

86895-6

No. 41211-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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In re the Custody of:

BENJAMIN MATTHEW HOLT

MICHAEL J. HOLT  
Respondent  
v.

LAURIE L. HOLT  
Petitioner

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
11/11/11 11:11 AM  
BRIEF

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

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BRIEF OF RESPONDENT AND  
OPENING BRIEF OF CROSS-APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. STATEMENT OF ISSUES ON DISCRETIONARY REVIEW ..... 2

III. ASSIGNMENTS OF ERROR FOR CROSS APPEAL ..... 3

IV. STATEMENT OF ISSUES FOR CROSS APPEAL ..... 4

V. STATEMENT OF THE CASE ..... 5

    A. MICHAEL IS AND HAS ALWAYS BEEN BENJAMIN'S ONLY LIVING FATHER. .... 5

    B. THE RELATIONSHIP BETWEEN THE ADULTS CHANGED. 6

    C. THE RELATIONSHIP BETWEEN MICHAEL AND BENJAMIN AS FATHER AND SON HAS BEEN CONTINUOUS AND STABLE..... 9

    D. SINCE LAURIE BEGAN HER MOST RECENT RELATIONSHIP, SHE HAS ACTED TO TERMINATE BENJAMIN'S CONTACT WITH MICHAEL, REPEATING HER PATTERN, TO BENJAMIN'S DETRIMENT..... 12

    E. AFTER NEGOTIATIONS FAILED, MICHAEL PETITIONED FOR DE FACTO PARENT RECOGNITION AND NONPARENTAL CUSTODY..... 17

    F. AT THE COURT OF APPEALS. .... 22

VI. ARGUMENT IN RESPONSE RE NONPARENTAL CUSTODY... .. 23

    A. THE TRIAL COURT CORRECTLY FOUND THERE WAS ADEQUATE CAUSE TO PROCEED TO TRIAL ON THE NONPARENTAL CUSTODY PETITION..... 23

        1) The adequate cause standard. .... 24

        2) The trial court correctly found Michael satisfied adequate cause..... 26

        3) The standard of review for an adequate cause order is whether the trial court committed an obvious or probable error in the exercise of its discretion . .... 30

4) The trial court was right to set this matter for trial..	32
.....	
VII. ARGUMENT ON APPEAL.....	36
A. MICHAEL IS BENJAMIN'S DE FACTO PARENT UNDER WASHINGTON LAW.....	36
1) Michael's prior marriage to Laurie does not preclude de facto parentage. ....	36
2) There are no other statutory remedies available to Michael.....	40
3) The de facto parent doctrine does not trench on a parent's constitutional rights.....	45
B. BENJAMIN HAS A RIGHT TO REPRESENTATION OF HIS OWN INTERESTS IN THE FATHER-SON RELATIONSHIP. ....	46
.....	
VIII. MOTION FOR ATTORNEY FEES.....	48
IX. CONCLUSION.....	48

## TABLE OF AUTHORITIES

### Washington Cases

<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	39
<i>Boeing Co. v. State</i> , 74 Wn.2d 82, 442 P.2d 970 (1968).....	40
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004)..	40
<i>Gourley v. Gourley</i> , 158 Wn.2d 460, 145 P.3d 1185 (2006).....	48
<i>Hayward v. Hansen</i> , 97 Wn.2d 614, 647 P.2d 1030 (1982) .....	47
<i>In re Clark</i> , 26 Wn. App. 832, 611 P.2d 1343 (1980).....	33
<i>In re Custody of Brown</i> , 77 Wn.App. 350, 890 P.2d 1080 (1995)..	47
<i>In re Custody of E.A.T.W.</i> , 168 Wn.2d 335, 227 P.3d 1284 (2010). .....	25, 26, 27, 30, 31, 33
<i>In re Custody of Nunn</i> , 103 Wn. App. 871, 14 P.3d 175 (2000) ....	24
<i>In re Custody of S.C.D.-L.</i> , 170 Wn.2d 513, 243 P.3d 918 (2010).	32
<i>In re Custody of Shields</i> , 157 Wn.2d 126, 136 P.2d 117 (2006)..... .....	24, 28, 34, 47
<i>In re Custody of Skyanne Smith</i> , 137 Wn.2d 1, 20, 969 P.2d 21 (1998).....	27, 40, 41, 45
<i>In re Custody of Stell</i> , 56 Wn. App. 356, 783 P.2d 615 (1989) .....	34
<i>In re Mahaney</i> , 146 Wn.2d 878, 894, 51 P.3d 776 (2002).....	34
<i>In re Marriage of Adler</i> , 131 Wn. App. 717, 129 P.3d 293 (2006)..... .....	29, 32
<i>In re Marriage of Allen</i> , 28 Wn. App. 637, 626 P.2d 16 (1981) .....	34

<i>In re Marriage of Anderson</i> , 134 Wn. App. 506, 141 P.3d 80 (2006) .....	27, 33, 43
<i>In re Marriage of Kovacs</i> , 121 Wn.2d 795, 854 P.2d 629 (1993)..	35
<i>In re Marriage of Lemke</i> , 120 Wn. App. 536, 85 P3d 966 (2004) .....	26, 32
<i>In re Marriage of Mangiola</i> , 46 Wn. App. 574, 732 P.2d 163 (1987). .....	26
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003).	31
<i>In re Marriage of Roorda</i> , 25 Wn. App. 849, 611 P.2d 794 (1980)	26
<i>In re Parentage of C.A.M.A.</i> , 154 Wn.2d 52, 109 P.3d 405 (2005). .....	40, 41
<i>In re Parentage of Calcaterra</i> , 114 Wn. App. 127, 56 P.3d 1003 (2002) .....	38
<i>In re Parentage of J.A.B.</i> , 146 Wn. App. 416,, 191 P.3d 71 (2008). .....	26, 36
<i>In re Parentage of Jannot</i> , 149 Wn.2d 123, 65 P.3d 664 (2003) ...	31
<i>In re Parentage of L.B.</i> , 155 Wn.2d 679, 122 P.3d 161 (2005)..... .....	<i>passim</i>
<i>In re Parentage of M.F.</i> , 141 Wn. App. 558, 170 P.3d 601 (2007) .....	<i>passim</i>
<i>In re Parentage of M.F.</i> , 168 Wn.2d 528, 228 P.3d (2010).....	20
<i>In re Welfare of Gibson</i> , 4 Wn. App. 372, 483 P.2d 131 (1971) ....	49
<i>In re Welfare of Luscier</i> , 84 Wn.2d 135, 524 P.2d 906 (1974).....	49

<i>In re Welfare of BRSH</i> , 141 Wn. App. 39, 169 P.3d 40 (2007).....	35
<i>Minehart v. Morning Star Boys</i> , 156 Wn. App. 457, 232 P.3d 591 (2010).....	31
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990) .....	30
<i>State v. Johnson</i> , 159 Wn. App. 766, 247 P.3d 11 (2011).....	39
<i>State v. Santos</i> , 104 Wn.2d 142, 702 P.2d 1179 (1985). .....	47
<i>Velickoff v. Velickoff</i> , 95 Wn. App. 346, 968 P.2d 20 (1998) .....	27

**Statutes, Rules & Other Authorities**

CR 12(b)(6).....	26
CR 15(b). .....	19
CR 54(b) .....	22
House Bill Report, HB 1720, at 2 .....	29
Senate Bill 5656 ( <a href="http://apps.leg.wa.gov/documents">http://apps.leg.wa.gov/documents</a> (§ 13) .....	30
RCW 26.09.240 .....	40, 41
RCW 26.09.270 .....	24
RCW 26.10.032 .....	24, 25
RCW 26.10.080 .....	48
RCW 26.10.160(1). .....	35
RCW 26.26.106 .....	38

**Constitutional Provisions**

U.S. Const., Amend 14 ..... 38, 47  
Const., art. 1 ..... 38, 47

**Federal Cases**

*Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56  
(1973) ..... 38  
*Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 47 L.Ed.2d 18  
(1976) ..... 48  
*Quilloin v. Walcott*, 434 U.S. at 255 ..... 47  
*Santosky v. Kramer*, 455 U.S.745, 102 S.Ct. 1388, 71 L.Ed.2d 599  
(1982)..... 46  
*Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551  
(1972) ..... 38  
*Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49  
(2000) ..... 41, 47

## I. INTRODUCTION

The parent-child relationship may be formed through biology. It may be formed entirely through law (e.g., adoption). It may also be formed through love, care, and the shared intimacies of family life. This case involves the latter: A father and son relationship begun at the son's birth and continuing through each and every one of his nearly twelve years, with the consent and cooperation of the mother, the child's only living legal parent. Because there is no other living father, this case is distinguishable from *Parentage of M.F.* And because it is distinguishable, the trial court should not have dismissed Michael Holt's de facto parent petition, particularly in light of the overwhelming evidence that Michael has in every way fulfilled a parental role for Benjamin. However, if the law will not recognize the fact of the father-son relationship between Michael and Benjamin, it must protect Benjamin from the actual detriment to his growth and development that would result from severing the relationship. Certainly, Michael presented sufficient evidence of detriment to justify a trial on the merits of his nonparental custody petition.

