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No. 63919-6-I

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STATE OF WASHINGTON COURT OF APPEALS  
DIVISION ONE

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MARY FRANKLIN,

Appellant / Cross-Respondent,

and

JACKIE JOHNSTON,

Respondent / Cross-Appellant

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Respondent/Cross-Appellant's Reply Brief

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## A. Argument

### 1. Respondent has a Fundamental Constitutional Right to Raise her Child.

Parents have a fundamental Constitutional right to raise their child.<sup>1</sup> Any interference with this fundamental right is subject to strict scrutiny; the State must have a compelling interest, and such interference must be narrowly tailored to meet the compelling state interest involved.<sup>2</sup> Deference must be given to a fit parent's parenting decisions.<sup>3</sup> Here, Respondent, an adjudicated fit parent, has a fundamental Constitutional right to raise A.F.J. without Appellant's or the State's interference.

### 2. To Protect a parent's Fundamental Constitutional Right to Raise his or her Child, the Legislature has Enacted Heightened Burdens on Third Parties who Desire Parenting Rights.

To Constitutionally intrude upon a fit parent's parenting rights, a third party who is not a biological or adoptive parent must establish a biological parent's unfitness or that the biological parent's actions will result in actual detriment to the child.<sup>4</sup> Here, it is unchallenged Respondent is a fit parent. The only way the State or Respondent could Constitutionally intrude upon Respondent's fundamental Constitutional right to parent is

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<sup>1</sup> *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd*, *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

<sup>2</sup> *In re Custody of Shields*, 157 Wn.2d 126, 144, 136 P.3d 117 (2006).

<sup>3</sup> *Troxel*, 530 U.S. at 70.

<sup>4</sup> *Shields*, 157 Wn.2d at 143-45.

by proving the child would suffer actual detriment. This could only be done in extraordinary circumstances.<sup>5</sup> It is also undisputed that no such actual detriment or extraordinary circumstances are present in this case.

**3. Our State Supreme Court Created a Narrow Common Law *De Facto* Exception for Nontraditional Families Where Both Parents Mutually Intended to Conceive and Raise a Child.**

*In re Parentage of L.B.*<sup>6</sup> created a narrow common law exception to the Constitutionally-required heightened standard to interfere with a fit parent's parenting rights. Where a parent "consented to and fostered" a parent-child relationship, and no statutory remedy existed, the common law would provide a remedy and place the non-parent who functioned as a parent in parity with the biological fit parent.<sup>7</sup> To be adjudicated a *de facto* parent, the non-parent must meet a strict, five-factor test.<sup>8</sup>

**4. Our State Supreme Court Further Narrowed This Narrow Common Law Exception When a Third Party has a Status That Affords a Statutory Remedy.**

To be sure the *de facto* parent exception to the Constitutionally-required heightened burden in parenting disputes between biological parents and third parties who are neither a biological or adoptive parent is very narrow, our State Supreme Court narrowed the already-narrow

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<sup>5</sup> *Shields*, 157 Wn.2d at 145.

<sup>6</sup> 155 Wn.2d 679, 122 P.3d 161 (2005).

<sup>7</sup> *Shields*, 157 Wn.2d at 146; and *L.B.*, 155 Wn.2d at 161.

<sup>8</sup> *See L.B.*, 155 Wn.2d at 176-77.

holding in *L.B.* and held the common law *de facto* parent exception was not available to persons, such as step parents, who have traditional third party and other statutory parenting or custody rights.<sup>9</sup>

### **5. Appellant Had Statutory Remedies to Become a Parent.**

*L.B.*'s common law exception is narrow because courts have long recognized, and are loath to interfere with, parents' fundamental right to make decisions concerning the care, custody, and control of their children.<sup>10</sup> The ALI states, "The requirements for becoming a *de facto* parent are strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children."<sup>11</sup> *L.B.* filled the gap in statutory remedies that existed under that case's peculiar facts.<sup>12</sup>

Here, Appellant had statutory remedies because she attained foster parent status. First, she had the statutory remedy to be able to adopt. In Washington, a child such as A.F.J. is eligible for adoption with consent obtained from, as applicable, the parent(s) or the agency or department to whom the child has been relinquished.<sup>13</sup> Moreover, the ALI recognizes this is the preferred remedy over a *de facto* parentage adjudication.

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<sup>9</sup> *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010).

<sup>10</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208 (1972).

<sup>11</sup> Principles of the Law of Family Dissolution § 2.03 cmt. c. (2002).

<sup>12</sup> *In re Parentage of M.F.*, 168 Wn.2d 528, 531, 228 P.3d 1270 (2010).

