

86188-9

No. 63919-6-I

STATE OF WASHINGTON COURT OF APPEALS
DIVISION ONE

MARY FRANKLIN,
Appellant / Cross-Respondent,

v.

JACKIE JOHNSTON,
Respondent / Cross-Appellant.

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Respondent/Cross-Appellant's Answer to Amici Curiae Briefs

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A. Argument

1. The Trial Court's Decision Unconstitutionally Failed to Presume Ms. Johnston Would Act in A.F.J.'s Best Interests.

The law is settled that parents have a fundamental Constitutional right to make decisions concerning the care, custody, and control of their children.¹ Moreover, in order to act Constitutionally, courts must presume a fit parent will act in their child's best interests.² State interference with a parent's child-rearing decision is subject to strict scrutiny and can only be sustained if it serves a compelling state interest and the interference is narrowly tailored to serve that compelling interest.³ To satisfy this strict scrutiny test, state interference with a parent's right to parent their child is justified only when the parent is unfit or if there would be actual detriment to the child if the decision were made.⁴ Here, the trial court found, and it is not challenged, that Ms. Johnston is a fit parent and there would be no actual detriment to the child if he were placed in Ms. Johnston's care.⁵ Moreover, Ms. Johnston also has not objected to the child having contact with Appellant and, in fact, favors continued contact between Appellant

¹ *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000); *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005); and *In re Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998).

² *Troxel*, 530 U.S. at 68; *In re Custody of Shields*, 157 Wn.2d 126, 144, 136 P.3d 117 (2006)

³ *C.A.M.A.*, 154 Wn.2d at 57.

⁴ *Shields* at 142, 143

⁵ CP 707-708.

and A.F.J.⁶ In this regard it is similar to the mother in *Troxel* who also did not object to visitation and contact with the grandparents.⁷ Under these circumstances, the trial court unconstitutionally interfered with Ms. Johnston's right to parent A.F.J.

The American Academy of Matrimonial Lawyers' (AAML's) argument that the trial court should be allowed to act preemptively and require contact between Appellant and A.F.J. is unconstitutional. Regarding a child's relationship with another person, the United States Supreme Court in *Troxel* specifically stated the decision on what kind of "relationship would be beneficial in any specific case is for the parent to make *in the first instance*."⁸ (Emphasis added). Despite this, AAML argues that "[a]lthough Ms. Johnston stated she would not sever [the] contact [between Appellant and A.F.J.], she could do so with impunity in the absence of an order defining legally enforceable residential rights as between [Appellant] and A.F.J."⁹ AAML justifies the state's interference with Ms. Johnston's fundamental Constitutional parenting rights because Ms. Johnston *might* sever contact between Appellant and A.F.J. sometime in the future, contrary to A.F.J.'s best interests. In essence, it argues the court was allowed to act preemptively based on what Ms. Johnston *might*

⁶ VRP (Johnston 4/9/09) 23:21-24.

⁷ *Troxel*, at 71

⁸ *Troxel* at 70

⁹ Amicus Br. at 12.

do in the future. If adopted, this argument would deprive Ms. Johnston of her ability to make the parenting decision in the first instance as required by *Troxel*.

AAML's argument is also not well grounded in law because if Ms. Johnston were to sever contact between A.F.J. and Appellant, it may not be with impunity. State interference in a parenting decision may be justified if it would result in actual harm to the child.¹⁰ If Ms. Johnston were to make a parenting decision, like depriving A.F.J. contact with Appellant, and that parenting decision would cause actual harm to the child, then state interference with that decision might be Constitutional if the interference was narrowly tailored to meet the state's compelling interest in not causing harm to the child.

Putting these arguments together, the law is clear and dictates that the state should not interfere with Ms. Johnston's fundamental Constitutional right to make parenting decisions prior to her making a decision that would actually harm the child. To do otherwise would presume Ms. Johnston, a fit parent, will act contrary to A.F.J.'s best interests in the future. It would put the burden on Ms. Johnston to disprove that she would do something that would not harm her child. That would negate the *Troxel* presumption and, therefore, be unconstitutional.

¹⁰ *C.A.M.A.*, 154 Wn.2d at 64.

2. *L.B.* Created a Very Narrow and Limited Exception to the Required Strict Scrutiny Analysis that does not Apply Here.

L.B. created a limited and narrow exception to the strict scrutiny analysis when a parent intentionally and affirmatively creates a family unit that is not recognized by statute. *L.B.* allows courts to define who is a parent and, thereby, ignore the strict scrutiny analysis and settle parenting disputes using a best interest standard.¹¹ Because it bypasses the typical strict scrutiny analysis, the *L.B. de facto* parentage determination was intended to be “no easy task.”¹² Here, the trial court loosened the *L.B.* requirements and made a *de facto* parentage determination easier than it was intended to be.

