

ORIGINAL

No. 86188-9

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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MARY FRANKLIN,

Respondent,

v.

JACKIE JOHNSTON

Petitioner.

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STATE OF WASHINGTON  
SUPREME COURT

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JACKIE JOHNSTON'S SUPPLEMENTAL BRIEF

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I. The Trial Court Unconstitutionally Infringed Upon Jackie Johnston's Fundamental Substantive Due Process Liberty Rights

The trial court unconstitutionally used its state power to deny Jackie Johnston her substantive due process right to make child rearing decisions in the first instance regarding what access Mary Franklin should have to Jackie Johnston's child, A.F.J. Jackie Johnston has a fundamental substantive due process liberty interest and right to autonomy in making child rearing decisions for her biological son, A.F.J.<sup>1</sup> This extends to making decisions "*in the first instance*" as to other persons' access to A.F.J.<sup>2</sup> Because child rearing decisions are a fundamental right, state interference is constitutional only if the state has a compelling interest and the relief is narrowly tailored to meet that interest.<sup>3</sup> Despite finding Jackie Johnston a fit parent,<sup>4</sup> the trial court never allowed her to decide in the first instance what access Mary Franklin should have to A.F.J.<sup>5</sup> Instead, it thrust Mary Franklin upon her as a co-parent with joint decision making authority<sup>6</sup> and then determined Mary Franklin's access to A.F.J.

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<sup>1</sup> *Troxel v. Granville*, 530 U.S. 57, 68 (2000); and *In re Custody of Smith*, 137 Wn.2d 1, 14-15, 969 P.2d 1 (1998).

<sup>2</sup> *Troxel*, 530 U.S. at 70; and *Smith*, 137 Wn.2d at 21.

<sup>3</sup> *Smith*, 137 Wn.2d at 16.

<sup>4</sup> CP 701-03 and 707-09. These findings were not challenged on appeal and are, therefore, verities.

<sup>5</sup> The trial court decided what access Mary Franklin should have to A.F.J. before the dependency action was dismissed and the state turned over decision making to Jackie Johnston. As a result, Jackie Johnston was never allowed to decide this issue for herself.

<sup>6</sup> On November 4, 2011, the trial judge removed Mary Franklin's joint decision making and awarded sole decision making to Jackie Johnston. Jackie Johnston has moved this Court to supplement the record to prove this occurred. A decision was not rendered prior to submitting this brief.

Even if the trial court had allowed Jackie Johnston to initially decide what access Mary Franklin would have to A.F.J., but disagreed with Jackie Johnston's decision, it should not have been able to substitute its judgment for Jackie Johnston's judgment regarding this issue using the best interest of the child standard. Once a fit parent makes any child rearing decision, courts must constitutionally presume the parent is acting in the child's best interests, give the parent's decision deference and cannot use the best interests of the child standard to overrule, or substitute its judgment for, the parent's decision.<sup>7</sup> In Washington, that means courts must allow a fit parent to first make a decision and can overrule that parent's decision only by finding harm would result from the parent's decision.<sup>8</sup> Here, the trial court's unchallenged finding is that placing A.F.J. in Jackie Johnston's custody would not result in actual detriment to A.F.J.<sup>9</sup> Despite this, the trial court unconstitutionally infringed upon Jackie Johnston's right to make child rearing decisions by using the impermissible child's best interests standard to determine what access Mary Franklin should have to A.F.J.

The unconstitutionality became more severe once the trial court entered its permanent parenting plan. Once the trial court entered the parenting plan in this case, Jackie Johnston's ability to decide what access Mary Franklin could

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<sup>7</sup> *Troxel* 530 U.S. at 67 and 70.

<sup>8</sup> *Id.*; and *Smith*, 137 Wn.2d at 20.