## II. STATEMENT OF ISSUES ON DISCRETIONARY REVIEW

1. To satisfy adequate cause, must a petitioner do any more than “set[ ] forth facts” that, *if proved*, would establish actual detriment to the child’s growth or development?

2. In determining whether the petitioner’s affidavits satisfy the adequate cause threshold, is the trial court best positioned to determine credibility and weigh the evidence?

3. Did Michael satisfy adequate cause when he supported with multiple affidavits from those who know Benjamin best his claim that Benjamin would suffer detriment should the father-son relationship be severed?

4. For adequate cause, is it necessary to submit expert evaluations of detriment to the child?

5. If Michael prevails on his nonparental custody petition, is the court authorized by RCW 26.10.160(1) to enter a residential schedule like what Benjamin has followed in the nine years since Michael and Laurie separated?

6. Should Michael receive his fees on the nonparental custody action in light of Laurie’s ability to pay and Michael’s financial need?

### III. ASSIGNMENTS OF ERROR FOR CROSS APPEAL

1. The trial court erred when it dismissed the de facto parent petition.

2. The trial court erred when it denied legal representation to the child.

3. The trial court erred when it entered the following Findings of Fact and Conclusions of Law (however denominated):

9. The Court finds that there are no statutory remedies to allow non-parent visitation in the State of Washington at this time, only custody.

10(a). ... [The de facto parent cause of action] is no longer, in this court's view, available to the Petitioner as a matter of law because he is a former stepparent and because he has petitioned for nonparental custody.

10(b). ... [Petitioner is excluded from the de facto parent doctrine] based on his former marriage to the Respondent and on the filing of a nonparental custody action."

#### CP 299-300.

1. The Court has jurisdiction over the parties and the child.

2. As stated in Parentage of L.B., de facto parentage is a common law remedy to be granted under limited facts. In L.B. the parties were a same sex couple who specifically wanted a child together to raise as co-parents and our Supreme Court created this equitable de facto parent doctrine to cover situations where there are no other statutory remedies available to parties.

3. The Supreme Court in *Parentage of M.F.*, 168 Wn.2d 528 (2010), reiterated that the de facto parentage action is only under [sic] extremely narrow and limited facts and should be only granted if no other statutory remedy is available to a party. M.F. also discussed how “the de facto test we applied in L.B. could not in the stepparent context, be applied in a meaningful way.”

4. Petitioner’s de facto parent action is barred as a matter of law under L.B. and M.F. because Petitioner has a potential statutory remedy to continue his relationship with the child under RCW 26.10; and at the time of the parties['] dissolution, and subsequently, the Petitioner could have sought visitation under [RCW] 26.09.240 prior to it being struck down prospectively in 2005, *Marriage of Anderson*, 134 Wn. App. 506 (2006).

5. The court[']s determination that Petitioner cannot be a de facto parent is not based solely on the fact that he was a stepparent; it is also based upon the fact that he has had other statutory remedies. In addition our higher courts have on a number of occasions stated that a fit custodial parent has a fundamental constitutional right to make decisions concerning the rearing of his or her own children and a standard of best interest of the child is insufficient to serve as a compelling state interest overruling a parent’s rights.

CP 302-303.

#### IV. STATEMENT OF ISSUES FOR CROSS APPEAL

1. Did the trial court err when it dismissed the de facto parent petition?

2. Because Benjamin has only one living legal parent, is *Parentage of M.F.* distinguishable because in that case there were two living legal parents governed by a parenting plan?

3. Is an unconstitutional statute a nullity and, therefore, never available as a remedy?

4. Is nonparental custody a remedy for a claim to parental status where there is no “competing interest” of two living legal parents?

5. Did the court err by failing to appoint an attorney for the child, who has a right to be represented in this matter?

## V. STATEMENT OF THE CASE

### A. MICHAEL IS AND HAS ALWAYS BEEN BENJAMIN'S ONLY LIVING FATHER.

Michael Holt is the only father Benjamin Holt has ever known. CP 132-132, 138, 264. Benjamin's biological father, Benjamin Ensley, died in an accident before Benjamin was born. CP 82. Benjamin's mother, Laurie, had previously been involved with Michael, and they had a child together, Chandler. CP 18. After Ensley's death, Michael helped Laurie through the remainder of her pregnancy and was there when Benjamin was born. CP 19. Michael was the first person to hold Benjamin; he cut Benjamin's umbilical cord. CP 19, 49 (photo captioned by Laurie: “The first

time you met your son, Benjamin”), 132. Benjamin carries Michael’s last name. CP 38, 52. As Laurie’s father describes it, “in Benjamin’s eyes, Michael is his father here on Earth and always has been.” CP 132

Laurie describes Michael and Benjamin in the same terms, as father and son. For example, in April of 2008, she expressed her desire that Michael formalize the relationship by adopting Benjamin. CP 72. Laurie said she wanted for “[Benjamin’s] father, Michael Jerome Holt, to legally adopt him,” but did not pursue that protection because of consequences to Benjamin’s survivor benefits from Ensley’s estate. CP 72, 258. As she described in a photo album she gave to Michael, “There was no doubt he is your son.” CP 51. Benjamin has no doubts either, calling Michael “Dad” and sending him Father’s Day cards and DVDs, for example. CP 55-56, 140. To Benjamin, Michael is his father and to Michael, Benjamin is his son.

#### B. THE RELATIONSHIP BETWEEN THE ADULTS CHANGED.

By the time Benjamin was born, in August, 1999, Michael and Laurie had resumed their relationship; they married a month after the birth. CP 19. However, in the aftermath of Ensley’s death, Laurie manifested significant emotional difficulties and received

treatment for alcohol abuse and depression, as she acknowledges. CP 19, 257. The Holt marriage did not last. Michael and Laurie divorced just before Benjamin turned two. CP 19. Laurie claims she left the marriage because Michael is addicted to gambling. CP 82, 182. Actually, Michael manages a gambling casino and has worked in the industry for 23 years. CP 14, 255, 269. There is no evidence he has any kind of addiction.

When the Holts divorced, a parenting plan was entered regarding Chandler, the oldest son. CP 19. The parties did not make Benjamin part of the parenting plan because Michael had not been established as the legal parent and because litigation was pending relating to Ensley's death, which they did not want to jeopardize. CP 19, 258. Ultimately, the tort litigation resulted in a favorable settlement for Benjamin, which is in trust for him; Benjamin also receives Ensley's social security and worker's compensation benefits. CP 19, 125. After the litigation ended, and there were no further concerns about affecting Benjamin's interest in Ensley's estate, Laurie changed Benjamin's name from Ensley to Holt, though she had already divorced Michael. CP 19.

Laurie has herself had numerous name changes, indicative of a history of serial, short-term romantic relationships, totaling as

many as eight since Benjamin's birth in 1999, including two other marriages. CP 18-22, 30, 133-134. Typically, Laurie's relationships last three to four months. CP 30. This pattern began early. She and Michael began to cohabit within several months of meeting in 1993 and had a child within two years. CP 81. They separated after five years, which appears to be Laurie's longest relationship. CP 82.

In 1998, immediately after her relationship with Michael ended the first time, Laurie became engaged to Benjamin Ensley, moved in with him, and became pregnant with Benjamin. CP 18-19, 82. After Ensley died, Laurie and Michael resumed their relationship and married in 1999. CP 82. Two years later, in 2001, they divorced. CP 19.

The next year, Laurie married William Walters, from whom she filed for divorce in 2006. CP 20, 82. The next year, Laurie married Mark Jiganie, a 20-year-old. CP 20, 82, 228. (Laurie was then 35. CP 1.) That marriage ended, a year later, in 2008, when Jiganie assaulted and sodomized Laurie. CP 82-83. Laurie had several additional relationships, moving these men into and out of her home in Vancouver, before beginning her current relationship, with Spencer Partridge, in 2009, with whom, after four months, she

decided to live at his home in Castle Rock. CP 21-22, 23, 30, 75, 83, 242, 256.