There cannot be a Constitutional *de facto* parent adjudication in this case because Ms. Johnston did not affirmatively establish a family unit and did not foster and consent to Appellant parenting her child for a sufficient duration. In order to Constitutionally bypass the strict scrutiny analysis by adjudicating a party to be a *de facto* parent, it is essential that the parent-like relationship between the prospective *de facto* parent and the child be brought about “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

¹¹ *In re the Parentage of L.B.*, 155 Wn.2d 679, 683, 122 P.3d 161, 178 (2005).

¹² *L.B.*, 122 P.3d at 179.

family.”¹³ L.V. argues incorrectly that *de facto* parent analysis focuses “not on the relationship between the child’s natural parent and the *de facto* parent” and that there is no requirement that a *de facto* parent “have a particular type of relationship with the child’s natural parent.”¹⁴ Actually, *L.B.* does require that the natural parent affirmatively establish a family unit that includes both the child and the *de facto* parent. Although such a three-person family unit existed in *L.B.*, there was no such family unit here.

Ms. Johnston did not establish a “family unit” with Appellant and A.F.J. prior to the state removing A.F.J. from Ms. Johnston’s custody. It is undisputed Ms. Johnston did not speak to Appellant from the time Ms. Johnston left Appellant’s home in early October 2005 until A.F.J. was born in November 2005. Ms. Johnston and A.F.J. lived in the Perinatal Treatment Center in Tacoma, Washington until December 24, 2005. After December 24, 2005, Ms. Johnston and A.F.J. spent half their time staying with Appellant until Appellant called CPS on January 22, 2006. The child was removed by the state from Ms. Johnston’s care on January 24, 2006. Ms. Johnston and A.F.J., therefore, had only stayed with Appellant half-time for one month before the state intervened. This was insufficient, as a matter of law, to prove Ms. Johnston established a family unit with

¹³ *L.B.* 122 P.3d at 179.

¹⁴ Amicus Br. at 18.

Appellant and A.F.J. and insufficient to prove Appellant consented to and fostered the parent-child relationship with A.F.J.

Ms. Johnston establishing a family unit with Appellant and A.F.J. is required under Washington law. That gives rise to the statutory gap that needed to be filled by Washington's common law. It was the family unit that existed in *L.B.* that was not recognized by Washington's statutes that was the recognized statutory gap.¹⁵ In *L.B.*

the petitioner and respondent were involved in a long-term, committed same-sex relationship. They agreed to conceive a child with the intention of forming a family, and the petitioner gave birth. The parties shared parenting responsibilities for the child and held themselves out to the public as a family. Unlike most parents, however, the respondent, Carvin, had no legal parental status. After the relationship ended when *L.B.* was six years old, the petitioner terminated Carvin's contact with *L.B.*, and Carvin then filed suit to establish her legal parental rights.¹⁶

This case is a far cry from the family unit in *L.B.* Appellant and Ms. Johnston were in a same-sex relationship, but it was neither long-term nor committed. They did not agree to conceive a child much less with the intention to form a family. There was no evidence as to how Appellant and Ms. Johnston divided parenting responsibilities except that Ms. Johnston was to be the stay-home mom at Appellant's home. The family unit here did not last six years; rather, it broke up one month after it purportedly started when the state removed A.F.J. from

¹⁵ *In re Parentage of M.F.* 168 Wn.2d 528, 534, 228 P.3d 1270 (2010).

¹⁶ *M.F.* at 532

Ms. Johnston's care. Finally, Ms. Johnston has not cut off contact between A.F.J. and Appellant. In fact, she has not even been given the opportunity to make the decision.

In addition, there is no gap in the complex statutory framework in dependency and foster care situations like the one in this case.

Contrary to the AAML's and LV's legal assertions that *M.F.* is limited to situations involving two parents with recognized legal rights, *M.F.* distinguished itself based upon the fact there was no statutory gap for stepparents to become custodians when a child has two parents.¹⁷

Here, there is similarly no statutory gap; rather, there is an intricate statutory web for dependency, adoption, third-party custody and fostering placements. When the state declares a child dependent and places a child with a relative, responsible adult, or licensed foster parent, the child's custodian, parents, and the state all have defined rights and responsibilities, including the right to terminate or preserve parent or custodial status. There is no gap in this extensive and cumbersome statutory scheme to allow the common law to add additional rights to a licensed foster parent, relative, or responsible adult to become a *de facto* parent once the state steps in and exercises

¹⁷ *M.F.* at 533 and 535 ("Because no statutory void exists in this case, as it did in *L.B.* we decline to extend the de facto parentage doctrine to the facts presented.")

its legislative jurisdiction over the parties and the child. Any augmentation to these parties' expectations should be legislative and prospective not judicial and retrospective.