<sup>9</sup> CP 701-03 and 707-09. These findings were not challenged on appeal and are, therefore, verities.

have to A.F.J. as conditions changed became significantly more limited.<sup>10</sup> In other words, the state's infringement on Jackie Johnston's fundamental substantive due process right to make child rearing decisions became greater once the parenting plan was entered. After the parenting plan was signed, Jackie Johnston could not unilaterally modify Mary Franklin's access to A.F.J. and could not even compel a modification using the best interest of the child standard. Instead, Jackie Johnston would face an uphill battle and have to show actual detriment to the child to change the access arrangements the trial court thrust upon her in the first instance.<sup>11</sup>

In conclusion, the trial court unconstitutionally supplanted Jackie Johnston's constitutional right to decide what access Mary Franklin had to A.F.J. in the first instance. It then used the unconstitutionally impermissible best interests of the child standard to make the decision. Finally, it placed an unconstitutionally heightened and onerous burden upon Jackie Johnston to make a different decision when circumstances changed to alter the trial court's decision it initially made

Once the constitutional underpinnings are understood, it is clear the common law *de facto* parent standard should be applied sparingly. This Court has made clear when discussing the interplay between a parent's fundamental liberty interest in making child rearing decisions and this state's common law

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<sup>10</sup> *See* RCW 26.09.160(2).

<sup>11</sup> RCW 26.09.260(2)(c).

*de facto* parent standard, that establishing *de facto* parentage should be “no easy task.”<sup>12</sup>

II. Mary Franklin Did Not Meet All The Criteria To Become A *De Facto* Parent

To make sure it was difficult to become a *de facto* parent, this Court defined six criteria that all must be met before *de facto* parentage may be established.

- 1) A gap in this state’s statutory scheme resulting in no statutory remedy;<sup>13</sup>
- 2) The natural or legal parent consented to and fostered the parent-like relationship;
- 3) The *de facto* parent and the child lived together in the same household;
- 4) The *de facto* parent assumed obligations of parenthood without expectation of financial compensation;
- 5) The *de facto* parent 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; and
- 6) The *de facto* parent fully and completely undertook a permanent, unequivocal, committed, and responsible parental role in the child’s life.<sup>14</sup>

Here, criteria 1, 2, 4, 5 and 6 were not met.

A. There is no statutory gap that must be filled by the common law. Mary Franklin had a statutory remedy in the state dependency

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<sup>12</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 712, 122 P.3d 16 (2005).

<sup>13</sup> *L.B.*, 155 Wn.2d at 689 and 701; and *In re Parentage of M.F.*, 168 Wn.2d 528, 531–32, 228 P.3d 1270 (2010)

<sup>14</sup> *L.B.* 155 Wn.2d at 708.

and termination of parental rights proceedings. The legal relationship between a dependent child and his or her foster parent is entirely a state contractual relationship. Here, A.F.J. was a child adjudicated dependent on the state for almost his entire life. Mary Franklin was a recognized foster parent.

This state's case law is currently in disarray regarding *L.B.* and *M.F.* and when there is a gap and no adequate statutory remedy and when there is not a gap and an adequate statutory remedy. In *L.B.*, the two women were in a committed relationship when the child was born, the women made a joint decision to conceive the child through artificial insemination and the child was born to only one legally recognized parent; the women held themselves and the child out to the public as a family, and the women co-parented the child until their relationship ended when the child was six.<sup>15</sup> Under these circumstances, a statutory gap existed and there was no statutory remedy. In *M.F.*, a stepparent was precluded from establishing himself as a *de facto* parent because “[t]he legislature has provided a statutory remedy for a stepparent seeking a custodial relationship with a stepchild by enabling stepparents to petition for custody [under RCW ch 26.10].”<sup>16</sup>

Division One's Opinion in *A.F.J.* has been interpreted by other intermediate appellate courts as standing for two untenable propositions. First, it has been interpreted as standing for the proposition that “nonparental custody

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<sup>15</sup> *L.B.*, 155 Wn.2d at 683–84.

