 708-09. The court went on to additionally find that if the little boy were cut off from Ms. Franklin, he “would suffer detriment”, and further found Ms. Franklin to be a *de facto* parent to A.F.J. CP at 709-12. In making this finding, the court considered Ms. Franklin’s relationship and care of the child from the time he was born, including the time the child was temporarily placed with her during the dependency. *See* CP at 711, Finding of Fact R.

The Court of Appeals affirmed the custody ruling and the mother petitioned this Court for review.

V. ARGUMENT

A temporary foster caregiver who cares for a dependent child should not be found a *de facto* parent based on facts that arise during the foster care placement, and should only be found a *de facto* parent when the basis for the finding is established solely outside the dependency proceeding.

¹ Soon thereafter, the Department dismissed the termination petition. CP at 1176-77.

A. A Person Who Cares For A Dependent Child Should Not Be Considered A *De Facto* Parent Due To Facts That Arise During The Temporary Out-Of-Home Placement

As the definition of the modern American family evolves, the definition of “parent” has grown to include persons whose relationships with children are not based on marriage, adoption, or biology. Mary L. Bonauto, Karen L. Lowey, & Susan D. Ricci, *Equity Actions Filed by de facto Parents*, in Mass. Continuing Legal Ed., Inc., *Paternity and the Law of Parentage in Massachusetts* (2d ed. 2009) (see ch. 12), at 2, available at Westlaw at PLPI MA-CLE 12-1. For those individuals who have no statutory remedy for custody or for establishing parentage, such as through RCW chapter 26.10 (non-parental custody), RCW chapter 26.26 (the Uniform Parentage Act), or RCW chapter 26.33 (the adoption statute), the court may use its equitable powers as a means of achieving a just result for children and “parents.” See e.g., *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).

In *In re L.B.*, this Court acknowledged the appropriate use of equity to establish the parent-child relationship. However, it was careful to limit the availability of the doctrine.

Accordingly, a court may grant equitable or *de facto* parent status only to those adults who undertake a *permanent*, unequivocal, committed and responsible parental role in a child’s life. *In re L.B.*, 155 Wn.2d at

708. To be considered a *de facto* parent the prospective parent must prove: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the prospective parent and the child lived together in the same household; (3) the prospective parent assumed obligations of parenthood without expectation of financial compensation; and (4) the prospective parent had been in a parental role for a length of time sufficient to have a bonded, dependent relationship that is parental in nature. *Id.* A foster parent – licensed or unlicensed – who cares for a dependent child cannot meet these requirements. First, the foster placement is temporary and finite in nature. Additionally, the child is placed by the Department during a time when the parent does not have legal authority to decide issues such as where their child will live, with whom, and under what circumstances they will have contact with their child.

A *de facto* parent stands in legal parity with an otherwise legal parent. *Id.* In other words, the *de facto* parent, like the natural or adoptive parent, has a fundamental liberty interest in the care, custody and control of their child. *In re L.B.*, 155 Wn.2d at 710. In a dependency proceeding, this would mean that the *de facto* parent would become a party to the action, would be entitled to legal counsel if indigent, could move for placement of the child, and could move for dismissal of the action – based

on the fitness of the *de facto* parent. See RCW 13.34.090, RCW 13.34.025.

A threshold determination in recognizing a person as a *de facto* parent is whether they engaged in a *permanent* parenting role. See *In re L.B.*, 155 Wn.2d at 708.

The American Law Institute cautions that “relationships with foster parents are . . . generally excluded [from the *de facto* parent doctrine] . . . because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children.” ALI Principles of the Law of Family Dissolution § 2.03 comment c(ii), ALI-FAMDISS § 2.03, 2000 WL 34025782 (2011).²

The Court of Appeals noted that this does not rule out caretakers who qualify for financial assistance, if their caretaking role was not motivated by that assistance. *In re Custody of A.F.J.*, 161 Wn. App. 803, 260 P.3d 889 (2011). Nevertheless, “[t]o qualify as a *de facto* parent, an adult must have assumed caretaking functions for a significant period of

² This is consistent with this state’s definition of foster care: “Foster care” means twenty-four-hour per day temporary substitute care for the child placed away from the child’s parents or guardians and for whom the department or a licensed or certified child placing agency has placement and care responsibility. This includes but is not limited to placements in foster family homes, foster homes of relatives, licensed group homes, emergency shelters, staffed residential facilities, and preadoptive homes, regardless of whether the department licenses the home or facility and/or makes payments for care of the child.

time, not less than two years.” ALI Principles of the Law of Family Dissolution § 2.03 comment c(iv).