<sup>13</sup> RCW 26.33.160(1).

the best course of action for an individual who expects legal recognition as a de facto parent would be formal adoption, if available under applicable state law. Failure to adopt the child when it would have been possible is some evidence, although not dispositive, that the legal parent did not agree to the formation of the de facto parent relationship.<sup>14</sup>

The Appellant is correct that whatever relationship she had with Jackie Johnston predated state domestic partnership laws. However, there were always adoption laws. The Appellant has repeatedly claimed that Jackie Johnston intended for her to be a “co-parent” with full parental rights. If that is true, then Jackie Johnston should have readily consented to Appellant’s formal adoption of A.F.J. As the ALI states, Appellant’s failure to adopt A.F.J. is evidence, although not dispositive, that Jackie Johnston did *not* consent to the formation of a *de facto* parent relationship.

Moreover, Appellant, like all foster parents and like the step parent in *M.F.*, had the right to pursue custody through a third party custody proceeding.<sup>15</sup> Here, Appellant was unsuccessful in infringing upon Respondent’s fundamental Constitutional liberty interest to parent her child and could not meet the heightened burden in third party custody actions to protect Respondent’s parenting rights. The trial court, therefore, impermissibly extended the *L.B.* gap-filling decision to this situation where no gap existed and lowered the heightened standard and used the

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<sup>14</sup> Principles of the Law of Family Dissolution § 2.03 cmt. c. (2002).

<sup>15</sup> Ch. 26.10 RCW.

lower best interest of the child standard to infringe upon Respondent's parenting rights. Because Appellant, who was a foster parent, had traditional statutory remedies to obtain parenting rights, she is not eligible to use the very narrow common law *de facto* parent exception in *L.B.*.

Even Wisconsin, the state upon which the *L.B.* court relied in developing the *de facto* parent exception,<sup>16</sup> has distinguished cases where the child is dependent and in that state's foster care system. *In re Custody of Jeffrey A.W.*,<sup>17</sup> the Wisconsin Appellate Court distinguished the *H.S.H.-K* case upon which this Court and our Supreme Court relied in *L.B.*, held that when a child is dependent and placed in foster care, the foster parents do not qualify for the equitable *de facto* parent exception because that exception should not "trump" the comprehensive statutory scheme in place for dependent children.<sup>18</sup> Here, the same is true. Like the step parent in *M.F.*, a comprehensive statutory scheme existed for Appellant to obtain parental rights (termination of parental rights, consensual adoption, and third party custody). Appellant and the State could not meet the Constitutionally heightened burdens associated with the termination of parental rights and third party custody remedies and apparently could not obtain Ms. Johnston's consent to Appellant adopting. Appellant, therefore,

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<sup>16</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 702-703 and 708, 122 P.3d 161 (2004); and *In re Parentage of L.B.*, 121 Wn. App. 460, 487, 88 P.3d 27 (2004).

<sup>17</sup> 221 Wis.2d 36, 47, 584 N.W.2d 195 (1998).

<sup>18</sup> 221 Wis.2d at 47.

had to squeeze herself into the *L.B.* common law *de facto* parent exception to erode Ms. Johnston's protected fundamental, Constitutional liberty interests in parenting her child without interference from the State or a third party.

**6. Even if This Court Were to Consider the *De Facto* Parent Exception, Appellant is not a De Facto Parent.**

**a. This Case is Factually Distinguishable from *L.B.***

First, this case is factually distinguishable from *L.B.* The couple in *L.B.* had been in a steady, committed intimate relationship, cohabiting for approximately five years before *L.B.* was born.<sup>19</sup> The couple jointly decided to conceive and raise a child.<sup>20</sup> They conducted the artificial insemination in their home, with one woman personally inseminating the other with the donor sperm.<sup>21</sup> The biological father was a sperm donor who was not named on the original birth certificate.<sup>22</sup> Both women were present at *L.B.*'s birth.<sup>23</sup> For the first six years of *L.B.*'s life, *L.B.* and the two women lived together as a family and held themselves out to the public as a family. During that time, the women shared parenting responsibilities.<sup>24</sup>

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<sup>19</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 682, 122 P.3d 161 (2005).

<sup>20</sup> *Id.* at 683.

<sup>21</sup> *Id.* at 683-84.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 684.

