

86188-9

No. 63919-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MARY FRANKLIN, Appellant

v.

JACKIE J. JOHNSTON, Respondent/Cross-Appellant

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
REPLY AMICUS BRIEF

American Academy of
Matrimonial Lawyers,
Washington Chapter
200 West Mercer St.
Suite E-410
Seattle, Washington 98119

2011 JAN -3 PM 5:02
B

ORIGINAL

TABLE OF CONTENTS

I. Introduction.....4

II. Argument.....4

A. The State’s Position Contravenes Public Policy Governing Juvenile Dependency Proceedings.....4

B. The Overriding Policies Of Juvenile And Family/*De Facto* Parentage Proceedings Are The Same; There Is No Artificial Conflict Between The Actions5

1. The Child’s Best Interests.....5

2. The Goal of Perpetuating A Healthy Safe Family Unit Must Include The One Involving A *De Facto* Parent.....5

C. A Biological Parent’s Alleged Legal Incapacities In A Dependency Proceeding Do Not Prevent The Court From Determining Whether He or She Consented To Or Fostered A Parent-Like Relationship.....6

D. The State’s Intent That The Foster Parent Relationship Be Temporary Does Not Govern Whether The Unequivocal Permanent Commitment of Franklin To The Child Has Been Demonstrated.....7

III. Conclusion.....9

TABLE OF AUTHORITIES

Table of Cases

In re the Parentage of L.B., 155 Wn.2d 679,
122 P.3d 161 (2005).....3, 6-8

In re Dependency of J.W.H., 147 Wn.2d 687,
57 P.3d 266 (2002).....5

Statutes

RCW 13.34.....6, 8

RCW 13.34.020.....6

RCW 13.34.136(3).....8

RCW 13.34.900.....6

RCW 26.09.....9

RCW 26.09.210.....9

RCW 26.09.220(1).....9

RCW 26.10.170.....9

RCW 26.26.375(1).....9

I. Introduction

The State argues that “it would undermine the nature of dependency proceedings if a caregiver could become a *de facto* parent merely because they were [sic] a foster parent to a dependent child”.¹ However, as more fully discussed below, there is no incompatibility between the dependency statutory scheme and the four common law *L.B.* factors. When it argues that “[a] foster parent may properly be found a *de facto* parent only when the basis for the finding is established outside the foster care relationship” (p. 6), it supports the positions of the other *amici* in this case. The trial court made unassailable findings of fact expressly “outside the foster care relationship” to conclude that Franklin is A.F.J.’s *de facto* parent.

II. Argument

A. The State’s Position Contravenes Public Policy Governing Juvenile Dependency Proceedings

The State suggests that its obligations in dependency proceedings supersede the rights of children and third parties in private parenting proceedings. (p.15-16). This hierarchy is contrary to law since a third party parenting action “...may be heard in conjunction with a dependency

proceeding and *makes the dependency action contingent on the outcome of the custody proceeding not the other way around.*” (*In re Dependency of J.W.H.*, 147 Wn.2d 687 at 697, 57 P.3d 266 (2002)) (emphasis supplied). *J.W.H.* is also relied upon by Johnston, but supports the position of all *amici* except the State.

B. The Overriding Policies Of Juvenile and Family/*De Facto* Parentage Proceedings Are The Same; There Is No Artificial Conflict Between The Actions

1. The Child’s Best Interests

Dependency proceedings have the same overriding purpose as private third party parenting actions: “Both proceedings have the best interests of the children as their purpose.” *Dependency of J.W.H., supra*, at 698. The State acknowledges that the overriding public policy in dependency proceedings is to protect the child from abusive or neglectful parents, and to perpetuate a safe, stable parent-child family unit when it can be achieved as between the child and both his or her parents. The trial court correctly applied this principle in its decision.

2. The Goal of Perpetuating A Healthy Safe Family Unit Must Include The One Involving A *De Facto* Parent.

¹ All page references in parenthesis refer to the pages of the State’s brief in which this reply brief summarizes its contentions.