In order to ensure that the court does not infringe on parents’ rights, a threshold requirement to recognizing a *de facto* parent is a finding that the legal parent “consented to and fostered” the parent-child relationship. *In re L.B.*, 155 Wn.2d at 712. This finding ensures that any third-party caregiver, such as teachers, nannies, and relatives (or foster care providers) who care for a child in a role other than parent will not be found *de facto* parents. *Id.* A parent must have affirmatively established a family unit with a *de facto* parent and child for this criterion to be met. *Id.*

Therefore, a foster care provider – licensed or unlicensed – who cares for a dependent child is not properly considered a *de facto* parent for three reasons. First, a placement in a dependency proceeding is intended to be temporary and does not evince a permanent parental role for the caregiver. Second, once the state intervenes and is granted custody of a child, a parent can no longer be considered to have affirmatively fostered and consented to a permanent parenting role for a foster parent. Finally, legislative intent and public policy strongly supporting safe reunification of families does not support finding foster parents to be *de facto* parents.

1. A Foster Caregiver With Whom A Child Is Placed In A Dependency Proceeding Does Not Assume A Permanent Parenting Role

L.B. requires that recognition of a *de facto* parent be limited to those who have fully and completely undertaken a permanent parental role in the child's life. *L.B.*, 155 Wn.2d at 708. In *L.B.*, the *de facto* parent co-parented the child in a family unit with the child's biological mother for six years. *See id.* at 684. In contrast, in this case the biological mother and her son only lived with Ms. Franklin for a few weeks before the state intervened; thereafter, the Department had custody of the child, and it and the court placed him with Ms. Franklin. Ms. Franklin was not in a permanent parental role while she served as a temporary foster care placement for A.F.J. during the dependency proceeding.

Initially, a dependency proceeding attempts to reconstruct the family unit. *In re Coverdell's Welfare*, 30 Wn. App. 677, 679, 637 P.2d 991 (1981). When the state initiates a dependency proceeding, it is often required to take temporary custody of a child, remove him from his parent's care and place the child with a foster care provider temporarily, while the parent attempts to remedy her parental deficiencies. When this occurs, priority foster care placement of the child is with a relative or other

suitable person.³ RCW 13.34.060(2); RCW 13.34.065(5); RCW 13.34.130(5). If an appropriate relative or other suitable person cannot be identified, the child is placed in licensed foster care. *See* RCW 13.34.065(5)(d), RCW 13.34.030(16); RCW 13.34.130(1)(b)(ii). The statute directs that a child should be placed in the least disruptive and most family-like setting, taking into consideration the child's existing relationships. Absent good cause, the Department should follow the wishes of the natural parent regarding the placement of the child. RCW 13.34.065(4)(e); RCW 13.34.130(2), (3); RCW 13.34.260.

Not all foster care providers need to be licensed. RCW 74.15.040 (requiring licensure of any "agency seeking to accept and serve children"); RCW 74.15.020(2) (excepting relatives and others, who are not considered agencies, from the licensing requirement). More than one-third of Washington's foster children are placed with relative foster caregivers, approximately 13 percent of whom are licensed.⁴

A foster caregiver serves a vital but inherently limited role in a child's life. Placement of a foster child is by its very nature "temporary,

³ Until a legislative change in 2007 that authorized placement with suitable unlicensed nonrelatives, the only out-of-home placement options were relatives or licensed foster parents. Laws of 2007, ch. 413, § 5, at 1887; *see also* RCW 13.34.130(1)(b)(ii).

⁴ *See, e.g.*, Children's Administration 2010 Year in Review p. 1, Snapshot of Children and Families Served, <http://www.dshs.wa.gov/pdf/ca/year-in-review2010.pdf> (last visited Feb. 14, 2012).

transitional and for the purpose of supporting reunification with the legal parents.” *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991). Foster care is for a planned period, and is not intended to be a permanent substitution of one home for another. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 823, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

A temporary out-of-home placement during a dependency is intended to be finite, to support a stable placement for the child and ultimately to support reunification with a parent. *In re Dependency of J.H.*, 117 Wn.2d at 476; *see also* ch. 13.34 RCW. The person with whom a child is placed away from his parents is encouraged to assist parents by helping them understand the child’s needs and to participate in educational and community activities with birth families. RCW 13.34.260. Relative caregivers and other suitable persons must be willing to cooperate with the child’s case plan and court orders for the child including those regarding parent-child visits. RCW 13.34.065(5)(b)(i), (5)(e). Foster caregivers are responsible for the “protection, care, supervision and nurturing of the child” in their care. RCW 74.13.330; *see also* WAC 388-25-0090 (expectations for licensed foster parents).