These relationships have been confusing and disruptive to both children. CP 22. "This constant shuffling of boyfriends in and out of the household ... has taken its toll on both boys but especially on Benjamin who sees Michael as his one and only father." CP 30.

C. THE RELATIONSHIP BETWEEN MICHAEL AND BENJAMIN AS FATHER AND SON HAS BEEN CONTINUOUS AND STABLE.

Michael and Benjamin have continued their father-son relationship throughout the vicissitudes of Laurie's life, although not always easily. After Laurie and Michael separated, they agreed to keep the same residential schedule for both boys, such that the boys spent ten to twelve nights a month with Michael, as well as half of all breaks (summer, winter, spring, etc.). CP 19-20.<sup>1</sup>

Laurie's father describes Laurie's past agreement to continue Michael's involvement in Benjamin's life as "the best choice she has ever made ...." CP 133.

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<sup>1</sup> In her brief, Laurie says "Benjamin would *occasionally* visit Michael on the same schedule as Chandler" and that she has "provided all Benjamin's parenting." Br. Appellant, at 5 (emphasis added). At *best*, this misrepresents the facts. Certainly, it is unsupported by the record, where Laurie concedes Benjamin has followed Chandler's residential schedule. CP 72; see, also, CP 83 ("every other weekend" with Michael). Michael and Laurie have co-parented both boys.

“Michael has been Benjamin’s stability, his father, his mentor and the person he can rely on to always be there for him.” CP 134; see, also CP 139. He treats Benjamin identically to Chandler, meaning Benjamin is as “loved and nurtured” by Michael as Chandler is. CP 24, 29. Michael lives for his children. CP 15, 29, 134, 140. Along with providing basic parental care, Michael has been the most active parent with respect to Benjamin’s schooling, which, according to the school principal, accounts for Benjamin doing as well as he has in school. CP 29, 139-140, 263. Michael has volunteered at the school, spending a day a week, in a program called “WATCH DOGS.” CP 39-41. Michael has signed up Benjamin for sporting activities and has coached some of his teams and gotten his company to sponsor the teams. CP 22, 29, 37, 45-47, 57. Even after Laurie switched Benjamin from his baseball team in Vancouver to one in Castle Rock, Michael continued to attend games and practices. CP 134. Michael is, according to Laurie’s father, “a super dad.” CP 134.

In short, Michael’s relationship to and caretaking of Benjamin has been as rich and comprehensive as any parent’s, including financially. Though not required by court order, Michael paid child support for Benjamin in an amount equal to what he paid for

Chandler, as the trial court repeatedly found. CP 24, 75, 218, 222-223, 243. Michael also provides insurance coverage, both medical and life, and pays for numerous other expenses (e.g., food, clothing, activity costs, vacations). CP 20-21. Laurie's claim that Michael provides no financial support for Benjamin is completely at odds with the facts.<sup>2</sup> See, e.g., CP 107; Br. Appellant, at 5.

Despite all these years of depending on Michael as co-parent, Laurie now claims the only reason she allowed Benjamin to spend time with Michael was to support the bond Benjamin had with his brother, Chandler, who is four years older. CP 81-82, 83. Indisputably, the boys have grown up together and share a strong bond. CP 19, 43, 58, 60, 62, 63, 65, 66, 67 (photos). They are "remarkably close" and "extremely close." CP 30, 139. It is hard on both boys when they are separated. CP 139, 261.

Chandler now lives full time with Michael, partly because of friction with his mother. CP 260. Even so, Michael continues to pay child support to Laurie for both boys. CP 24, 262. Benjamin mainly sees Chandler when spending time in Michael's home.

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<sup>2</sup> For unknown reasons, Commissioner Skerlec said Michael did not dispute Laurie's claim that he does not pay child support. Ruling Granting Discretionary Review, at 2. As the record proves, Michael has consistently demonstrated that he provides substantial financial support for Benjamin, though not court ordered.

Benjamin's relationships with his extended family are also very close, as Laurie acknowledges. CP 35-36. He vacations with the Holt family, celebrates holidays, commemorates important family events. Of particular significance is his relationship to his Grandmother Holt, Sue Boyd, who has provided after school care to Benjamin for years. CP 35-36 (Laurie); 62, 67 (photo). As Laurie just several years ago said, "nobody in the world knows my Benjamin like Sue Boyd." CP 73. It was her wish that, should anything happen to her or Michael, Sue be made Benjamin's guardian. CP 72-73. That Benjamin is deeply integrated into his extended family on Michael's side is also demonstrated by his own gestures of familial devotion. See, e.g., CP 139-140.

**D. SINCE LAURIE BEGAN HER MOST RECENT RELATIONSHIP, SHE HAS ACTED TO TERMINATE BENJAMIN'S CONTACT WITH MICHAEL, REPEATING HER PATTERN, TO BENJAMIN'S DETRIMENT.**

Both Michael and Laurie claim that they have co-parented the boys in a largely cooperative manner. CP 20, 24, 182, 188, 234-235.<sup>3</sup> However, frequently, when Laurie becomes involved with a new man, she tries to limit Michael's time with Benjamin. CP 20-21, 30. Indeed, Michael first went to see an attorney when, in

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<sup>3</sup> Michael has two children from his previous marriage, which he has also cooperatively and actively co-parented, according to his ex-wife. CP 28

2008, during Laurie's marriage to Jiganie, she began to interfere in Michael's relationship with both children. CP 21, 227-228, 234. She split up the boys for the residential time, for the first time in Benjamin's eight years of life. CP 20. She terminated some of Benjamin's activities, such as football, which Michael had participated in with him. CP 20-21. She withheld Benjamin from family time with his brother, with Michael, and with his extended family, including on special occasions. CP 21. However, as soon as the relationship with Jiganie ended, in rape and assault, Laurie turned, again, to Michael for support. CP 228. This is her pattern. She relies on Michael, both for co-parenting and for her own sake, until she takes up with a new man. CP 30. She then attempts to cut Michael off from his children, deciding that the "new boyfriend should try to be Benjamin's father," until the relationship with the new boyfriend implodes and Laurie relies on Michael to pick up the pieces. CP 133, 228.

In general, Laurie retaliates against people in her life by withholding the children from them. CP 92. When, for example, her father expressed concern about the choices Laurie makes in respect of her serial relationships, and their effect on the children, Laurie refused to allow him to see his grandsons. CP 133. Laurie

threatened to withhold Benjamin from Michael, and actually tried to remove him from school records, when Michael unwittingly angered her by delivering a card to Benjamin from his grandfather and stepmother, when Laurie was not speaking with them. CP 20.

Recently, after Laurie moved from Vancouver to Castle Rock to live with Partridge, she attempted to remove Benjamin from school and related programming, mid-year, with no apparent concern for the impact on Benjamin nor any plan for continued contact between Benjamin and Michael and Benjamin and Chandler. CP 22-23, 25. Laurie also indicated she was changing her mind about allowing Benjamin to go on a planned vacation with his brother and Michael and she obstructed telephone contact. CP 23. Her efforts to obstruct Benjamin's time with Michael have continued throughout the litigation, despite her disavowing same. See, e.g., CP 330-358, 399.

Laurie's conduct has affected the children. CP 22. Benjamin adamantly did not want to move to Castle Rock and missed seeing his brother; the change to life with another new man was "happening too quickly for him." CP 24, 261. As a rule, Laurie leaves the children little time to adjust to her life changes, but jumps right into her relationships "head-on." CP 30. Given Laurie's

history, many people expressed concerns that her relationship with Partridge would not last, yet the impact of uprooting Benjamin would be irreparable, threatening his emotional stability. CP 23-24, 30, 92, 133, 139. Even Chandler is skeptical about the durability of his mother's latest romance. CP 261.

Chandler's relationship with Laurie is now very strained. CP 262. He felt alienated by Laurie's behavior during her marriage to Jiganie, when he was repeatedly slighted by Laurie. CP 21, 30. Laurie reports Chandler screamed and yelled at her. CP 262. The change in residential schedule that resulted is the subject of a parenting plan modification. CP 254. Yet Laurie now claims Chandler lives with Michael only to allow him to attend a particular high school in Vancouver. CP 83-84.<sup>4</sup> However, that does not explain why Laurie has virtually stopped exercising her residential time with Chandler. CP 333.

