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Feb 12, 2015, 3:48 pm
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SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of:
MASON WADDLE,
GREG MINIUM and LINDA MINIUM,
Petitioners,
and
PATTI SHMILENKO,
Respondent.

JOHN SHMILENKO,
Respondent,
PATTI SHMILENKO,
Respondent,
and
GREG and LINDA MINIUM,
Petitioners.

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

In 2008, M.W.'s parents, Zack Waddle and Libby Minium, were killed by a drunk driver. Zack and Libby were away from home on a trip at the time of their deaths, and they had left M.W. with Libby's parents, Greg and Linda Minium. (CP 174) The Miniums had physical possession of M.W. at the time of their deaths, so they just kept him. (CP 174) Although they could have challenged the Miniums for custody, Patti and John chose to keep the peace.

John and Patti had a strong relationship with Zack, Libby, and M.W. prior to Zack and Libby's death. Patti specifically refuted Linda's attempts to speak for Zach and otherwise denigrate John and Patti's relationship with her deceased son. (App. A)¹ At the time of their deaths, John and Patti were building a new home for Zach, Libby, and M.W. that was near John and Patti's home on the Columbia River. (App. A) Although counsel for Miniums points out that John and Patti have a home

¹ Two documents are attached to this brief: *Respondent Shmilenko's Reply Declaration* (Clerk's Doc. No. 21) and *Petitioner's Reply Declaration* (Clerk's Doc. No. 22). These documents were filed under Cowlitz County Cause No. 13 3 00787 2, which was John's petition prior to consolidation with Patti's petition (Cause No. 08 3 00476 1). The court clerk rightly maintained a separate file for documents filed in John's case prior to consolidation, whereas post-consolidation filings were filed under Patti's cause number. Counsel for John inadvertently failed to review the clerk's file for Cause No. 13 3 00787 2 when he prepared his first designation of clerk's papers. A supplemental designation of clerk's papers was filed and served with this brief, but the clerk has not assigned page numbers to either of these documents. In order to aid the court, counsel will refer to these documents as "App. A" and "App. B."

in Portland, Oregon, they also have a house in Longview, Washington. (CP 24 and App. A) Zack and Libby often visited Patti and John at the Longview, Washington, home and they both seemed excited to move in nearby. (App. A)

With regard to John's relationship with M.W., he was at the hospital when M.W. was born and has accompanied Patti to nearly all of her visits with M.W. (App. A) Through the efforts of John and Patti, M.W. has a strong relationship with his father's side of his family, including aunts, uncles, and cousins. (App. A and App. B) Prior to the 2013 court action, M.W. referred to John as "Pa John," but since that time has expressed confusion about what to call him. (App. A)

On September 11, 2008, the Miniums filed their *Nonparental Custody Petition*. (CP 3) The Shmilenkos and the Miniums were able to resolve their differences about eighteen months later. On March 23, 2010, they entered an agreed order that provided primary custody to the Miniums and substantial visitation to Patti. (CP 8, 15) Under the agreed order, M.W. resided with Patti at the following times:

1. Midweek visits every Tuesday and Thursday from 1:00 p.m. to 7:00 p.m.;
2. Overnight visits every other weekend;
3. Thanksgiving every other year;
4. Christmas Day every year; and
5. Father's Day every year.

(CP 22-24)

The 2010 agreed order contained a sunset clause which required the parties to reassess the residential schedule once M.W. reached age five and, if no agreement could be reached, go to mediation. (CP 10, 22)

Over the next three years, John and Patti worked together to parent M.W. whenever Patti had visitation. (CP 45-46) Patti described M.W.'s bond with John during this time as "close, strong, and loving" (CP 46)

While at their home, M.W. helps with preparing meals, including barbecuing and smoking fish with John. (CP 113) Patti and John regularly purchased clothing for M.W. and took him on excursions. (CP 113) John taught M.W. lessons about working safely, such as wearing protective eye wear. John teaches M.W. about fishing and playing music. (CP 113)