The *L.B.* requirement that the parenting relationship was intended to be permanent can not be supported by evidence that arose from a temporary out-of-home placement of a child in a dependency proceeding.

2. Parents Do Not Affirmatively Consent To And Foster A Permanent Relationship Between Their Children And Temporary Placements In A Dependency Proceeding

L.B. also requires a finding that the natural or adoptive parent consented to and fostered a parent-like relationship between the child and petitioner as a condition of finding a *de facto* parent. *In re L.B.*, 155 Wn.2d at 708. A parent's rights are temporarily abridged during a dependency proceeding, and therefore they cannot be deemed to have affirmatively fostered or consented to a placement made in the dependency.

In *L.B.*, the biological mother planned her family together with the *de facto* mother and actively encouraged parenting by the *de facto* mother by establishing a family unit with her for many years. *Id.* at 707-08, 712. In contrast, here the biological mother did not plan to conceive A.F.J. with Ms. Franklin, and she and her son only lived with Ms. Franklin for a few weeks before the state removed the child from his mother's care. CP at 655-56; CP at 572.

Once the state has custody of a child, a natural parent no longer has the right to independently consent to and encourage a family-like

relationship between a nonparent and the child. Ms. Franklin argues that the mother affirmatively established a family unit with her by identifying her as a placement in the dependency proceeding, and supporting that placement. Supp. Br. of Respondent at 2, 15. However, when the Department has custody of a child, the Department makes a placement of the child; the parent's placement and decision-making authority is temporarily constrained. See WAC 388-25-0025; RCW 13.34.062, RCW 13.34.130, RCW 13.34.138. Thus, a parent's ability to consent to establishing a permanent and family-like relationship with the foster parent is also constrained. As a result, the court cannot conclude that the parent consented to and fostered the parent-like relationship between the child and the person he was placed with in the dependency proceeding.

Moreover, a parent in a dependency does not establish a permanent family unit with the person with whom her child is placed. It is uncommon for natural parents in dependency proceedings to reside with their children's foster parents, although it may occur if the natural parent is under 18 or when the child is placed in the home of a relative or another suitable person. When this does occur, it is intended as a temporary arrangement meant to provide stability to the parent and child and assist in reunification. A parent's efforts – whether appropriate or not – to spend more time with her child in the child's foster placement cannot be

construed as an affirmative act to establish a permanent parent-child relationship between the child and the foster parent.

3. Legislative Intent And Public Policy Would Be Undermined If The *De Facto* Parent Doctrine Were Available To Foster Caregivers

Public policy and legislative intent in enacting the dependency statute weigh against permitting relying on a temporary out-of-home placement in a dependency proceeding to support the criteria for establishing *de facto* parent status. Permitting a court to find a relative foster caregiver or a licensed foster parent to be considered a *de facto* parent based on the relationship established during the temporary placement itself would shift the focus of the dependency proceeding away from reunification with the natural parents, and would undermine the purpose of the dependency process. Additionally, parental decisions in a dependency that support stable and caring placements of children are less likely to occur if they may form the basis for foster parents to be found *de facto* parents.

The legislature declared that “the family unit is a fundamental resource of American life which should be nurtured.” RCW 13.34.020. To that end, “the family unit should remain intact unless a child’s right to conditions of basic nurture, health, or safety is jeopardized.” *Id.* Thus, the

legislature intends for families to remain intact so long as doing so is not harmful to children.

In dependency proceedings, parents are “the biological or adoptive parents of a child unless the legal rights of that person have been terminated by judicial proceedings.” RCW 13.04.011(5). The Department is charged with coordinating remedial services in dependency proceedings that are aimed at addressing the family’s needs and at reunification. RCW 13.34.025. In terminating a parent’s rights to their child, the trial court must find the parent unfit, and cannot base any part of its decision on the child’s chance for “a better home” with a new parent. *In re Moseley*, 34 Wn. App. 179, 186, 660 P.2d 315 (1983).

De facto parents, however, stand in legal parity to an otherwise legal parent. *In re L.B.*, 155 Wn.2d 679 at 708. Thus, a *de facto* parent would become a party to any dependency proceeding, and would have the right to be heard and introduce evidence at all proceedings and to be represented by counsel including appointment of counsel if she is indigent. *See* RCW 13.04.020, RCW 13.34.090.