RCW 13.34.020 declares that the family unit is a fundamental resource of American life, which should be nurtured; that when the legal rights of the parents are in conflict, the rights and safety of the child should prevail. The term, “family unit” is nowhere defined in any statutory provision, although three years after this case was commenced when the legislature enacted the domestic partnership act it amended RCW 13.34 to include in the concept of “family,” couples who have registered their domestic partnerships (Ch. 521 laws of 2009 and RCW 13.34.900).

The legal concept “family unit” is not unique to the dependency statutory scheme. The *L.B.* Court acknowledged the need to create a common law equity concept of *de facto* parentage “...to respond to the needs of children and families in the face of changing realities.” *L.B.* at 689. Those realities are the “...advancing technologies and evolving notions of what comprises *a family unit* (emphasis supplied). *LB* at 687.

And yet the State would necessarily have A.F.J. lose the stability and safety of such a parent-like family unit nurtured by a *de facto* parent merely because that parent-in-fact becomes the child’s foster parent.

C. A Biological Parent’s Alleged Legal Incapacities In A Dependency Proceeding Do Not Prevent The Court From Determining Whether He or She Consented To Or Fostered A Parent-Like Relationship

The State says that Ms. Johnston, as biological parent in the dependency proceeding, did not have the legal capacity to consent to or foster the parent-like relationship because she had no right to independently encourage and consent to a family-like relationship, due to the contractual relationship governed by state law (see pages 9 - 11). This argument is a *non sequitur*. The relationship started before Franklin had to agree to become a foster parent in order to protect A.F.J. *L.B.* requires proof of whether Johnston consented to *and* fostered the parent-like relationship, not whether she fostered or consented to the foster care relationship. Such proof was highly evident in this case.

D. The State's Intent That The Foster Parent Relationship Be Temporary Does Not Govern Whether The Unequivocal Permanent Commitment of Franklin To The Child Has Been Demonstrated.

The state argues that since its intention in permitting a foster care placement is temporary, that person should be prevented from proving an irrevocable and permanent commitment to the child. However, it is not the state's intent in creating the foster parent relationship that is the measure of Franklin's commitment to the child under *L.B.*, *supra*, because it is not the State who seeks *de facto* parent status. The issue under *L.B.*, *supra*, is what the nature of the third party's commitment was in fact.

The State's brief observes that the child has a right to a "...speedy resolution of any proceeding..." under RCW 13.34 (see pages 2, 3, and 15) which is why foster care placements are intended to be temporary.

Although the dependency act does not define the word "temporary" RCW 13.34.136(3) places a 22 month limit on the duration of the juvenile dependency process.

"... If the child has been in out-of-home care for fifteen of the most recent twenty-two months, the court shall require the department or supervising agency to file a petition seeking termination of parental rights..."

That did not happen here. Although termination may have been sought in 2008, by the time the court entered its parenting plan order on May 26, 2009, A.F.J. had been in Franklin's care for 39 months the dependency proceeding was not terminated until March 2010, approximately 48 months after it began.

With the termination of the dependency proceeding the State's reunification efforts with the biological parent would end; but not, as the State argues, the court's ability to oversee that process.

In parentage proceedings the court can enter parenting plan orders "...on the same basis as provided in chapter 26.09..." (RCW 26.26.375 (1) (a). Under RCW 26.09 the court has enormous flexibility. It can "...seek

the advice of professional personnel..." RCW 26.09.210. It can require investigation and reports from a "...guardian ad litem, the staff of the juvenile court, or other professional social service organization experienced in counseling children and families." (RCW 26.09.220 (1)).

Under Family Court authority, a judge or court commissioner "...may order...family court services ... and monitoring of the parties through public or private treatment services, other treatment services in or other specialists" (RCW 26.12.170).