<sup>24</sup> *Id.*

Here, although the parties dated, the Appellant maintained a home in Washington, and Ms. Johnston in California.<sup>25</sup> The relationship was sporadic,<sup>26</sup> punctuated by repeated break-ups and reconciliations.<sup>27</sup> Ms. Johnston became pregnant during one of the break-up periods while living apart from Appellant in California.<sup>28</sup> Ms. Johnston's pregnancy was accidental; neither she nor Appellant intended it to happen.<sup>29</sup> Although yet another reconciliation between Appellant and Ms. Johnston occurred during the pregnancy, and Ms. Johnston even stayed at the Appellant's house, they broke up again before A.F.J. was born and Appellant was not present at his birth.<sup>30</sup> After the child was born, less than two months elapsed before DSHS intervened.<sup>31</sup> During approximately the first month, Ms. Johnston was in treatment at PTS and Appellant had two overnight visits with the child.<sup>32</sup> During approximately the second month, Ms. Johnston had clean and sober housing in Tacoma, where Ms. Johnston would live half the time and visit with Appellant half the time.<sup>33</sup>

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<sup>25</sup> VRP (Franklin 3/26/09) 10:9-24; 11:7-8.

<sup>26</sup> VRP (Kent Fremont-Smith 3/31/09) 19:15-24; and VRP (Johnston 3/30/09) 82:2-6.

<sup>27</sup> VRP (Franklin 3/26/09) 8:23-9:8; and VRP (Johnston 4/8/2009) 31:13-17.

<sup>28</sup> VRP (Franklin 3/26/09) 22:2-9 and 23:1-3; VRP (Johnston 4/8/2009) 16:21-17:5.

<sup>29</sup> CP 709, FOF No. 2.12(J); and VRP (Franklin 3/26/09) 8:19-22.

<sup>30</sup> VRP (Franklin 3/26/09) 31:1-25; VRP (Franklin 3/26/09) 33:22-24:2; and VRP (Johnston 4/8/2009) 22:2-9.

<sup>31</sup> CP 710, FOF No. 2.12(L), ln 4.

<sup>32</sup> CP 709, FOF 2.12(K), ln 23; VRP (Johnston 3/30/2009) 53:17-20.

<sup>33</sup> VRP (Franklin 3/26/09) 16:4-16; and VRP (Johnston 4/8/2009) 24:17-25:4.

The facts of this case are completely unlike the committed, long term couple in *L.B.* that jointly planned to raise a child, participated together in the artificial insemination and childbirth, and then lived together and held themselves out to the community as a family for the first six years of the child's life. The non-biological parent and partner in *L.B.* performed child caretaking functions with the other partner's unfettered active consent and encouragement. They were a committed couple and family in the traditional sense, but had no traditional access to the marital dissolution process or the parentage process.

Here, the situation is entirely different. These two women were not a committed couple. They had a turbulent; sporadic; on-again, off-again relationship and maintained separate homes in different states. They had no committed intimate relationship property to divide and kept their households, finances and debts separate. Appellant was not an intended parent. The child had a biological father that was not merely a sperm donor. There was no evidence or findings they were a committed couple and intact family. They, therefore, were not the marriage-like couple in *L.B.* lost in a pervasive statutory gap that needed filling by common law.

**b. Because A.F.J. was Dependent on the State and Placed in Foster Care, Ms. Johnston's passive acquiescence to A.F.J.'s Placement with Appellant Does not Satisfy *L.B.*'s Factor No.1.**

To create a Constitutionally valid exception to the heightened standards for third party custody and terminating parental rights, the biological or adoptive parent must actively foster and consent to the non-parent's relationship with the child.<sup>34</sup> A biological mother's "passive acquiescence" in a dependency placement is insufficient to meet this standard.<sup>35</sup> A child in foster care "remains a dependent child in the legal custody of the State."<sup>36</sup> When A.F.J. was adjudicated dependent and removed from Ms. Johnston's care, the State, not Ms. Johnston, fostered and encouraged the relationship between A.F.J. and Appellant and made the placement decisions. Anything Ms. Johnston may have said during the dependency proceedings about A.F.J.'s relationship with Appellant and Ms. Johnston's desires regarding that relationship continuing was entirely different from the consenting to and fostering of a parent-like relationship with sole and absolute unfettered discretion that L.B.'s birth mother did that satisfied the first *L.B.* factor and thereby lowered the Constitutionally required heightened standards in terminating parental rights and obtaining third party custody. Ms. Johnston was not in a legal position to foster and

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<sup>34</sup> *L.B.*, 155 Wn.2d at 709-10.

<sup>35</sup> *In re Adoption of R.L.M.*, 138 Wn. App. 276, 289, 156 P.3d 940 (2007), *citing*, *In re Dependency of D.M.*, 136 Wn. App. 387, 397, 149 P.3d 433 (2006).

<sup>36</sup> *Blackwell v. State Dep't. of Social and Health Services (DSHS)*, 131 Wn. App. 372, 379, 127 P.3d 752 (2006).

consent to co-parenting.<sup>37</sup> When a child is adjudicated dependent and removed by the State from the natural parent's care and placed in another adult's care, the natural parent loses the choice to parent the child her or himself. They must provide input as to who they would want to care for their child. If merely following the wishes of the natural parent in these situations is enough to satisfy the first *L.B.* factor, then many foster parents and relative placements would satisfy the first *L.B.* factor. This is the same problem envisioned in *M.F.* with step parents – every step parent would meet the *L.B.* requirements.<sup>38</sup> Moreover, such a result would undermine the integrity of the state's foster care system as the *Osterkamp* court feared and as the *L.B.* court did not intend.