When considering whether to grant foster parents’ motions to intervene in dependency proceedings, Washington courts have rejected arguments that foster parents should be allowed full party status in dependencies – even where the child has been placed with the foster

parent for a lengthy period and views her as the parent figure. Adversarial participation in a dependency proceeding by a foster parent “has a tendency to shift the focus of the proceeding from the ability of the natural parent to care for the child to a comparison of the natural parent to the foster parent.” *In re Welfare of Coverdell*, 39 Wn. App. 887, 891, 696 P.2d 1241 (1984). This is an “unequal battle” for the parent, since it is her shortcomings that brought the case to the attention of the court. *Id.* Thus, a foster parent’s participation in a dependency proceeding as a party is only appropriate when her interests do not conflict with the rights and interests of the legal parent. *In re Dependency of J.H.*, 117 Wn.2d at 471-72.

Ms. Franklin’s participation in the dependency of A.F.J. as a full party shifted the focus to apportioning contact and decision-making between the natural parent and the foster – now *de facto* – parent. Ms. Franklin became a party to the dependency proceeding of A.F.J. CP at 1055. She moved to restrict Ms. Johnston’s contact with her son such that the child’s visitation with his mother – which had been unsupervised from Wednesday at 9:00 a.m. to Friday at noon plus four hours on Monday – would become supervised. CP at 1236-39; CP at 1040. If the court had granted her requests, the child would have continued to be placed with Ms. Franklin, and Ms. Johnston’s contact with

her son would have been greatly limited. The court then ordered a transition plan such that the child would reside “equally” with both his mother and Ms. Franklin, and later, the court dismissed the dependency. CP at 1041; CP at 1358-71.

If foster parents are recognized as *de facto* parents, they may seek full custody of the child. As between two parents, the dependency court decides placement based on the best interests of the child. *In re Dependency of R.W.*, 143 Wn. App. 219, 177 P.3d 186 (2008). Thus, instead of attempting to remedy the birth parent’s deficiencies in hopes of safely reunifying her with her child, the court would determine which home is the best for the child – the foster/*de facto* parent’s or the birth parent’s.

Further, if a child is found dependent because he has no parent capable of caring for the child, any newly found *de facto* parent would necessarily have to be found incapable of adequately caring for the child if the dependency were to continue. *See, e.g., In re Dependency of J.W.H.*, 147 Wn.2d 687, 698, 57 P.3d 266 (2002).

Allowing evidence of a temporary foster care placement in a dependency proceeding to establish a basis for recognizing the foster parent as a *de facto* parent undermines the dependency process and contravenes legislative intent to maintain the family unit.

B. Foster Parents May Seek Custody of Dependent Children Through Other Legal Means

Legal proceedings already exist by which foster parents may seek custody of a child in their care.

There is no statutory void triggering application of the *de facto* parent doctrine here. The legislature has established at least three statutory paths for foster parents to seek custody of foster children. First, a foster parent may seek permanent custody of their foster child in a third-party custody action. *See* RCW 13.34.155. Second, a foster parent may petition to become a guardian of the child. *See* RCW 13.36.030. Finally, a foster parent may become a legal parent of the child through adoption. *See* RCW chapter 26.33.

Unlike the circumstances facing the *de facto* parent in *L.B.*, there were statutory remedies available to Ms. Franklin to become a parent to A.F.J.

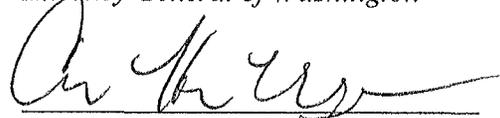
VI. CONCLUSION

The Department respectfully asks this Court to hold that a foster parent – whether licensed or unlicensed – may not be found a *de facto* parent to a child solely by virtue of the foster care placement in a dependency action. The ultimate goal of the foster care system is to safely return children to their parent’s care. Permitting a person with whom a child is placed in a dependency proceeding to petition for recognition as

the child's legal parent controverts statute and public policy and infringes
on the rights of the family.

RESPECTFULLY SUBMITTED this 14 day of February, 2012.

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Respondent.

DECLARATION OF
SERVICE

I, Cheryl Chafin, declare and state as follows:

That on February 14, 2012, I served a true and correct copy of the
MOTION TO FILE BRIEF OF AMICUS CURIAE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES and the AMICUS CURIAE BRIEF
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Dated this 14th day of February, 2012, at Tumwater, Washington.



Cheryl Chafin, *Legal Assistant*