Chandler, believes Benjamin would be "devastated" if parted from Michael. CP 263. Benjamin's grandmother (Michael's mother), with whom Michael (and Benjamin) have lived, also

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<sup>4</sup> Laurie also claimed Chandler's move to Michael's was temporary, though that claim was not credible, being at odds with her claim that she did not give notice of relocation because Chandler was residing with Michael. CP 261-264.

believes Benjamin would be devastated. CP 138. For Benjamin's grandfather, Laurie's father, "[t]he thought that Benjamin could lose the stability and love of his only father is more than I can comprehend as his grandfather." CP 132-133. In particular, Laurie's father expressed the view that Laurie's serial relationships "are detrimental to the boys." CP 133. The impact is particularly hard on Benjamin, for whom the separation would have a "significant and negative impact ... for years to come." CP 30. For all these and other reasons, the guardian *ad litem* believes "it would be detrimental for Benjamin to terminate contact with Michael, ..." CP 263. She also observed it would be detrimental if the two brothers "aren't in the same household." RP (07/15/10) 28; see, also, CP 30, 139. Even Laurie conceded to the guardian *ad litem* that maintaining the relationship between Benjamin and Michael was best for Benjamin. CP 264.

Now Laurie says that Michael is seeking to maintain the relationship with Benjamin only because he "feels threatened by [her] boyfriend" and hopes to make Laurie abandon the relationship. CP 84, 188. Michael feels threatened, she says, because her new boyfriend is "successful" in some way and

Benjamin enjoys his company. CP 182, 188.<sup>5</sup> This “fear” motivated Michael to litigate. *Id.* Actually, it appears Michael has been supportive of Laurie’s new relationships and repeatedly reassured her of his support. See, e.g., CP 235, 242.

E. AFTER NEGOTIATIONS FAILED, MICHAEL PETITIONED FOR DE FACTO PARENT RECOGNITION AND NONPARENTAL CUSTODY.

Michael consistently attempted to address this alienating conduct of Laurie’s through mediation and negotiation. CP 228, 229, 234-236, 242-243. When negotiations failed to produce an agreement, Michael petitioned the court for two kinds of relief: to be declared Benjamin’s de facto parent or for nonparental custody. CP 1-5, 223. The court initially found de facto parentage established *prima facie*, and set the matter on a trial track. CP 218, 219. This means the family court commissioner found *prima facie* evidence of the following:

- (1) the natural or legal parent consented to and fostered the parent-like relationship,
- (2) the petitioner and the child lived together in the same household,
- (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and
- (4) the petitioner 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.

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<sup>5</sup> Laurie lives with Partridge in a home owned by his parents for whom Partridge also works. CP 256.

... In addition, 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.”

*In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005)

(internal citations omitted). Specifically, the trial court found that

- Benjamin calls Michael “Dad,” and that Michael was present for the birth and cut the umbilical cord.
- Michael has been secondary residential parent to Benjamin for the past nine years, sharing the same residential schedule as Chandler.
- Laurie has consented to and fostered a parent-child relationship between Michael and Benjamin and does not dispute she has held Michael out as Benjamin’s father for all intents and purposes since Benjamin’s birth.
- Michael began living with Benjamin shortly after his birth in 1999 and lived with him through 2001, after which Benjamin lived in Michael’s home on a regular schedule.
- Michael has voluntarily paid child support for Benjamin and maintained him on his health insurance and as a beneficiary on his life insurance, as well as providing financially for other of Benjamin’s needs.

•Michael has been Benjamin's father figure consistently since his birth and Benjamin bears his last name, which Laurie changed to Holt after she divorced Michael.

•Michael has been involved in Benjamin's academic and extracurricular activities and Benjamin has participated with Michael in family vacations, holidays and events.

•Laurie attempted to uproot Benjamin in the middle of the school year to move to Castle Rock to live with a man she had known for four months.

CP 218, 219, 222-223.

Based on this evidence, the court set the case for trial on the de facto parent issue, while continuing an order restraining Laurie from moving Benjamin before the end of the school year and continuing his residential schedule with Michael. CP 218, 219. The court also appointed a guardian *ad litem* and ordered Michael to continue making support payments for Benjamin. CP 218-219.

Shortly thereafter, the court gave Michael permission to add a claim for nonparental custody to his petition. CP 223.<sup>6</sup> Michael alleged Laurie is not a suitable custodian because of her chronic

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<sup>6</sup> No formal amendment was made, but the nonparental custody claim has proceeded in conformance with CR 15(b).

instability, including her exposure of the child to domestic violence (in one of her prior relationships), and because of her intent to peremptorily relocate the child, pulling him out of school and other activities mid-term, and moving him away from his brother and his only father, Michael, to another unstable situation. CP 3-4; CP 18-27. The court commissioner found adequate cause. CP 220. The court also linked the action with the pending modification of Chandler's parenting plan. CP 224, 296.

Laurie moved for revision. CP 109-110. Before the court heard the revision motion, the Washington Supreme Court decided *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d (2010). In light of *M.F.*, the trial court felt compelled to dismiss the claim summarily. CP 112, 247 (de facto parent "is off the table").

At the same approximate time, the trial court found adequate cause to proceed on Michael's nonparental custody petition based on the allegation of detriment to Benjamin's growth and development. CP 141-142. This allegation was supported by affidavits or statements from Benjamin, who wants to continue the pattern of contact with Michael, from Laurie's father, Benjamin's brother, Benjamin's grandmother, the school principal, and the guardian *ad litem*, among others. CP 30, 134, 138, 261, 264; RP

(07/15/10) 28. This allegation was further supported by the guardian's observation with respect to the parties' other child, Chandler, that "there is some evidence to suggest that the environment for Chandler in his mother's care is detrimental[.]" CP 262. The guardian also corroborated that Michael is "the only father [Benjamin] has known in his life,..." CP 264.

After review of these submissions, the court found there was "enough documentation" to proceed to trial, specifically:

that if the Respondent/mother denies contact between Petitioner and minor child it would cause actual detriment to the minor child's growth and development [and that] if the relationship between the minor child and the Petitioner is not protected, [sic] the Court has concerns that the mother may withhold the visitation contact in the future.

CP 142. The court denied Michael's motion to stay its order dismissing the de facto parent petition. CP 144. However, the court ordered the residential schedule to continue under the the nonparental custody petition. CP 144.

After finding adequate cause, the court appointed a psychologist, Dr. Kirk Johnson, to evaluate "whether actual detriment would result in the termination of the relationship between [Michael] and Benjamin." CP 145. The court ordered trial on the nonparental custody petition to be combined with the trial on the

pending modification of Chandler's parenting plan. CP 224, 242.<sup>7</sup>

The court also entered findings and conclusions. CP 147-150.

Michael asked the court to clarify whether its dismissal of the de facto parent petition was ripe for appeal, pursuant to CR 54(b) and RAP 2.2(d) (i.e., whether there was "any just reason for delay" for the appeal). CP 275-290. Laurie then moved the court to reconsider its order finding adequate cause or to certify that order as appealable. CP 291-292. The court denied her this relief, holding that a finding of adequate cause "is not a final disposition in the matter." CP 295. Laurie moved for discretionary review of the adequate cause order. CP 151-159. Subsequently, the court entered amended findings and conclusions, which included certification of the de facto parent dismissal as appealable. CP 297-303. Michael appealed. CP 160-175.

#### F. AT THE COURT OF APPEALS.

Michael's notice of appeal arrived at the Court of Appeals while Laurie's motion for discretionary review was pending a hearing. A commissioner mistook the CR 54(b) certification as applying to the nonparental custody petition and struck the hearing

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<sup>7</sup> It is anticipated, the parenting plan for Chandler will now be modified by agreement of the parties, effective May 6, 2011.

on Laurie's motion for discretionary review and declared Laurie to be the appellant. Laurie did not point out the obvious error, but perfected her record and filed an opening brief. Michael moved to modify and this court granted the motion. A hearing on Laurie's motion for discretionary review was rescheduled.

On January 21, 2011, the commissioner granted discretionary review of the adequate cause ruling on the basis that Michael had presented only "the bare opinions of family member[s] and the GAL" regarding the impact of terminating the relationship between Benjamin and Michael. Ruling at 4. The commissioner cited the lack of an "expert evaluation of the degree to which [Benjamin] will be effected [sic]." *Id.* She concluded this "paucity of evidence pertaining to the impact of loss of contact" justified discretionary review of the adequate cause ruling. *Id.* This Court denied Michael's motion to modify that ruling.