**c. Appellant's Becoming a Foster Parent With Knowledge and Expectation of Payment for her Caretaking Defeats her De Facto Parentage Claim.**

In *Blackwell*, having been paid to serve as foster parents was enough to fail the third part of the *L.B.* test.<sup>39</sup> The court stated, "Certainly parts one and three are not established. The Blackwells are not the natural or legal parents of DR and they were paid to serve as foster parents."<sup>40</sup> Here,

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<sup>37</sup> It is true that absent good cause, DSHS must "follow the wishes of the natural parent regarding the placement of the child with a relative or other suitable person." RCW 13.34.260(1). The ultimate decision, however, is still the State's and not the birth mother's.

<sup>38</sup> *M.F.*, 168 Wn.2d at 534-35.

<sup>39</sup> *Blackwell v. State Dep't. of Social and Health Services (DSHS)*, 131 Wn. App. 372, 378, 127 P.3d 752 (2006).

<sup>40</sup> *Id.*

Appellant received foster care payments from the state,<sup>41</sup> and she always understood that she would be compensated for her foster care.<sup>42</sup> In light of *Blackwell*, Appellant cannot argue that she met *L.B.* factor three.

This Court is bound by binding precedent and *stare decisis* to make no exception to *L.B.* factor three. When creating the five-factor *L.B.* test, this Court specifically chose a rigid and inflexible “without expectation of financial compensation” factor. This Court analyzed two different *de facto* parent exceptions, one from Wisconsin and one from Massachusetts.<sup>43</sup> In its analysis this Court recognized a difference between the Wisconsin factors that included a factor that the parental caretaking services be provided “without expectation of financial compensation”<sup>44</sup> and the Massachusetts factors that adopted the expansive ALI factors including a more liberal factor that the parental “care was not provided *primarily* for compensation.”<sup>45</sup> This Court specifically chose the more rigid and inflexible Wisconsin “without expectation of financial compensation” factor.<sup>46</sup> This factor was then adopted by our State Supreme Court.<sup>47</sup>

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<sup>41</sup> Appellant’s Response Br. 24.

<sup>42</sup> VRP (Franklin 3/26/09) 37:5-16; and 39:22-40:1.

<sup>43</sup> *L.B.*, 121 Wn. App. at 481-83 wherein this Court discussed *In re Custody of H.S.H.-K*, 193 Wis 2d 649, 533 N.W. 2d 419 (1995); and *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E. 2d 886 (1999).

<sup>44</sup> *L.B.*, 121 Wn. App. at 481, *citing*, *H.S.H.-K*, 193 Wis.2d at 658-59.

<sup>45</sup> *L.B.*, 121 Wn. App. at 483, *citing*, *E.N.O.*, 429 Mass. at 829.

<sup>46</sup> *L.B.*, 121 Wn. App. at 487.

<sup>47</sup> *L.B.*, 155 Wn.2d at 708

Because the Supreme Court also adopted this rigid expectation of financial compensation test, it is binding precedent.<sup>48</sup> To deviate from the rigid “without expectation of financial compensation” Wisconsin factor and replace it with the flexible not *primarily* for expectation of financial compensation factor is exclusively our Supreme Court’s province.

This Court has been previously confronted with situations where it wants to deviate from binding precedent, but acknowledged its limitations and properly noted that it is our State Supreme Court’s, and not this Court’s, prerogative to deviate or create a further exception if it so chooses.<sup>49</sup> That choice should not be taken lightly.<sup>50</sup>

There is also persuasive authority indicating any changes to the existing dependency and juvenile statutory scheme to create a *de facto* parent exception should not be through judicial fiat or activism; rather it should be left to the Legislature to make the exception.<sup>51</sup> This makes sense in this case because this State has a comprehensive juvenile and dependency statutory framework and any changes should be Legislative.

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<sup>48</sup> *Tobin v. Dept of L & I*, 145 Wn. App. 607, 625, n.6, 187 P.3d 780 (2008).

<sup>49</sup> See *Keene v. Edie*, 80 Wn. App. 312, 907 P.2d 1217 (1999); and *In re Estate of Borghi*, 141 Wn. App. 294, 301-02, 169 P.3d 847 (2007).

<sup>50</sup> *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997).

<sup>51</sup> See *Debrah H v. Janice R.*, 14 N.Y.3d 576, 596, 930 N.E. 2d 184, 904 N.Y.S.2d 292 (2010).