*Osterkamp*¹⁸ creates a hybrid exception, but this is not the case to decide the exception because the state became involved before any *de facto* parent relationship could form. Here, the state made the placement decisions for A.F.J. within one month after Ms. Johnston and A.F.J. moved from P.T.S. in Tacoma. Under these circumstances, no *de facto* relationship could form between Appellant and A.F.J. in this short duration. The AAML and LV stress the child has lived with Appellant 99% of his life. They fail to mention, however, that 99% of this time was under state authority and not pursuant to Ms. Johnston's affirmative fostering and consent. If this Court removes the time the state made A.F.J.'s placement decisions from consideration as required in *Osterkamp*, then Appellant spent insufficient time with A.F.J. to establish the *de facto* parent relationship with A.F.J. prior to the state's involvement.

3. Appellant had Expectations of Compensation when she Assumed Obligations of Parenthood as a Foster Parent.

¹⁸ 235 P.3d 178 (Alaska 2010)

L.B. factor #3 requires that “the petitioner assumed obligations of parenthood without expectation of financial compensation.”¹⁹ AAML argues that Appellant meets *L.B.* criteria #3 because she did not request compensation, she did not need compensation, and she did not want compensation.²⁰ All of that might be true, but the test is whether she had an “*expectation*” of compensation. Expectation is “[t]he act of looking forward; anticipation.”²¹ A foster parent undeniably has an expectation of compensation, whether or not she requests it, needs it, or wants it. To write “expectation” out of *L.B.* factor #3 is the province of the Supreme Court.

LV argues that because Appellant’s relationship with the child formed before the dependency, she satisfies the third prong of the *L.B.* test.²² Whatever parental obligations Appellant may have assumed in the one month between Ms. Johnston’s and A.F.J.’s release from P.T.S. in Tacoma and the state’s removing A.F.J. from Ms. Johnston’s care, this was not enough time to establish a “bonded, dependent relationship, parental in nature,” as contemplated in *L.B.* The parental obligations that Appellant assumed after the state intervened on January 24, 2006 were with the expectation of financial compensation and thus they fail *L.B.* factor #3.

¹⁹ *In re the Parentage of L.B.*, 155 Wn.2d 679, 683, 122 P.3d 161 (2005).

²⁰ Amicus Br. at 9-10.

²¹ Black’s Law Dictionary 617 (8th ed. 2004).

²² Amicus Br. at 11.

4. All Foster Placements, Including This One, Are by Definition Temporary.

Washington statutes, Washington Administrative Code, and the Washington State Supreme Court recognize foster parents are temporary custodians.²³ The Office of the Attorney General has pointed out that foster care “is temporary substitute care of a child who is placed away from the child’s parents or guardians and for whom the Department has placement and care authority.”²⁴ The trial court made no finding the state-imposed relationship between Appellant and A.F.J. was permanent. Despite this, the AAML asserts, without authority, that the “placement of A.F.J. with Franklin as foster parent was not temporary.”²⁵ This bald assertion cannot stand against the abundant precedent to the contrary.

5. The Factors Listed in *L.B. Govern, not the Child’s Perception.*

AAML argues, when concluding that an individual is a *de facto* parent, that it is “the child’s perception... that governs whether the *de facto* parentage doctrine applies.”²⁶ Similarly, LV argued that *L.B.* recognizes that, “from a child’s perspective,” a parent need be neither biological nor

²³ RCW 74.15.020(1)(e); WAC 388-25-0010, *L.B.*, 155 Wn.2d at 692 n.7, quoting *In re Dependency of J.H.*, 117 Wash.2d 460, 469, 815 P.2d 1380 (1991).

²⁴ Amicus Br. at 9.

²⁵ Amicus Br. at 17.

²⁶ AAML Br. at 20;

adoptive.²⁷ While it may be true that a young child does not distinguish between the label “foster parent,” “biological parent,” or “*de facto* parent” when the child falls and hurts themselves and looks to their primary attachment figure for support and care, reliance on the child’s perception or perspective is not relevant much less dispositive in a *de facto* parent analysis. *L.B.* does not enumerate the child’s perspective as a factor. Rather *L.B.* enunciated 5 clear factors that do not involve a child’s perception. This objective test is preferred and understandable because a young infant or toddler does not understand the term parent much less the adjective that precedes the term parent. All they understand is who their security is and who they are attached to. This can happen with nannies, babysitters, grandparents, unrelated foster parents and it happened in this case with Appellant. But this relationship is no different from A.F.J.’s perspective than it would have been with any other foster parent who cared for A.F.J. for the four years Ms. Johnston was involved in the dependency getting herself fit to resume parental duties.