<sup>16</sup> *In re Parentage of M.F.*, 168 Wn.2d 528, 534, 228 P.3d 1270 (2010).

was not an available statutory remedy where the trial court had rejected the foster parent's nonparental custody petition after determining that the biological mother was a fit parent."<sup>17</sup> This interpretation invites uncertainty and opens a Pandora's Box to *de facto* parent litigation. Under this reasoning, which is what the Opinion says, any third party, including the stepfather in *M.F.*, can establish a statutory gap if they are unsuccessful in establishing a parent's unfitness. This obliterates the constitutional protections in *Smith* and *Troxel*.

Second, Division Three also cited *A.F.J.* to support limiting *M.F.* to cases where a child has two legally recognized parents in existence at trial.<sup>18</sup> Seemingly the Opinion in this case does just that. Admittedly, A.F.J. was born to two legally recognized biological parents resulting from consensual intercourse. Division One believed the biological father's rights were terminated prior to the *de facto* parentage trial, a point not conceded by Jackie Johnston.

This holding is diametrically opposed to Division One's unpublished opinion *In re J.M.W.* that holds *M.F.* prohibits a stepparent from establishing themselves as a *de facto* parent even when the child has only one recognized parent.<sup>19</sup> The rationale was that the nonparental custody statutes were equally available to the stepfather in *J.M.W.* as they were the stepfather in *M.F.*

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<sup>17</sup> *In re Custody of B.M.H.*, \_\_\_ P.3d \_\_\_, 2011 WL 6039260, n.12 (Div III, Dec. 6, 2011).

<sup>18</sup> *B.M.H.*, 2011 WL 6039260, at \*9.

<sup>19</sup> *In re J.M.W.*, 158 Wn. App. 1017, 2010 WL 4159385 (UNPUBLISHED) (2010).

*L.B.* recognized a real statutory gap and disparate treatment between a lesbian couple and a heterosexual couple. The two women in *L.B.* were a committed lesbian couple that mutually intended to conceive and bring into this world a child they would jointly raise and co-parent. Due to biology, and not desire, they conceived and bore a child through artificial insemination.<sup>20</sup> Despite the couple's mutual intent to both be parents to the child and for the child to have two parents, our statutes recognized only the biological mother as a parent. *L.B.* then appropriately recognized a statutory gap and disparate treatment between the two women and a heterosexual couple that mutually decided to do the same thing. In the heterosexual couple context, both partners would be biological parents solely because they would have the ability to share genetic material, and they would automatically have established parental rights when the child was born without having to go through any additional effort like adoption to achieve those rights. The only way for our statutes to recognize *L.B.*'s mommy Carvin as the child's parent would be for mommy Carvin to

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<sup>20</sup> This was an important fact that this Court considered in *L.B.*, 155 Wn.2d at 694, n.9; *see also Bancroft v. Jameson*, 19 A.3d 730 ( Del.Fam.Ct. 2010) ("The combination of the technological advances both of genetic testing and assisted reproduction, along with a change in view from the traditional family concept of prior years, has given rise in the past decade or more to numerous decisions around the country concerned with the issue of whether a person can obtain parental and custodial rights of a minor where the minor was conceived by assisted reproduction or surrogate relationship during that person's committed intimate domestic relationship with another person of the same sex, and where both of these individuals made a joint decision to cause the birth of the child and thereafter raise the child.")

have adopted—an extra step the heterosexual couple did not have to take. In that case there was a gap and disparate treatment.

Here, there is no such gap. Mary Franklin and Jackie Johnston did not mutually agree to conceive a child and bring the child into the world with only one statutorily recognized parent.<sup>21</sup> Jackie Johnston unilaterally had sex with a man, exchanged genetic material through natural means, and brought a child into the world. The child had two existing biological parents when he was born. Jackie Johnston and Mary Franklin were estranged when the child was conceived and when the child was born. Mary Franklin was not even present at the child's birth. Jackie Johnston and Mary Franklin maintained separate residences for most of their relationship both before and after the child was born. There was no evidence Jackie Johnston or Mary Franklin held themselves and the child out as a family to the public. Jackie Johnston and A.F.J. stayed with Mary Franklin for only one month prior to the state taking custody of A.F.J. and making all placement decisions. There is no statutory gap as there was in *L.B.*