This persuasive authority also points to an ill that would be created if courts were to continue to make exceptions to the rigid “without expectation of financial compensation” factor enunciated in *L.B.*

More to the point, the flexible type of rule championed by Debra H. threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party.<sup>52</sup>

That ill is especially present here as well. Here, Ms. Johnston was forced to choose an alternative caregiver for her child after the child was adjudicated dependent and the State decided Ms. Johnston was not a suitable caregiver for in-home placement until after she successfully accepted services and rehabilitated herself. The dependency court ordered Appellant to become a foster parent. Predictably, then, Appellant would not become a *de facto* parent under *L.B.* To retroactively create an exception to the rule that foster parents, who receive compensation, can now become *de facto* parents would create “a limbo of doubt” in any natural parent’s mind if they provide input into the State’s decision for an alternative caregiver for the natural parent’s child. They would continually be asking themselves, “when could the foster parent become a *de facto* parent?”

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<sup>52</sup> *Debra H.*, 14 N.Y.3d at 595.

**d. Even if Ms. Johnston Expressed a Desire to “Co-Parent,” This Does Not Satisfy L.B. Factor 5.**

To give legal effect to a de facto parent, the court must find that the claimant satisfies all five *L.B.* factors, including “recognition of a de facto parent is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.”<sup>53</sup> The *L.B.* court expressly distinguished foster parents as not having a right to continue the relationship because it was not permanent by definition when it cited *In re Dependency of J.H.*<sup>54</sup>

Although Ms. Johnston speculated about a desire to “co-parent” with Ms. Franklin when the dependency was dismissed, that was her Constitutional choice. Her Constitutional right to make this choice and to change her mind if in her child’s best interest must be protected. Ms. Johnston recognized the bond between Appellant and A.F.J. and, as a fit parent, recognized the detriment to A.F.J. if the bond was abruptly broken. Ms. Johnston wanted and wants the relationship to continue between Appellant and A.F.J. for A.F.J.’s sake. At the same time Ms. Johnston

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<sup>53</sup> *In re Custody of Shields*, 157 Wn.2d 126, 145-46, 136 P.3d 117 (2006).

<sup>54</sup> “In *J.H.*, in the context of foster families, we reaffirmed that the ‘law recognizes the importance of the psychological parent to the child’ but found that because the very nature of a foster placement is ‘temporary, transitional and for the purpose of supporting reunification with the legal parents’ the law does not ‘establish a right on the part of a foster parent’ to continue the relationship.” *L.B.*, 155 Wn.2d at 692 n.7, quoting *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991).

feared and fought Appellant having legal parental rights as a *de facto* parent because Appellant would use those rights as a weapon against her.

This appeal is the best evidence that Ms. Johnston's fears ring true. Ms. Johnston did not appeal within 30 days – Appellant did. Obviously Ms. Johnston was willing to try to co-parent with Appellant. Appellant's at times incoherent appeal, however, makes clear Appellant does not want to pay child support or contribute to Ms Johnston's attorney fees as ordered by the trial court. It makes clear that co-parenting will be perpetual conflict. To be sure, Appellant filed bankruptcy when Ms. Johnston sought to collect unpaid child support. Appellant is rigid – she wants the benefits of being a parent without the responsibilities. This does not bode well for co-parenting between these two women. Ms. Johnston should have the right to change her mind about co-parenting if it is not in her child's best interests. Presumptively, Ms. Johnston, an undisputed fit parent, is the best person to evaluate that decision as the situation changes. The trial court's decision denies Ms. Johnston the ability to make those Constitutionally protected parenting choices and forces a potentially unhealthy relationship on Ms. Johnston and her child.

- e. This is not the Case To Determine Whether to Adopt the Alaska Supreme Court's Hybrid Solution to Exclude the Time a Foster Parent Spends With the Child When Determining De Facto Parentage.**

While Ms. Johnston advocates retaining the hard and fast “without expectation of financial compensation” rule announced in *L.B.* to promote predictability in dependency and foster care situations, the Alaska Supreme Court has decided a hybrid approach may be preferred. Even if this hybrid approach is considered by this Court, Appellant does not qualify for *de facto* parent status because Ms. Johnston and her child only stayed with Appellant for, at most, two months before the child was removed from Ms. Johnston’s care.