III. Conclusion

The State's position would seal the fate of all those children in A.F.J.'s circumstances – by causing them to lose the only stable, safe, permanent family unit they have ever known – without the possibility of legally protecting that relationship. Its position abnegates the very permanency and stability of the family unit which the State is required to protect and perpetuate for children under its jurisdiction for any reason. It thereby disserves a child's best interests, which is the most important public policy that family law and the juvenile dependency system are designed to achieve.

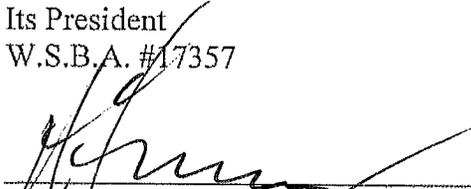
DATED this 3rd day of January, 2011.

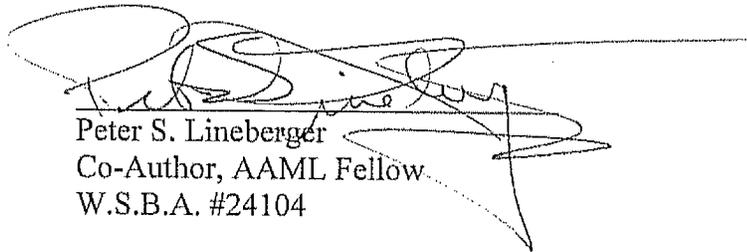
Respectfully submitted,

American Academy of
Matrimonial Lawyers,
Washington Chapter

[see attached.]

J. Mark Weiss
Its President
W.S.B.A. #17357

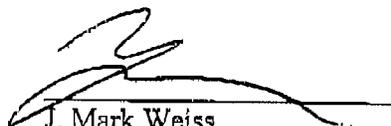

H. Michael Finesilver (Dea Fields)
Author, AAML Fellow
W.S.B.A. #5495


Peter S. Lineberger
Co-Author, AAML Fellow
W.S.B.A. #24104

DATED this 3rd day of January, 2011.

Respectfully submitted,

American Academy of
Matrimonial Lawyers,
Washington Chapter



J. Mark Weiss
Its President
W.S.B.A. #17357

H. Michael Finesilver (fka Fields)
Author, AAML Fellow
W.S.B.A. #5495

Peter S. Lineberger
Co-Author, AAML Fellow
W.S.B.A. #24104

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MARY FRANKLIN,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
JACKIE J. JOHNSTON,)	
)	
Respondent/Cross-Appellant,)	
_____)	

I, Lester Feistel, state and declare as follows:

I am a Paralegal in the Law Offices of Anderson, Fields, McIlwain & Dermody, Inc., P.S. On the 3rd day of January, 2011, I placed true and correct copies of the Motion for Order Authorizing Consideration of Amicus Reply Brief and the AAML Amicus Reply Brief with Seattle Legal Messengers for delivery on January 3, 2011 to:

Dennis J. McGlothin
Robert J. Cadranell, II
Olympic Law Group PLLP
1221 E Pike St Ste 205
Seattle, WA 98122-3930

2011 JAN -3 PM 5:02

ORIGINAL

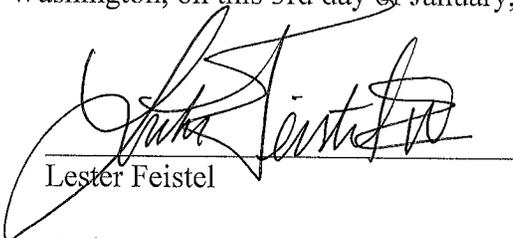
Robert S. Bock
810 3rd Ave Ste 800
Seattle, WA 98104-1695

Lori L. Irwin
King Co Superior Ct/Dependency Casa
1401 E. Jefferson Street, Suite 500
Seattle, WA 98122-5574

Mary Franklin
c/o Seattle Legal Messengers
711 – 6th Avenue North, #100
Seattle, WA 98109

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

DATED at Seattle, Washington, on this 3rd day of January, 2011.



Lester Feistel

Anderson, Fields, McIlwain & Dermody
207 E. Edgar Street
Seattle, Washington 98102
(206) 322-2060