6. The Petitioner’s Hopes Are Irrelevant Under *L.B.*

The AAML cites the trial court’s finding that Appellant had every hope that she and Johnston would parent together and uses that hope to support the argument that Appellant assumed parental obligations without

²⁷ Amicus Br. at 6.

expectation of compensation.²⁸ However, the *L.B.* factors focus on the petitioner's established relationships and roles, not the petitioner's hopes. A finding as to Appellant's hopes is irrelevant to her status as a *de facto* parent or whether as a foster parent she had an expectation of compensation. Appellant's hopes are one thing; the reality is that if she and Ms. Johnston ever parented together, it was for only a brief period—approximately two months at most—and as a foster parent she had an expectation of compensation. Such expectation is fatal to qualification under *L.B.* factor #3.

7. Under Our Current Precedent, a Child Does not Have an Absolute Right to Perpetuation of a Relationship.

L.B. does mention a few rights that a child has. For instance, it mentions a child's right to support from a putative father²⁹ and that the marital status of a child's parents has no bearing on the child's rights to a legally cognizable relationship with his or her parents.³⁰ However, *L.B.* mainly focuses on, and was decided on, the parents' right and not the child's rights. The *L.B.* court explained in a footnote, "Carvin and amicus in this case persuasively argue that Carvin and *L.B.*, in addition to Britain, have constitutionally protected rights to maintain their parent-child relationship. However, our resolution of the central issue here, granting de

²⁸ Amicus Br. at 9.

²⁹ 155 Wn.2d at 688.

³⁰ *Id.* at 701.

facto parental standing to Carvin, renders these additional constitutional concerns moot.”³¹ *L.B.* does mention “the best interests of the child” standard and the welfare of the child, but a child’s best interests and welfare are not the same as a child’s rights.

AAML argues that A.F.J. has a *right* to the perpetuation of his relationship with Appellant. To support this argument, AAML quotes Justice Bridge’s concurring opinion in *Shields* that “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.”³² It was, therefore, Justice Bridge’s current hope, and not legal precedent that a child’s right to stable relationships be given greater recognition. To date that has not occurred.

The AAML also cites a statement by Justice Stevens from his dissent in *Troxel* citing the Supreme Court’s jurisprudence recognizing a “child’s own complementary interest in preserving relationships that serve her welfare and protection.”³³

Even if this Court were to create and define a child’s right to a stable relationship, that right would have to yield to the parent’s fundamental Constitutional right to make parenting decisions without state involvement

³¹ 155 Wn.2d at 709 n.27 (citation omitted).

³² *In re Custody of Shields*, 157 Wn.2d 126, 151, 136 P.3d 117 (2006) (Bridges, J., concurring) (emphasis added).

³³ *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

absent the parent being unfit or a fit parent making a decision that would cause actual harm to the child. Even Justice Stevens recognized that he was not “suggest[ing] that a child’s liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child’s parents’ contrary interests.”³⁴

8. Any Agreement to Raise A.F.J. as Co-Parents is Not Controlling.

An agreement to co-parent fails to satisfy any prong of the *L.B.* test. The first prong requires that the natural or legal parent consent to *and* foster the parent-like relationship. This requires more than an agreement. Compare *State ex rel D.R.M. v. Wood*,³⁵ where an intended parent who had an agreement to conceive and raise a child was insufficient to establish parent status on the intended parent.³⁶ *De facto* parentage requires more than an agreement. It requires performance of the agreement between the parties. The agreement, standing alone, does not confer *de facto* parent status.

ALI supports this contention. It recognizes a parent by estoppel, which is distinct from a *de facto* parent. An agreement is relevant to a

³⁴ *Id.* at 89 (Stevens, J., dissenting).

³⁵ 109 Wn.App. 182, 34, P.3d 887 (2001)

³⁶ *D.R.M.*, 109 Wn. App. 182, 194-95, 34 P.3d 887 (2001).

parent by estoppel analysis, but is not relevant in a *de facto* parent analysis.³⁷ Washington has not recognized a parent by estoppel.

9. The Brief Duration Prior to State Assuming Control Over Placement was Insufficient to Establish *De Facto* Parenthood.