Although Washington courts have denied *de facto* parent status to foster parents in the past,<sup>55</sup> there does not seem to be a reported Washington case in which a foster parent claiming *de facto* parent status could also argue the existence of a romantic relationship with the natural parent. However, in her cross appeal, Ms. Johnston cited a recently decided (June 25, 2010) Alaska Supreme Court case, *Osterkamp v. Stiles*, that has since been published.<sup>56</sup> In *Osterkamp*, the Alaska Supreme Court refused a domestic partner *de facto* or psychological parent status because the domestic partner was also a foster parent. The domestic partner had to establish he met the *de facto* or psychological parent requirements without

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<sup>55</sup> See, e.g., *In Re Custody of A.C.*, 137 Wn. App. 245, 153 P.3d 203 (2007), *rev'd on other grounds* 165 Wn.2d 568, 200 P.3d 689 (2009); *Blackwell v. State Dep't. of Social and Health Services (DSHS)*, 131 Wn. App. 372, 127 P.3d 752 (2006).

<sup>56</sup> 235 P.3d 178 (Alaska 2010).

including the relationship that he had with the child during the time he was a foster parent.<sup>57</sup> The Alaska Supreme Court specifically held:

Allowing [the domestic partner] to establish psychological parent status based upon time he served as a foster parent is... inconsistent with the basic premise of our foster care and adoption programs. Discussing the related concept of “de facto parent” status, the American Law Institute has cautioned, “[r]elationships with foster parents are...generally excluded...because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children.” (citation omitted).<sup>58</sup>

While the Alaska Supreme Court’s reasoning seems plausible and would not deviate from the “without expectation of compensation” factor in *L.B.*, this is not the case to apply the exception. The exclusion should be extended to the period the child has been removed from the natural parent’s custody because that is when the natural parent can no longer waive his or her Constitutional rights by fostering and encouraging another to care for his or her child. If this Court were to exclude the time the child was removed from Ms. Johnston’s care by the State or even the time Appellant was a foster parent, the time Appellant provided caretaking services would be 2 – 9 months at the most. This does not come close to the 2 year requirement suggested by the ALI.<sup>59</sup>

#### **7. The Termination Petition was Voluntarily Dismissed.**

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<sup>57</sup> *Osterkamp*, 235 P.3d at 187-88.

<sup>58</sup> *Id.* at 187.

<sup>59</sup> Principles of the Law of Family Dissolution § 2.03(1)(c) (2002).

An interlocutory order is one “not constituting a final resolution of the whole controversy.”<sup>60</sup> A final judgment is a “court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs... and enforcement of the judgment.”<sup>61</sup> Comm’r Sassaman signed an interlocutory order entered July 26, 2007 that “permanently terminated” the “parent-child relationship between [A.F.J.] and the child’s unknown father.”<sup>62</sup> This Order, however, was never embodied in a judgment and the termination petition was ultimately dismissed, thereby dismissing Comm’r Sassaman’s interlocutory order. DSHS moved to dismiss its termination petition.<sup>63</sup> The order dismissing the petition pursuant to CR 41(a)(1)(A) was entered June 15, 2009.<sup>64</sup> In the interim, Appellant filed her Third-Party custody and Parentage petitions,<sup>65</sup> and on May 9, 2008, Judge Doyle ordered that the termination trial be continued and linked with the Non-Parental custody, Parentage and Dependency actions.<sup>66</sup> Obviously, the known father was a necessary and indispensable party to the third party and de facto parentage proceedings. The *L.B.* court noted that L.B.’s father, John Ausetth, “is not

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<sup>60</sup> *Black’s Law Dictionary* 832 (8th ed. 2004).

<sup>61</sup> *Id.* at 859.

<sup>62</sup> CP 1070-74.

<sup>63</sup> CP 1173-75.

<sup>64</sup> CP 1176-77.

<sup>65</sup> CP 1299-1312 and CP 1292-98.

<sup>66</sup> CP 1162-72.

a party to this action, and his whereabouts are unknown.”<sup>67</sup> The dissent stated,

The Court of Appeals remanded the case and directed the trial court to determine whether the father is a necessary party. It seems obvious the father would be a necessary party as [the de facto parentage] action also intrudes on his rights. The majority's disposition of this problem is unclear.<sup>68</sup>

**8. Fee awards cannot be challenged for the first time on appeal and the trial court did give a basis for the award.**

In Washington, the general rule is that a challenge to the amount of attorney fees awarded cannot be raised for the first time on appeal.<sup>69</sup> Appellant admits that when opposing counsel requested attorney fees, her attorney “made no rebuttal.”<sup>70</sup> The issue was not preserved.

Appellant additionally argues that the \$20,000 award of attorney fees was “without a basis given.”<sup>71</sup> Ms. Johnston pointed out in her earlier brief filed with this Court that the applicable statutes authorizing award of attorney fees and committing those awards to the trial court’s discretion are RCW 26.26.140 and 26.10.080. She noted that the trial judge found Appellant had greater ability to pay attorney fees, Ms. Johnston had a need for attorney fees, Appellant kept \$149,000 in proceeds from Ms.