## VI. ARGUMENT IN RESPONSE RE NONPARENTAL CUSTODY

### A. THE TRIAL COURT CORRECTLY FOUND THERE WAS ADEQUATE CAUSE TO PROCEED TO TRIAL ON THE NONPARENTAL CUSTODY PETITION.

Nonparental custody may be awarded on a showing of detriment to a child. To get a trial on such a claim, a petitioner needs merely to "set[ ] forth facts" that go to these merits. The

petitioner needs to prove these facts at trial, but not at the threshold hearing. If detriment is proved, the court's award of custody may take the form of a residential schedule whereby the child spends time in both the petitioner's and the parent's homes. Here, the trial court properly found that Michael justified a trial on the merits, a finding entitled to deference. This becomes clear on review of the adequate cause standard itself, of how it is met here, and of the standard of review.

1) The adequate cause standard.

The insertion of the adequate cause requirement (RCW 26.10.032) in the nonparental custody statute came after complaints about burdening parents and children with intrusive investigations and hearings in meritless nonparental custody actions. See, e.g., *In re Custody of Nunn*, 103 Wn. App. 871, 14 P.3d 175 (2000). The provision, like its counterpart in the modification statute (RCW 26.09.270), interposes a substantive threshold as a mechanism for expediently dismissing meritless petitions. See *In re Custody of Shields*, 157 Wn.2d 126, 139, 136 P.2d 117 (2006) (noting the difference between the standing requirement and the substantive standard for nonparental custody).

Thus, nonparental custody petitioners now must satisfy two prerequisites to having a trial on the merits. As before, they must establish standing by “declaring” either that the child is not in a parent’s custody or that neither parent is a suitable custodian. RCW 26.10.032(1). Standing is not at issue here. CP 3 (alleging “[n]either parent is a suitable custodian”).

In addition to standing, petitioners now must “set[ ] forth facts” supporting their ability to prevail on the merits, that is, their ability to prove the parents are unfit or to prove actual detriment to the child’s growth and development. RCW 26.10.032(1); *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 348, 227 P.3d 1284 (2010). These assertions of fact must then be proved at a trial on the merits. *E.A.T.W.*, 168 Wn.2d at 348 n.5.

The statute does not establish a quantum for this proof. The statute merely requires the petitioner to file “an affidavit ... setting forth facts supporting the requested order.” RCW 26.10.032(1). On its face, this is not a heavy burden. As the Supreme Court describes, the alleged facts must simply be of a kind that, “*if true*, will establish a prima facie case supporting the requested order.”

*E.A.T.W.*, 168 Wn.2d at 346 (emphasis added).<sup>8</sup> The alleged facts should be viewed in the light most favorable to the petitioner. *In re Marriage of Lemke*, 120 Wn. App. 536, 541-542, 85 P3d 966 (2004); see, also, *In re Parentage of L.B.*, 155 Wn.2d 679, 684 n.2, 122 P.3d 161 (2005) (using this standard in de facto parent petition by analogy to CR 12(b)(6) motion). Michael does not, in other words, have to prove the truth of the facts at the threshold hearing.

2) The trial court correctly found Michael satisfied adequate cause.

Michael satisfied the adequate cause requirement with numerous affidavits showing that Benjamin will suffer actual detriment if Laurie is permitted to sever the father-son relationship he has with Michael. Under Washington law, the trial court was correct in granting a trial on the merits. Certainly, Michael's case bears no resemblance to the example we have of a failure to

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<sup>8</sup> The Supreme Court did not adopt a formulation for the burden of proof that appears in some cases, that adequate cause means "something more than *prima facie* allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change." This formulation first appeared in *In re Marriage of Roorda*, 25 Wn. App. 849, 852, 611 P.2d 794 (1980) and, then, in *In re Marriage of Mangiola*, 46 Wn. App. 574, 577, 732 P.2d 163 (1987). It has been repeated in the Court of Appeals since then. However, both *Roorda* and *Mangiola* have been overruled because the Court of Appeals reviewed adequate cause determinations in those cases *de novo*, instead of with deference to the trial court's fact-finding, which renders *Mangiola* particularly inapposite in this proceeding. See Br. Appellant, at 16. Moreover, the phrase "prima facie allegations" seems to be a mash-up of "prima facie" proof and "more than mere allegations." It does not appear to have ever been used by the Supreme Court.

establish adequate cause, where the moving parties failed even to plead adequate cause. *E.A.T.W.*, 168 Wn.2d at 348 (petitioners pled only that child was not in custody of parent and argued that was sufficient to satisfy adequate cause). Despite Michael having done all that the statute required, if not more, the commissioner dismissed Michael's evidence as "bare opinions" and granted discretionary review because Michael did not present expert testimony. Ruling, at 4. This is plainly wrong.

First, it hardly requires expertise to conclude that severing a child's relationship with a parent will cause detriment. See *Velickoff v. Velickoff*, 95 Wn. App. 346, 355, 968 P.2d 20 (1998) ("An effort by one parent to terminate the other parent's relationship with a child can be considered detrimental to the child" justifying modification of residential schedule). This much is widely acknowledged. See, e.g., *In re Custody of Skyanne Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998) ("We recognize that in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child."); *In re Marriage of Anderson*, 134 Wn. App. 506, 512, 141 P.3d 80 (2006) (the "fundamental right to a stable and healthy family life ...

include[s] independently valued protections of a *child's* relationship with siblings and with adults other than his or her biological parents with whom the child has formed a critical bond," *citing Custody of Shields*, 157 Wn.2d at 159 (Bridge, J., concurring)). Indeed, the importance to a child, and to the child's actual emotional health, of the attachment to a parent is hard to overstate. Even Laurie has described Michael as Benjamin's father. Losing a father is a traumatic event for a child. Evidence of this bond is an aspect of the adequate cause showing.

But Michael did not rely solely on this simple and sensible truth, that severing a child from a parent will produce harm to both. Rather, he provided a great deal of additional evidence in the form of written testimony from those who know Benjamin best and from the guardian *ad litem* appointed to investigate Benjamin's interests. Even if these are "opinions," they are worth something, especially if their source is knowledgeable, such as is a sibling, a grandparent, a school principal, and a court-appointed advocate.<sup>9</sup>

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<sup>9</sup> The affiants' testimony was based on their direct knowledge of Benjamin and Michael. Certainly, these "opinions," if that is what they are, are admissible. ER 701. Moreover, because "[t]he distinction between a statement of fact and an opinion is not always easily drawn," (16 Wash. Pract. § 18.4), discounting the affidavits here simply because their authors are not experts seems simply wrong. If this is a question of weight, then it is for the trial judge to weigh, as discussed below.

Certainly, measured against a threshold requirement, Michael affidavits amply satisfy adequate cause. Michael did not need to prove his case in an ultimate sense. Rather, the process of further proving the allegations is precisely what discovery and trial are designed to do. For example, here, after ruling on adequate cause, the trial court granted Michael the right to obtain a psychological evaluation of detriment. CP 270. It is hard to know by what process this evaluation could have occurred prior to the adequate cause hearing and the court's order permitting this further discovery. More importantly, the idea that such an evaluation should have been made for purposes of satisfying the threshold is at complete odds with the whole purpose of the adequate cause requirement – to limit the legal proceeding, including discovery, where meritless. To work properly, this gate-keeping mechanism necessarily occurs early in the process, in advance of the time, resources, and intrusiveness incidental to a full-blown trial. *In re Marriage of Adler*, 131 Wn. App. 717, 724, 129 P.3d 293 (2006).<sup>10</sup>

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<sup>10</sup> The legislative history likewise reflects this concern, noting that a threshold determination:

should be made as early as is practicable under the circumstances of each case, so as to minimize unwarranted state interference with the integrity of the family.

House Bill Report, HB 1720, at 2.

For this reason, it makes no sense to fault Michael for not providing an expert evaluation at this point in the proceeding.

Finally, if the Legislature did mean to require an expert's opinion for adequate cause, it could easily have said so, as it did just this year in SB 5656 (explicitly requiring expert testimony in cases involving an involuntary foster placement of an Indian Child or involuntary termination of an Indian parent's rights).<sup>11</sup>

Michael has satisfied the requisite threshold. He is not required to make his entire case at this stage. Indeed, to deny him a trial contravenes the law's goal to prevent harm to the child.

*E.A.T.W.*, 168 Wn.2d at 346.

- 3) The standard of review for an adequate cause order is whether the trial court committed an obvious or probable error in the exercise of its discretion .

In general, it is the trial court's role to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses, to which the appellate court defers.