There is also no disparate treatment because a heterosexual couple would be treated the same way. If a man would have married Jackie Johnston after her conception to another man, provided assistance to Jackie Johnston

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<sup>21</sup> *M.F.* specifically recognizes the parties' original intent and agreement as creating the statutory gap in *L.B.* 168 Wn.2d at 531–32 “Taking into account the *original* intent and agreement of the parties and the lack of a statutory remedy, we fashioned a remedy.”

during pregnancy and lived with Jackie Johnston and A.F.J. for one month before the state took custody of A.F.J., then the man, a stepfather, would have been precluded from establishing himself as a *de facto* parent because the nonparental custody statute would have been an available remedy.<sup>22</sup> Here, Mary Franklin should be treated no differently than the man in this example.

B. To pass constitutional muster, it is the second criteria—the natural or legal parent consented to and fostered the parent-like relationship—that estops a biological or adoptive parent from asserting their fundamental liberty interest in making child rearing decisions:

Critical to our constitutional analysis here, a threshold requirement for the status of the *de facto* parent is a showing that the legal parent “consented to and fostered” the parent-child relationship. The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the *active* encouragement of the biological or adoptive parent by *affirmatively* establishing a family unit with the *de facto* parent and child or children that accompany the family.<sup>23</sup>

Inherent in this analysis is recognizing the family the sole parent in *L.B.* created. Ms. Britain created a family with Ms. Carvin for six years whereby the child had two parents, and by doing so, Ms. Britain could not disaffirm the family she created. The court therefore recognized the family she created.

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<sup>22</sup> *M.F.*, 168 Wn.2d at 533 (“The legislature has provided a statutory remedy for a stepparent seeking a custodial relationship with a stepchild by enabling stepparents to petition for custody.”)

<sup>23</sup> *L.B.*, 155 Wn.2d at 712.

Division One committed a fundamental error in its analysis when it added the time A.F.J. was in the state's custody to the one month Jackie Johnston voluntarily shared A.F.J. with Mary Franklin. To circumvent Jackie Johnston's fundamental rights as a biological parent, she must have *affirmatively* and *actively* created a family with Mary Franklin and A.F.J. whereby A.F.J. grew to know both Jackie and Mary as his two parents. Here, Jackie Johnston had no capacity to affirmatively or actively create such a relationship.

Once the state took custody of A.F.J., it affirmatively and actively fostered and encouraged the relationship between A.F.J. and Mary Franklin. Once she became a licensed foster parent to A.F.J., Mary Franklin's expectations were entirely dependent upon the state's laws and its contractual commitments.<sup>24</sup> Our laws underscore the important but inherently limited role that foster parents play in a child's life. Foster care is temporary substitute care for a child who is placed away from the child's parents or guardian and for whom DSHS has placement and care authority.<sup>25</sup> Whatever emotional ties may have developed between Mary Franklin and A.F.J. while they were in a fostering relationship have their origins in an arrangement in which the State—and not Jackie Johnston—was the partner actively and affirmatively fostering

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<sup>24</sup> *Smith v. Organization of Foster Families for Equality and Reform*, 491 U.S. 816, 845–46 (1977).

<sup>25</sup> RCW 74.15.020(1)(e); and WAC 388-25-0010.

and encouraging the relationship. Division One ignored this fundamental distinction when it repeatedly referenced Jackie Johnston's participation in the relationship between Mary Franklin and A.F.J. after the state took custody of A.F.J.<sup>26</sup> Jackie Johnston should not be estopped from asserting her constitutional rights when the state was the partner actively and affirmatively fostering and encouraging the relationship between Mary Franklin and A.F.J.