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<sup>67</sup> *In re Parentage of L.B.*, 155 Wn.2d 679, 685 n.3, 122 P.3d 161 (2005).

<sup>68</sup> *Id.* at 716 n.2 (Johnson, J., dissenting).

<sup>69</sup> *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983); RAP 2.5(a).

<sup>70</sup> Appellant’s Reply and Cross-Resp. Br. 14.

<sup>71</sup> *Id.*

Johnston's California home being sold that Appellant had used to pay her attorney fees in this matter, and under these circumstances it was fair and equitable to have Appellant pay \$20,000 toward Ms. Johnston's \$65,000 in attorney fees.<sup>72</sup> Even if the issue had been preserved, Appellant has not shown that the trial court abused its discretion in making this award.

### **9. In Washington State Appellate Courts, Pro Se Litigants are Held to the Same Standards as Attorneys.**

The Appellant argues that, as a pro se litigant, she should be given "deference" and "softened" rules. She cites five cases in support of this proposition.<sup>73</sup> These cases are inapposite because they are all either U.S. Supreme Court or other federal cases, not cases under our Washington Rules of Appellate Procedure governing appeals. In Washington, a pro se litigant is held to the same standards as an attorney.<sup>74</sup>

### **10. Child Support Should Not Have Been a Surprise.**

Child support is statutory.<sup>75</sup> The intent of the legislature is "that the child support obligation should be equitably apportioned between the

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<sup>72</sup> FOF 2.9, CP 706; and FOF 2.12 (W), (Y), (Z) and (AA), CP 712; VRP (Franklin's 3/26/09 Testimony) 28:21 – 29:1.

<sup>73</sup> *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 89 S. Ct. 1843 (1969); *Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972); *Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3rd Cir. 1945); *Elmore v. McCammon*, 640 F. Supp. 905 (1986).

<sup>74</sup> See *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) ("the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel--both are subject to the same procedural and substantive laws") (quoting *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155, rev. denied, 100 Wn.2d 1013 (1983)).

<sup>75</sup> *State ex rel. D.R.M.*, 109 Wn. App. 182, 192, 34 P.3d 887 (2001).

parents.”<sup>76</sup> In November 2007, Appellant filed a petition for establishment of de facto parentage and child support.<sup>77</sup> She sought (1) to be recognized as a de facto parent and (2) an entry of a child support order.<sup>78</sup> It should have come as no surprise to Appellant that if the court were to recognize her status as a parent to whom child support might be paid, she would also hold the status of a parent who might be required to *pay* child support.

### **11. Judicial Estoppel Applies Only to Facts.**

A court may properly apply judicial estoppel when the following elements are shown: (1) a party asserts a position that is “clearly inconsistent” with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.”<sup>79</sup>

This rule prevents inconsistent positions regarding facts; it does not require consistency on points of law.<sup>80</sup>

Here, whether Appellant qualifies as a *de facto* parent is not a fact but a legal conclusion that follows from careful application of the *L.B.* test. Ms. Johnston could not bestow on Appellant the legal rights and responsibilities of parenthood, no matter what she might have said in her testimony about “two mommies.” Even if Ms. Johnston did advance

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<sup>76</sup> RCW 26.19.001.

<sup>77</sup> CP 1292-98.

<sup>78</sup> *Id.*, para. 1.1, 1.2, 1.6.

<sup>79</sup> *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008).

<sup>80</sup> *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974).

inconsistent legal theories in different courts, she is not judicially estopped from doing so.

### **12. Issue Preclusion Requires Proof of Four Elements and Cannot Be Raised For the First Time on Appeal.**

The party asserting issue preclusion (collateral estoppel) must prove all its elements: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.<sup>81</sup> Whether a judgment has preclusive effect is to be determined at the time of the subsequent litigation.<sup>82</sup> Legal theories not timely raised before the trial court will not be considered for the first time on appeal.<sup>83</sup>

Appellant asserts the preclusive effect of the termination proceeding testimony for the first time on appeal. Because this issue was not raised before the trial court, it should not be considered on appeal. Also, the second element of issue preclusion, that the prior adjudication end in a “final judgment on the merits,” is not present. Collateral estoppel should

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<sup>81</sup> *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998).

<sup>82</sup> *Banchero v. City Council of Seattle*, 2 Wn. App. 519, 468 P.2d 724 (1970).