*State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This deference applies as well when a trial court reviews affidavits in family law matters. See *In re Marriage of Rideout*, 150 Wn.2d 337,

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<sup>11</sup> The final bill may be found at <http://apps.leg.wa.gov/documents> (§ 13).

350-353, 77 P.3d 1174 (2003); *In re Parentage of Jannot*, 149 Wn.2d 123, 126-128, 65 P.3d 664 (2003). Our court has recognized “that a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference on review.” *Jannot*, 149 Wn.2d at 127; *see, also, Rideout*, 150 Wn.2d at 351. Indeed, “a trial judge is in the best position to assign the proper weight to each of the varied factors raised by the submitted affidavits in a particular case.” *Jannot*, 149 Wn.2d at 127 (emphasis omitted). Here, if anything, more than the usual deference is owed the trial court because of the interlocutory context. *See Minehart v. Morning Star Boys*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (“Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.”).

Of course, an order granting adequate cause may be reversed where there is a legal insufficiency in the pleadings. For example, in *E.A.T.W.*, the trial court granted adequate cause though the petitioners failed to set forth facts showing either detriment to the child or unfitness of the parent, in violation of the statute. 168 Wn.2d at 338. Similarly, dismissal is appropriate

where the petitioner failed to declare the requisites for standing (not in physical custody or no suitable custodian). *In re Custody of S.C.D.-L.*, 170 Wn.2d 513, 514-515, 243 P.3d 918 (2010). Finally, in the context of a parenting plan modification, this Court reversed where the petitioner's affidavits failed to show or even to suggest the requisite detriment. *Lemke*, 120 Wn. App. at 541-542.<sup>12</sup>

These legal insufficiencies are not present here. Michael's pleadings do everything the statute requires, and more.

4) The trial court was right to set this matter for trial for trial.

As Michael's affidavits more than adequately demonstrate, the question at the heart of this case, whether Benjamin will suffer detriment if deprived of his only living father, deserves a full fact-finding, including evaluation by an expert. Yet Laurie seems to argue that Michael cannot ever, as a matter of law, satisfy the standard for nonparental custody. See, e.g., Br. Appellant, at 10-12. Repeatedly she asserts a violation of her constitutionally protected parental rights to determine when, if ever, Michael and Benjamin will see one another. As a practical matter, her exercise of this right would also determine when, if ever, Benjamin sees his

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<sup>12</sup> The father's affidavits showed only that the mother was sometimes absent because of work and that, during such absences, the grandmother, "a wonderful woman" provides child care.

brother, Chandler, who lives with Michael. Laurie asserts her rights without disputing that Michael has been Benjamin's functional father for all of Benjamin's life, a relationship formed with her consent and encouragement, and she asserts her rights without *any* consideration of anyone's interests but her own.

Laurie's parental rights are not absolute. Rather, Benjamin also has rights. *E.A.T.W.*, 168 Wn.2d at 346. He has a right to his significant relationships, as this court has previously noted. *Marriage of Anderson*, 134 Wn. App. at 512. He also has a right not to be harmed. *E.A.T.W.*, 168 Wn.2d at 346.

Moreover, the state has an interest in protecting Benjamin from harm, reflecting our "recognition of the fact that these impressionable and emotionally and psychologically fragile infants are not chattels or playthings or mere desiderata but have rights of their own which should be protected." *In re Clark*, 26 Wn. App. 832, 839, 611 P.2d 1343 (1980). The nonparental custody statute is one mechanism available for this purpose. It permits, for example, a stepmother to be the primary residential caregiver where the stepmother, unlike the otherwise fit father, had maximized developmental opportunities for the hearing-impaired child. *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16

(1981). Similarly, the statute allows for the possibility that another stepmother, in whose primary care the child had spent most of his life, could continue in that role after the death of the child's father, though the mother remained alive. *Custody of Shields*, 157 Wn.2d at 150 (remanding for trial on the stepmother's nonparental custody petition under proper legal standard of detriment).

Obviously, there is no "cookie cutter" for the fact-intensive inquiry structured by the nonparental custody statute. Obviously, also, the focus in that inquiry may be on the child, and his or her relationships, not on the parent's fitness or unfitness and not on the adult relationships. See, e.g., *In re Mahaney*, 146 Wn.2d 878, 894, 51 P.3d 776 (2002) (though mother now fit, the anticipated detriment to children of placement with her justified nonparental custody in grandmother); *In re Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989) (trial court erred when it failed to consider evidence that disruption of the child's relationship with his aunt, who had been his primary, consistent caretaker, would be detrimental, though father was fit).

Finally, as these cases demonstrate, the grant of nonparental custody to Michael, should he prevail, does not mean termination of Laurie's interests or residential time. RCW

26.10.160(1). See, also, *In re Welfare of BRSH*, 141 Wn. App. 39, 169 P.3d 40 (2007) (grandparents awarded custody and parents awarded visitation). Rather, the court can simply enter a residential schedule as it does in RCW 26.09 proceedings, in keeping with the framing of such issues that now prevails in Washington law and policy. See *In re Marriage of Kovacs*, 121 Wn.2d 795, 800-801, 854 P.2d 629 (1993) (parenting act replaced the terms “custody” and “visitation” with concepts such as “parenting plans” and “parental functions”). Nothing in RCW 26.10 prevents the court from entering a residential schedule retaining for Benjamin stability and his continuity of contact with both Michael and Laurie.

In short, the nonparental custody statute, when properly implemented, as it has been in this case, protects against violations of parental rights and protects children. It conditions state intervention on proof of actual detriment to the child’s growth and development. The statute also protects parents by requiring the nonparental petitioner to make a threshold showing of actual detriment to justify a trial. Because the statute has, at every stage in this case, been fully satisfied, Laurie’s parental rights have suffered no violation. Michael’s petition should proceed to a trial on the merits.

## VII. ARGUMENT ON APPEAL

### A. MICHAEL IS BENJAMIN'S DE FACTO PARENT UNDER WASHINGTON LAW.

- 1) Michael's prior marriage to Laurie does not preclude de facto parentage.

The trial court dismissed Michael's de facto parent action in part because he was formerly married to Laurie and, therefore, formerly a stepparent to Benjamin. CP 303. The court took this action reluctantly, feeling compelled to do so by *In re Parentage of M.F.* CP 302. However, the court read *M.F.* far too broadly.

First, the de facto parent doctrine meets the compelling need to protect the relationship between an adult and a child, one formed through function, not through law. Accordingly, the de facto parent doctrine addresses itself to the relationship *between the child and the petitioning de facto parent*, not to the relationship between the adults. *In re Parentage of J.A.B.*, 146 Wn. App. 416, 425, 191 P.3d 71 (2008).

Second, and simply, to read *M.F.* as excluding from the doctrine all former stepparents is too broad. Our Supreme Court, in *M.F.*, expressly addressed "only a question of law, whether a stepparent may acquire de facto parent status *when the child has two fit parents.*" (emphasis added). 168 Wn.2d at 531. Because

the petitioner was “a third-party to the two already existing parents,” the court held he was “in a very different position than the respondent in *L.B.*” *Id.*, at 534. The existence of these “competing interests,” i.e., the fact of two legal parents with a parenting plan, distinguished the case from *L.B.*, where there was only one legal parent. *Id.* Thus, it was not the fact of the former marriage (and the former “stepparent” status) that mattered in *M.F.*, but the fact of two living legal parents.

By contrast, here, as in *L.B.*, the same two people have parented the child from birth. Michael and Laurie have always been the only living parents to Benjamin, just as Carvin and Britain were the only living parents to L.B. By contrast, M.F. was born before Corbin met Reimen, the mother, and M.F. had a second living legal parent, Frazier, whose rights and responsibilities were embodied in a parenting plan, along with Reimen’s.