C. The fourth factor—assuming parental obligations without expectation of compensation—is dispositive. When deciding *L.B.*, this Court cited two cases that had two different approaches in the criteria related to compensation. The compensation approach this Court substantially adopted was the more stringent Wisconsin approach that required the *de facto* parent to assume parental obligations “without expectation of financial compensation.”<sup>27</sup> Fairly read, this means without expecting *any* compensation and precludes from consideration *any* caretaker who expects compensation. The other compensation criteria was the less stringent Massachusetts approach that only required the *de facto* parent to fulfill their parental role “for reasons primarily other than financial compensation.” This does not automatically prohibit a

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<sup>26</sup> See Opinion at 16 (“the parent-child relationship between Franklin and A.F.J. was initiated and encouraged by Johnston before *and beyond* the fostering relationship...”); and at 18. (“Johnston continued supporting Franklin’s relationship with A.F.J. even after the State became involved...” “Both before and after the State’s involvement and Franklin’s status as a foster parent, Johnston encouraged and fostered Franklin’s parental role in A.F.J.’s life.” “Moreover, after the State filed the dependency action, A.F.J. continued to reside with Franklin, a circumstance that Johnston supported...”)

<sup>27</sup> *In re Custody of H.S.H.-K.*, 193 Wis.2d 649, 695, 533 N.W.2d 419 (1995).

person from establishing themselves as a *de facto* parent because they received compensation. The American Law Institute adopted the less stringent and more liberal “primarily for nonfinancial reasons” approach.<sup>28</sup>

In *L.B.*, this Court recognized it did not adopt the ALI approach and adopted an approach that had “slightly different standards.”<sup>29</sup> Division One seemingly recognized this distinction in its opinion when distinguishing this case from the ALI regarding the duration requirement (discussed *infra*).<sup>30</sup> Division One, however, ignored this recognized distinction when it came to the compensation standard this Court adopted and equated the Wisconsin “without expectation of financial compensation” standard with the Massachusetts/ALI not primarily for financial compensation standard. In fact, Division One used ALI examples that use the not primarily for financial compensation standard to buttress its conclusion that “Franklin did not assume the obligations of care for A.F.J. with the expectation that she would receive compensation.”<sup>31</sup>

These standards are different and Mary Franklin did have an expectation of compensation. Her own testimony shows she knew she would receive foster care payments as early as April 2006.<sup>32</sup> She received foster

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<sup>28</sup> Am. Law Inst., Principles of the Law of Family Dissolution, §2.03, cmt. C(ii) at 120.

<sup>29</sup> *See L.B.*, 155 Wn.2d at 706, n.24.

<sup>30</sup> *See* Opinion at 20 n.9.

<sup>31</sup> *See* Opinion at 18 and 19.

<sup>32</sup> VRP (Franklin 3/26/09) 37:5-16 and 39:22-40.

payments from September 2006 – April 2008.<sup>33</sup> She received subsequent checks, but did not cash or return those checks to DSHS.<sup>34</sup> To say she did not assume parental obligations without expectation of any compensation is untrue. Division One changed the standard from the more stringent Wisconsin standard that this Court adopted to the less stringent Massachusetts/ALI standard without providing any reason whatsoever as to why.

The more rigid Wisconsin compensation standard should remain the correct standard. It provides certainty in a very uncertain area of the law. Without it, a parent may unwittingly end up sharing parental rights with a nonparent simply because the nonparent's subjective intent was love for the child and not the compensation that he or she may have received. It will also prevent foster parents and paid caregivers from asserting actions against DSHS for negligent investigation of child neglect or child abuse.<sup>35</sup>

D. Because the time Mary Franklin spent with the child after the state took custody of A.F.J. should be excluded from the *de facto* parent analysis, Mary Franklin did not meet the duration requirement set forth in *L.B.* In other words, if Mary Franklin would have brought a petition to establish *de facto* parentage at the time the state brought its dependency action in January 2006, then her petition should have been summarily dismissed for,

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<sup>33</sup> VRP (Franklin 3/26/09) 37:17-38:2