L.V. argues that “Appellant was A.F.J.’s mother before becoming a foster parent.”³⁸ This is a failed effort to sidestep the issue of Appellant’s foster parent status by attaching unwarranted significance to the month that elapsed between Ms. Johnston’s and A.F.J.’s release from P.T.S. in Tacoma and DSHS’ removing A.F.J. from Ms. Johnston’s care. L.V. has not explained how Appellant achieved parent status in this brief period. Nor does LV address how this satisfies the *L.B.* criteria #4 requiring “the petitioner [to have] been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.” L.V. avoids this analysis and explanation because it is unquestionable that Appellant could not have satisfied the *de facto* parent tests in *L.B.* “the petitioner [to have] been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature,” To be sure, the ALI suggests a

³⁷ Principles of the Law of Family Dissolution (2002). Compare a parent by estoppel, Sec. 2.03(1)(b) and a *de facto* parent, Sec. 2.03(1)(c).

³⁸ Amicus Br. at 12.

requirement of approximately two years.³⁹ It is undisputed that Appellant provided care to A.F.J. before the foster placement. However, L.V.'s argument does not support the conclusion that she was his mother prior to the foster placement.

10. There is no Authority to Allow Appellant to not join an Alleged Father she Knows Exists.

A.F.J.'s father had parental rights and duties under Washington law. The AAML draws an invalid parallel between A.F.J.'s biological father and the father in *L.B.* when it states that "like *L.B.*, A.F.J.'s father had no legally established rights."⁴⁰ *L.B.*'s father was a sperm donor.⁴¹ By statute, "[a] donor is not a parent of a child conceived by means of assisted reproduction."⁴² In sharp contrast, A.F.J. has a biological father that has yet to be adjudicated. Until he is adjudicated he is an *alleged father* as defined under RCW 26.26.011(3). There are rights that accompany this statutory definition.

The AAML further states without authority or cite to the record that "Ms. Johnston did not know the man that impregnated her. There was no way to determine who he is...."⁴³ This is unsupportable. By Appellant's

³⁹ Principles of the Law of Family Dissolution § 2.03(1)(c) (2002).

⁴⁰ Amicus Br. at 16.

⁴¹ *In re the Parentage of L.B.*, 155 Wn.2d 679, 683, 122 P.3d 161 (2005).

⁴² RCW 26.26.705.

⁴³ Amicus Br. at 7.

own testimony, Ms. Johnston *did* know who A.F.J.'s father was and she even had his address.⁴⁴

Appellant should not be allowed to proceed with a parentage action without joining the alleged father. Ms. Johnston may have told the state she did not know who the father was, but Appellant should not be allowed to benefit as a co-conspirator in this misrepresentation especially when she knows the representation is not true. Appellant should have named the alleged father as a party in her petitions as John Doe, sought discovery and ascertained his identity, and then served him. There was no finding that the father was unfit and no evidence even presented as to his fitness. A.F.J.'s situation was unlike L.B.'s, whose sperm donor father by statute was not a parent.

LV argues that because the decision terminating the father's parental rights was appealable under RAP 2.2(a)(6), it "was not interlocutory."⁴⁵ True, some interlocutory orders are subject to interlocutory appeal,⁴⁶ but they are still interlocutory orders. The judgment in this matter dismissed the state's termination of parental rights proceeding against both Ms. Johnston and A.F.J.'s father. The AAML even admits that "[w]here two biological... parents are involved, both would have to consent to the

⁴⁴ VRP (Franklin 3/29/09) 40:10-21.

⁴⁵ Amicus Br. at 16.

⁴⁶ Black's Law Dictionary 106 (8th ed. 2004).

parent like relationship.”⁴⁷ There was no evidence presented, or allegation made, that A.F.J.’s biological father consented to a parent-like relationship at any time. Without consent, Appellant’s claim fails *L.B.* factor #1.

Dated this 4th day of January, 2011.

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⁴⁷ Amicus Br. at 21.

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and
JACKIE JOHNSTON,
Respondent / Cross-Appellant.

No. 63919-6

Lower Court Case
No. 07-3-07493-1 UFK
07-5-02508-2 UFK

DECLARATION OF SERVICE

I, MY H. NGUYEN, hereby declare as follows:

1. I am employed by the law firm of Olympic Law Group, P.L.L.P., a citizen of the State of Washington, over the age of 18 years, not a party to this action, and competent to testify herein.

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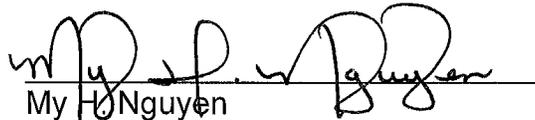
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I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.


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