Contrary to the trial court’s view here, the brief marriage between Michael and Laurie does not alter the essential likeness between this case and *L.B.*, where the parties could not marry. To hold otherwise not only misreads *M.F.*, but elevates form over substance, making the brief marriage between Michael and Laurie serve a gate-keeping function both arbitrary and capricious and

unconstitutional. Though a common law equitable remedy, the de facto parent doctrine is still subject to the same mandate that all children be treated equally, regardless of the marital status of their parents. *In re Parentage of Calcaterra*, 114 Wn. App. 127, 131, 56 P.3d 1003 (2002); see, also RCW 26.26.106 (child has same rights regardless of whether parents married). Such a limitation on the de facto parent doctrine would violate the equal protection rights of both Benjamin and Michael, since no legitimate state purpose is served by excluding former stepparents on facts such as are presented here. U.S. Const., Amend 14; Const., art. 1, § 12. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (unmarried fathers' due process right violated by irrebuttable presumption of unfitness); *Gomez v. Perez*, 409 U.S. 535, 538, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973) (where child has right to support, that right is unaffected by the fact the parents are unmarried). Indeed, as this case illustrates, it makes no sense to exclude from the de facto parent doctrine all former stepparents. If Chandler's biological father was not Michael, but a man who died before his birth, and all other facts remain the same, Michael could be his de facto parent but not Benjamin's. This is absurd, and unequal. Such an interpretation of the de facto parent doctrine

likewise would violate public policy promoting marriage by discouraging and penalizing de facto parents who marry the legal parents, however briefly. *Andersen v. King County*, 158 Wn.2d 1, 35-36, 138 P.3d 963 (2006). Michael is in no different position than was Carvin in *L.B.*, and his petition for de facto parent recognition is just as worthy.

Likewise, the absence here of a second living legal parent answers the concerns about floodgates expressed in *M.F.* It was the court's view that stepparents would "in most cases" satisfy four of the *L.B.* factors. 168 Wn.2d at 534-535. Obviously, the court did not mean to decide hypothetical cases. *State v. Johnson*, 159 Wn. App. 766, 778 n.8, 247 P.3d 11 (2011) (statements going beyond the facts of the case are *obiter dictum*). Moreover, the court's speculating about "most cases" involving stepparents failed to take into account the fifth *L.B.* factor, limiting the de facto parent doctrine "to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." *L.B.*, 155 Wn.2d at 708. Here, obviously, the fact of a former marriage does not prevent meaningful application of the de facto parent doctrine.

2) There are no other statutory remedies available to Michael.

In dismissing the de facto parent action, the trial court also held it was barred as a matter of law because Michael has other statutory remedies, specifically “a potential statutory remedy to continue his relationship with the child under RCW 26.10” and a previous opportunity to seek visitation under RCW 26.09.240. CP 302. Here, again, the trial court erred.

- a) The visitation statute is a nullity and, therefore, never a remedy.

First, the visitation statute cited by the trial court is a nullity. It was recognized as unconstitutional by the Court in *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 61, 109 P.3d 405 (2005). Accordingly, as a nullity, RCW 26.09.240 “is as inoperative as if it had never been passed.” *Boeing Co. v. State*, 74 Wn.2d 82, 88-89, 442 P.2d 970 (1968). *Accord City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004) (a facially unconstitutional statute is rendered totally inoperative). Simply, RCW 26.09.240 has always been unconstitutional.

Moreover, the statute’s unconstitutionality was evident, since it suffered the same infirmity as its predecessor, declared unconstitutional in *In re Custody of Smith*, 137 Wn.2d 1, 18, 969

P.2d 21 (1998). As the Court observed in *C.A.M.A.*, “[w]hile [this version of RCW 26.09.240] was not before the *Smith* court (though a precursor statute was), *Smith* did not limit application of constitutional requirements to the statutes challenged in that case.” *C.A.M.A.*, 154 Wn.2d at 61. Both versions omitted any deference to the fit parent, applying instead a simple “best interests” substantive test. *Id.*, at 67. As the Court held in *Smith*, this standard is insufficient. 137 Wn.2d at 20.

Not only did the Court in *Smith* make clear the principles that rendered RCW 26.09.240 unconstitutional, the United States Supreme Court likewise did so. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). There the court declared “the court must accord at least some special weight to the parent’s own determination.” *Id.* at 69-70. RCW 26.09.240, upon which the trial court tells Michael he should have relied, did not satisfy this constitutional mandate.

Not only is this remedy illusory as a constitutional matter, it is illusory as a practical matter here. The statute provides that “[a] person other than a parent may not petition for visitation under this section unless the child’s parent or parents have commenced an action under this chapter.” RCW 26.09.240(1) (emphasis added).

That is, the statute allows intervention by a nonparent “in a pending dissolution, legal separation, or modification of parenting plan proceeding” between the child’s parents. *Id.* There were never any RCW 26.09 proceedings between Laurie and Ensley, Benjamin’s biological father, so there was never a proceeding in which Michael could have intervened.

Thus, Michael had no remedy in an illusory and null statute. To bar his *de facto* parent claim on this basis makes no sense. Moreover, of course, at the time of his divorce from Laurie, there was no need for resort to statutory remedies, since Laurie continued to foster Michael’s parenting of Benjamin, and there was a good reason not to formalize the relationship. Michael and Laurie deferred all such legalities, including the name change, to avoid jeopardizing efforts on Benjamin’s behalf to obtain survivor benefits from the estate of his biological father. Neither Michael nor Benjamin should have this prudent solicitude held against him. In any case, there is no visitation statute now. *L.B.*, 155 Wn.2d at 714-15 (“there exists no statutory right to third party visitation in Washington.”). Certainly, it is no answer now to this child and to this man to speak of what Michael could have done, any more than it was an answer to *L.B.* that Carvin might have adopted her. *L.B.*,

155 Wn.2d at 719 n. 36. In any case, the statute was never available to Michael for the many reasons set forth above.

Finally, the Supreme Court in *M.F.* rejected *sub silentio* the use of this statute by the Court of Appeals as a rationale for defeating the de facto parent petition in that case. Compare *In re Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d (2010) (affirming Court of Appeals on grounds other than that RCW 26.09.240 was a remedy available to stepparent in 2002) to *In re Parentage of M.F.*, 141 Wn. App. 558, 170 P.3d 601 (2007) (rejecting de facto parent petition in part on failure to seek visitation under RCW 26.09.240).<sup>13</sup>

b) Nonparental custody is not a remedy for a claim to parental status.

At this point, after nearly twelve years of being Benjamin's father, nonparental custody is not the remedy Michael principally seeks. He seeks parental status, the legal reflection of the lived experience, not merely a custodial relationship. These are

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<sup>13</sup> The Court of Appeals relied on a Division Two case as holding that *C.A.M.A.* applies prospectively only. *M.F.*, 141 Wn. App. at 564, 566, citing *In re Marriage of Anderson*, 134 Wn. App. 506, 512, 141 P.3d 80 (2006). There the court invoked equity to enforce a former stepparent's visitation order entered in 1998, the year *Smith* was decided. Division Two acknowledged the presumption of retroactivity that attaches to unconstitutional statutes, but declared the presumption did not attach to RCW 26.09.240 because *C.A.M.A.* relied on *Troxel*, with its narrower grounds, not *Smith*. Actually, our Supreme Court has twice relied on *Smith* to declare visitation statutes unconstitutional. See, *C.A.M.A.*, 154 Wn.2d at 68 ("*Smith* requires more."), *L.B.*, 155 Wn.2d at 713-714 (rejecting argument regarding the third party visitation statute similar to reasoning in *Anderson*).

distinctly different statuses. See, e.g., *In re Parentage of J.A.B.*, 146 Wn. App. at 426 (noting distinctions between status as a parent and as a non-parental custodian). Michael seeks more than a custodial role in relationship to Benjamin. He seeks to preserve the mutuality of rights and affections that attends the parent-child relationship. He seeks to continue in the role he has performed all of Benjamin's life, that of his father.

Moreover, by reading *M.F.* to apply here, the trial court again read too broadly. In keeping with *Custody of Allen*, where the stepmother sought custody of a child with two living legal parents, *M.F.* holds that nonparental custody, with its requirement that detriment be proved, is the nonparent's remedy. Only under these facts, will the existence of the nonparental custody statute act as a bar to a de facto parent petition. This much is obvious from *L.B.* To the extent nonparental custody is a remedy, it was likewise available to the petitioner in *L.B.* Here, as in *L.B.*, the nonparental custody statute is not a barrier to de facto parent status. Here, as in *L.B.*, no means exist for Michael to preserve the parent-child relationship except through the de facto parent doctrine. Here, also as in *L.B.*, the Legislature did not contemplate facts such as these, where the equities so clearly favor recognition of parental status

and where the child will be otherwise deprived of his only living father.

3) The de facto parent doctrine does not trench on a parent's constitutional rights.

The trial court also made reference to the fact that the courts have declared “a fit custodial parent has a fundamental constitutional right to make decisions concerning the rearing of his or her own children and a standard of best interest of the child is insufficient to serve as a compelling state interest overruling a parent's rights.” CP 168. This principle is not abridged by the de facto parent doctrine, as the Supreme Court found in *L.B.* 155 Wn.2d at 710-713. Rather, recognition of “another class of ‘parents’ eradicates the parent/nonparent dichotomy that was the crux of both the *Smith* and *Troxel* opinions,” contrary to Laurie's assertions. See, e.g., Br. Appellant, at 12-14. As our court explained, through operation of the de facto parent doctrine,

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.