<sup>34</sup> VRP (Franklin 3/26/09) 38:10-16

<sup>35</sup> *See Blackwell v. DSHS*, 131 Wn. App. 372, 377-78, 127 P.3d 752 (2006).

among other reasons, her not having lived with the child long enough to have established a parent-child relationship. At that time, Jackie and A.F.J. had stayed with Mary Franklin for about one month. The same ALI principles Division One embraced when discussing the compensation standard suggest two years to be the minimum time for the parent and child to have lived together in the same household before a *de facto* parent-child relationship developed.<sup>36</sup> Clearly, Mary Franklin did not satisfy all *L.B.*'s exacting standards for a sufficient duration to become a *de facto* parent.

E. Mary Franklin also did not occupy a permanent role in A.F.J.'s life while she was a foster parent. The trial court made no explicit finding that Mary Franklin occupied a permanent role in A.F.J.'s life. Division One implied this necessary finding.<sup>37</sup> The law, however, precludes such a finding. As stated earlier, once a person becomes a foster parent, their reasonable expectations and legal relationships with the child are controlled by the state dependency statutes and the contractual relationship with the state and the foster parent.<sup>38</sup> The state becomes the foster parent's partner with respect to the child. Our statutes and administrative code make clear the fostering arrangement is, by its nature, a temporary relationship and not a permanent

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<sup>36</sup> Am. Law. Inst. , *supra* §2.03, at 107-08, 119.

<sup>37</sup> *See* Opinion at 21.

<sup>38</sup> *Smith v. Organization of Foster Families for Equality and Reform*, 491 U.S. at 845-46.

relationship.<sup>39</sup> Mary Franklin's subjective and unreasonable expectations to the contrary notwithstanding, her fostering relationship with A.F.J. cannot satisfy the permanency criteria. Because Mary Franklin chose to become a foster parent in 2006 rather than trying to establish herself as a *de facto* parent, the time she spent in the fostering relationship by definition preclude her from occupying a permanent role in A.F.J.'s life.

To be sure, Mary Franklin never paid child support. She received compensation from the state when she took care of the child, but when she was ordered to pay child support she objected at trial. Not only did she object at trial, but she appealed the trial court's child support determination to pay \$215 per month. How is this an unequivocal and permanent parental role?

### III. A.F.J. Had Two Parents At Birth And At Trial

To the extent Mary Franklin or Division One try to distinguish this case from *M.F.* based on A.F.J. not having two existing parents at trial, that is not a valid basis for distinction. First, A.F.J. had two biological parents with parental rights when he was born. In *L.B.* the child only had one statutorily recognized parent at birth. Second, A.F.J.'s biological father's rights were not properly terminated. While a default was entered against him, a default judgment was never entered, and the termination of parental rights action was dismissed prior to a judgment being entered.

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<sup>39</sup> RCW 74.15.020(1)(e); and WAC 388-25-0010; and *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991), cited with approval *L.B.*, 155 Wn.2d at 691, n.7.

More important, Mary Franklin, the petitioner in the trial court, knew that the biological father was ascertainable. Jackie Johnston may have told the state that that she did not know who the biological father was. Based on this, the state served the unknown father by publication in order to obtain the default against him. But Mary Franklin testified she knew that Jackie Johnston's statement was not true and that Jackie Johnston really did know who A.F.J.'s biological father was.<sup>40</sup> Mary Franklin was trying to establish herself as a parent to two existing parents without notifying the known father. This cannot be countenanced. Mary Franklin had experienced counsel during trial. Under these circumstances, Mary Franklin cannot ride the state's coat tails when she knew the service by publication in the state's termination of parental rights proceedings was wrongfully obtained.