<sup>83</sup> *Olson v. Siverling*, 52 Wn. App. 221, 230, 758 P.2d 991 (1988), *rev. denied*, 111 Wn.2d 1033 (1989).

not be applied to judgments of dismissal.<sup>84</sup> The termination petition was voluntarily dismissed.<sup>85</sup> Similarly, the preclusive effect of the dependency proceeding cannot be raised for the first time on appeal, and that proceeding also was dismissed.<sup>86</sup>

### **13. Claim Preclusion Requires Proof of Four Elements and Cannot Be Raised For the First Time on Appeal.**

Claim preclusion (*res judicata*) bars relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.<sup>87</sup> To apply claim preclusion, a prior judgment must have the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made (identity of interest).<sup>88</sup> The *res judicata* test requires satisfaction of all four elements.<sup>89</sup>

Appellant was not a party to the dependency action. The third element of claim preclusion is therefore not satisfied, and Appellant cannot make a claim of *res judicata* regarding the dependency action. Moreover, unless an exception applies, legal theories not raised in a timely fashion before the trial court will not be considered for the first time on appeal.<sup>90</sup>

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<sup>84</sup> *Marquardt v. Federal Old Line Ins. Co.*, 33 Wn. App. 685, 689, 658 P.2d 20 (1983).

<sup>85</sup> CP 1176-77.

<sup>86</sup> See Order on Dismissal entered in cause no. 06-7-01776-3 UFK, Mar. 16, 2010, referenced in Resp't's Supplemental Designation of Clerk's Papers filed Nov. 12, 2010.

<sup>87</sup> *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

<sup>88</sup> *Id.*

<sup>89</sup> *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004).

<sup>90</sup> *Olson v. Siverling*, 52 Wn. App. 221, 230, 758 P.2d 991 (1988), *rev. denied*, 111 Wn.2d 1033 (1989).

#### **14. Fitness is to be and was Determined at Time of Trial.**

The Appellant casts doubt on Ms. Johnston's fitness as a parent.<sup>91</sup> But at the third-party custody trial, the court made an express finding that Ms. Johnston was a fit parent,<sup>92</sup> and the Appellant did not challenge this finding in her opening brief. Any finding not challenged is a verity on appeal.<sup>93</sup> According to the Washington courts, "a parent has a due process right not to have the State terminate his or her relationship with a natural child in the absence of an express or implied finding that he or she, *at the time of trial*, is *currently* unfit to parent the child."<sup>94</sup> (emphasis added). Whatever issues Ms. Johnston might have had in the past, the trial court made an express finding that she was a fit parent at the time of trial, and that is when the determination is to be made.

#### **15. CR 52 was not Violated; the Issue Cannot Be Raised.**

Nothing in CR 52 requires that a judgment be entered at the same time as a court's findings of fact; the rule provides that a "[j]udgment... *may* be entered at the same time as the entry of the findings of fact..." (emphasis added).<sup>95</sup> Nothing in CR 52 precludes the findings of fact from being entered a few days after the corresponding judgment. CR 52(d) does provide that a "judgment entered in a case... where findings are required,

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<sup>91</sup> Appellant's Response Br. 9-10.

<sup>92</sup> CP 707-708, Finding of Fact 2.12(B).

<sup>93</sup> *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

<sup>94</sup> *In re Welfare of A.B.*, 168 Wn.2d 908, 918, 232 P.3d 1104 (2010).

<sup>95</sup> CR 52(a)(1).

without findings of fact having been made, is subject to a motion to vacate within the time for the taking of an appeal.” Here, no motion to vacate was filed, and the trial court entered its findings of fact within four days after the judgment. Even if the trial court had failed to enter findings of fact, the remedy would be a remand to enter the required findings.<sup>96</sup>

Appellant cites *WESCO* to support her CR 52 argument that the Judgment and Order on Petition for Establishment of Parentage is “condemned an annulment,” but in *WESCO* the trial judge *never* entered formal findings and conclusions; after rendering an oral decision at the end of trial, the judge died.<sup>97</sup> The *WESCO* court held that in the absence of the required findings and conclusions having been entered by the deceased trial judge, the successor judge was not authorized to enter judgment.<sup>98</sup> Finally, even if there had been a violation of CR 52, the Appellant raises the CR 52 issue for the first time in her Reply and Cross-Response. RAP 10.3(b) provides that a response brief should “answer the brief of [cross] appellant.” RAP 10.3(c) provides that a reply brief “should be limited to a response to the issues in the brief to which the reply brief is directed.” Because the CR 52 issue was not been heretofore raised in the briefs of either party, the Appellant cannot raise it now.

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<sup>96</sup> *In re Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

<sup>97</sup> *WESCO Distribution, Inc. v. M.A. Mortenson Co.*, 88 Wn. App. 712, 713, 946 P.2d 413 (1997).

<sup>98</sup> *Id.* at 719.

Dated this 11th day of November, 2010.

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**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed or caused delivery of a true copy of the foregoing to

Mary Franklin / Stewart Bock  
at the regular office or residence thereof

Dated this 11<sup>th</sup> day of November, 2010, at  
Seattle, Washington.