155 Wn.2d at 712. From the moment of Benjamin's birth and over the nearly twelve years of his life, Laurie has participated in the formation of the parent-child relationship between Benjamin and Michael. She has no constitutional right to sever the fundamental bond she helped to form.

B. BENJAMIN HAS A RIGHT TO REPRESENTATION OF HIS OWN INTERESTS IN THE FATHER-SON RELATIONSHIP.

This case involves Benjamin, his important relationships, his well-being, his family. Yet Benjamin's own interests are unrepresented. The guardian *ad litem* was charged only with investigation of "[a]ll issues relating to development of a parenting plan." CP 102-103. Her request that an attorney be appointed for Benjamin was denied. See Appendix.<sup>14</sup> This was error and, because of it, there is no one to assert Benjamin's rights.

Though the parent's constitutional right has long been acknowledged, the right is reciprocal: a child, too, has a compelling interest in preserving those relationships that embody his family. See, e.g., *Santosky v. Kramer*, 455 U.S.745, 749, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (child and parent share interest in preservation of bond); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98

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<sup>14</sup> The clerk's minutes memorializing this order were inadvertently filed in the modification action only (Clark County No. 10-3-00455-3). They are attached.

S.Ct. 549, 54 L.Ed.2d 511 (1978) (“the relationship between parent and child is constitutionally protected”) (emphasis added); *In re Custody of Shields*, 157 Wn.2d at 151 (Bridge, J., concurring); *Troxel v. Granville*, 530 U.S. 57, 88, 120 S. Ct. 2054, 2059, 147 L. Ed.2d 49 (2000). Indeed, “[i]t would be ironic to find issues of parent-child ties are of constitutional dimension when the parents’ rights are involved but not when the child’s are at stake.” *State v. Santos*, 104 Wn.2d 142, 143-144, 702 P.2d 1179 (1985).

In other words, because the child’s interests are central to this parentage action, the child is a necessary party and should be joined in the action as such, including with a right to representation by counsel. *Hayward v. Hansen*, 97 Wn.2d 614, 617, 647 P.2d 1030 (1982) (in determinations of parentage, child must be a party and independently represented). Benjamin has constitutional rights to his family relationships, as outlined above. U.S. Const., amend. 14; Const., art. 1 § 3 (substantive and procedural due process); *In re Custody of Brown*, 77 Wn.App. 350, 353, 890 P.2d 1080 (1995). It is a fundamental principle “that no individual should be bound by a judgment affecting his or her interests where he has not been made a party to the action.” *Hayward v. Hansen*, 97 Wn.2d at 617. Indeed, “[t]he essence of due process is that a party in jeopardy of

losing a constitutionally protected interest be given a meaningful opportunity to be heard.” *Gourley v. Gourley*, 158 Wn.2d 460, 474, 145 P.3d 1185 (2006), *citing Mathews v. Eldridge*, 424 U.S. 319, 333, 348, 96 S.Ct. 47 L.Ed.2d 18 (1976).

Our Supreme Court has “strongly urge[d]” trial courts to consider appointing attorneys for children where their constitutional interests are at stake. *Parentage of LB*, 155 Wn.2d at 712 n. 29 (courts should “remain centrally focused” on the child’s interests, “recognizing that not only are they often the most vulnerable, but also powerless and voiceless.”). Benjamin has a fundamental right to be a party in this action, represented by his own counsel.

#### VIII. MOTION FOR ATTORNEY FEES

Michael, who pursued this litigation as a last resort, has had to go heavily into debt to pay his fees. CP 336. Meanwhile, Laurie’s new boyfriend has given her \$45,000 to spend on litigation. CP 358. Laurie may also be using Benjamin’s trust funds in this effort. CP 134. Based on this disparity, and on the authority of RCW 26.10.080. Michael requests his fees.

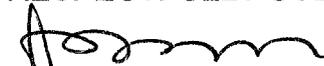
#### IX. CONCLUSION

Our Supreme Court has rightly endorsed the principle that a parent-child relationship may arise irrespective of biology.

*Parentage of LB*, 155 Wn.2d 679, 122 P.3d 161 (2005). The court has also recognized the right to preserve this relationship as “more precious to many people than the right of life itself.” *In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (quoting *In re Welfare of Gibson*, 4 Wn. App. 372, 379, 483 P.2d 131 (1971)). Michael and Benjamin have such a relationship. The de facto parent doctrine is a remedy available to preserve that relationship, based on the similarity of facts between this case and *Parentage of L.B.* The trial court’s order dismissing the petition should therefore be vacated and the cause remanded for trial. Michael’s second claim, for the remedy of nonparental custody, likewise should be remanded for trial and Michael should be awarded his fees and costs,

Dated this 5th day of May 2011.

RESPECTFULLY SUBMITTED,



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PATRICIA NOVOTNY #13604  
Attorney for Respondent/  
Cross-Appellant

## EXCERPTS OF PERTINENT STATUTES

### RCW 26.10.032

(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

(2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

### RCW 26.10.080

The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his or her name.

### RCW 26.10.160

(1) A parent not granted custody of the child is entitled to reasonable visitation rights except as provided in subsection (2) of this section.

CR 15(b)

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.



- Motion for Bi-lateral evaluation with Dr. Kirk Johnson
- **Court Proceedings & Decisions:**
  - Chandler is the child of the parties
  - Visitations with Chandler will be Sunday to Sunday; School is out on June 22<sup>nd</sup> and child will remain in father's home until the Sunday after the last day of school, then the Sunday to Sunday visitations will start
  - With regards to Benjamin:
    - De facto parenting cannot go forward at this point
    - Court is not making a ruling or determination on the bond relationship that Mr. Holt may or may not have with child
    - Benjamin had substantial visitation with Mr. Holt
    - Court does not make a finding as to level or nature/quality of the relationship between Mr. Holt and Benjamin
    - Court rules there are two separate claims on this matter; They are related, but are separate
  - Motion for Dr. Johnson evaluation: Court will not allow Dr. Johnson evaluation
  - Adequate Cause: A formal adequate cause hearing will need to be set; 07-15-10 TT @ 9:00 A.M. for adequate cause hearing;
  - Court will allow a little more over the Court rule in regards to affidavits/declarations; deadline for affidavits, declaration and materials by July 7<sup>th</sup>
  - Order appointing GAL still stands
  - Court indicates it is in the best interests to go forward with appeal process
  - Court to receive materials from parties and Court will blend into a manner that best represents Court's ruling; Court to receive proposed order by June 18<sup>th</sup>
  - ○ Court will not appoint an attorney for Benjamin
  - Court will make decision on stay on the 07-15-10 hearing; at this time, visitation will continue
  - Court - between now and the 15<sup>th</sup> of July, Benjamin will stay on the same schedule he is currently on; however; boys will be together on the same weekends; on the Thursday after the 22<sup>nd</sup> of June (end of school), Benjamin will have his visitation with Father; father to have alternating weekends, Thursday to Sunday
  - Court retains file

In re: Michael Holt vs. Laurie Holt  
Cause No.: 10-3-00455-3/10-3-00456-1

COURT OF APPEALS  
DIVISION II

11 MAY -6 AM 11:45

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

In re the Custody of:	)	
	)	
BENJAMIN MATTHEW HOLT,	)	No. 41211-0-II
A minor child,	)	
	)	
MICHAEL J. HOLT,	)	
	)	
Petitioner,	)	DECLARATION
and	)	OF SERVICE
	)	
LAURIE L. HOLT,	)	
Appellant.	)	

Jayne Hibbing, assistant to Patricia Novotny, certifies as follows:

On May 5, 2011, I served upon the following copies of the Brief of Resondent and Opening Brief of Cross-Appellant, and this Declaration, by:

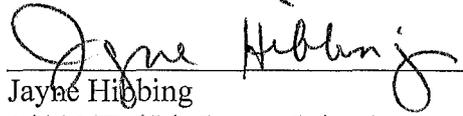
- depositing same with the United States Postal Service, postage paid
- arranging for delivery by legal messenger.

Robert M. Vukanovich  
Attorney at Law  
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Vancouver, WA 98663

I certify under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Jayne Hibbing", is written over a horizontal line.

Jayne Hibbing  
3418 NE 65th Street, Suite A  
Seattle, WA 98115  
206-525-0711

DECLARATION OF SERVICE