IV. There Are Several Sound Policy Reasons Not To Allow Mary Franklin *De facto* Parent Status In This Case

It is necessary to assure a functional state-run dependency and foster care system to prohibit the time a foster parent spends with a foster child from being counted when the foster parent is trying to establish herself or himself as a child's *de facto* parent. A *de facto* parent must be a *de facto* parent either before or after the state's involvement in dependency or foster placement. This Court does not have to say definitively that anytime there is a fostering relationship, then the foster parent cannot establish themselves as a *de facto*

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<sup>40</sup> VRP (Franklin 3/29/09) 40:10-21.

parent. For instance, had the state intervened in the Britain and Carvin family and removed *L.B.* from Britain's care after she and Carvin jointly raised the child for 6 years, then Carvin would still be a *de facto* parent if she could meet the applicable criteria independent of the time she spent with the child during the fostering relationship. Similarly, there are situations where DSHS could reunite a nontraditional family after the statutorily recognized parent accepted services and this post-dependency period could also be used to establish *de facto* parentage. The problem is trying to squeeze the facts in this case into *de facto* parentage and allowing a nonparent to become a *de facto* parent during the fostering relationship. That must be avoided.

Not only is a fostering relationship antithetical to the criteria this Court developed in *L.B.*, but allowing a nonparent to become a *de facto* parent during a fostering relationship would completely undermine the predictability the state needs and throw into chaos the rules the state must follow in dependency and foster care situations. Even if the sole biological parent consented to and fostered a parent-child relationship between a child and a caregiver prior to the state's involvement, the state and the biological parent need to know that continuing the relationship between the caregiver and the child will not result in the caregiver obtaining parental rights. If it were otherwise, then a dependency action would have to be dismissed once the caregiver achieved *de facto* parent status because there would be a parent capable of taking care of the child and

the child would no longer be dependent on the state. This would also result in the court then comparing the foster parent's home with the statutorily recognized parent's home and determining placement using a best interests of the child standard.

In addition, once the caregiver magically crossed the imaginary *de facto* parent line, he or she would then be entitled to intervene into the dependency action as a matter of right and the state would be required to give the now-*de facto* parent notice and an opportunity to be heard at any dependency hearings. The now *de facto* parent would also be entitled to request appointed counsel. She or he would also be able to challenge any proposed move to a different foster home. Finally, she or he would be allowed to sue the state for negligent investigation of child neglect and abuse cases.

Allowing *de facto* parent status during a fostering relationship would also hamper and complicate further proceedings. The caregiver would have to be named as a party to any termination of parental rights proceedings to assure all parental rights are terminated with appropriate due process. Again, the caregiver could request appointed counsel. If the caregiver became a *de facto* parent during the fostering relationship, then the caregiver would have to consent to any adoptions.

As a result, the state would be inclined to make less-than-optimal placement decisions to avoid the quagmire becoming a *de facto* parent during a

fostering relationship would cause. The state would have to move children frequently between foster homes to ensure that the magical *de facto* parenting status is not achieved.

Similarly, a parent whose child is in dependency proceedings would be discouraged from acting in their child's best interests. They would be confronted with the proverbial Hobson's choice between recommending their child remain in continuing care with a known suitable adult and requesting their child be placed with a complete stranger in a traditional licensed fostering arrangement. According to the Opinion in this case, if the parent requested the child remain in the existing home with the suitable non-licensed adult caregiver, then the parent would be fostering and encouraging the parent-child relationship and waiving their constitutional rights to make child rearing decisions without state interference once they became fit. To avoid this result, the parent whose child is in dependency would have an incentive to insist on a traditional fostering relationship with a complete stranger to make sure that his or her parental rights are not compromised or unknowingly shared.<sup>41</sup> This would also increase the cost to the State for running the foster care system because it would decrease the demand for unpaid and unlicensed fostering relationships.

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<sup>41</sup> This parade of horrors is only made worse by the 2007 change to RCW 13.34.130 that now allows non-licensed suitable adult placements if the caregiver is known to the child. It now satisfies the expectation of compensation requirement.

It is this State's policy to promote childrens' best interests. Allowing a nonparent to become a *de facto* parent during a fostering relationship will not achieve that goal.

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