Patti describes John as "an important part of [M.W.]'s life," as "active and involved," and as a provider of "food, care, nurturing, and security" to M.W. (CP 118) Patti specifically refutes the Miniums' assertion that only they have been parenting M.W., stating "Both sets of grandparents have taken on parent-type duties since Mason's parents passed." (CP 119) John and Patti "historically provided clothes, shoes, underwear, socks, coats, car seats, and personal hygiene items and only stopped at the request of Linda Minium." (CP 119) John and Patti have provided M.W. with his own bedroom in their home. (CP 119) They provide M.W. with allergy medicine, a home medical kit, dental care,

flossing, and bathing items. (CP 119) They purchased eczema lotions and fragrance free soaps due to M.W.'s allergies. (CP 119) John and Patti wanted to attend M.W.'s doctor visits, particularly with regard to his allergies, but Linda Minium refused. (CP 119) Linda Minium demanded that they remove the dog from their home due to M.W.'s allergies. (CP 119) John and Patti complied only to later learn that the Miniums keep two dogs in their house. (CP 119) Nonetheless, John and Patti complied. (CP 119)

John and Patti's description of the love, care, and guidance that they provide M.W. is nearly identical to Linda's description of her relationship with M.W. (CP 102, 130) Nonetheless, Linda and Greg view Patti and John as outsiders, stating in their 2014 interrogatory responses "We have been in a forced visitation with a person we don't even know since we were granted temporary custody of [M.W.] on 09/29/2008." (CP 135) As demonstrated later herein, the Miniums claim that there is no reason to believe that John and Patti need a court order to protect their access to M.W. is not supported by the record.

Patti stated in one of her declarations, "We [Patti and John] empathize with [M.W.] and listen to his feelings. We discipline him when necessary but love him unconditionally. We show [M.W.] pictures of his

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daddy, Zach, and tell him of his daddy. John involves [M.W.] in his daddy's hobbies by teaching [M.W.] how to fish, etc." (CP 119)

Patti also stated in her declaration, "We [Patti and John] teach [M.W.] to respect others and treat others the way he would like to be treated. We teach him to be polite and to say 'please' and 'thank you.' I took [M.W.] to swimming lessons at the YMCA for over two years. We have taken [M.W.] to the Longview Library for the summer reading program, encouraged him with his Kung Fu, and go to all of the tournaments of which we are aware." (CP 120) John and Patti hold birthday parties every year for [M.W.] at their home, Chuck E. Cheese, and/or the Rainier Swimming Pool. (CP 120) Between five and ten of M.W.'s friends come to the parties. (CP 120) They take M.W. and his friends to Oregon Museum of Science and Industry, and the Children's Museum. They coordinate play dates with the children of Zack's old friends. (CP 120)

The *Declaration of Anthony Anderson* (CP 226), M.W.'s second cousin, and the *Declaration of Barbara Kivela* (CP 222), also provide insight into Mason's happy, loving relationship with John and Patti.

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Despite their common goals in raising M.W., the Miniums have taken an antagonistic stance against John and Patti. In her January 22, 2014 responses to Patti's interrogatories, Linda bared her soul with regard to her feeling about Patti:

Ms. Shmilenko is willing to damage [M.W.]'s character, confuse his mind, and manipulate his happy personality in an attempt to get what she wants. (CP 127)

[M.W.]'s emotional and developmental health and well-being should not be jeopardized to meet the wants and demands of his paternal grandmother through excessive force and the disrespect she has shown [M.W.]'s life, our lives and the memories of [M.W.]'s mother, Libby. Our daughter spoke often of the difficulties with Patti Shmilenko, and my spouse and I now understand the emotional distress and spiteful nature of Patti Shmilenko's actions upon us and [M.W.]. (CP 133)

My spouse and I have tried to build a relationship with Patti Shmilenko for [M.W.], but it has been five (5) years of manipulation, negotiation and threats of court action. It is not in [M.W.]'s best interest to be under the intimidating and manipulating personality traits that Patti Shmilenko presents. It is difficult enough as an adult to deal with but as a child it could be permanently damaging. (CP 133-34)

Ms. Shmilenko is not a good role model for Mason. She does not care who gets hurt or used by her actions. She does not seem to comprehend that others have feelings. She takes advantage of the kindness and goodwill of others. She knows no boundaries, has no rules and has no respect for authority. She wants to manipulate and control. She will let nothing stand in her way to get what she wants. She does not seem to know truth. (CP 134)

Linda also leveled a number of other weighty indictments against Patti, including offenses such as attempting to volunteer at M.W.'s school,

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offering to pay for private school, suggesting that M.W. get counseling, and feeding M.W. hummus with garlic. (CP 128, 130)

In her interrogatory answers, Linda proudly takes credit for preventing Patti from volunteering at M.W.'s school, going so far as to have his teacher changed because Patti had made contact. (CP 128-129)

Thus, it should come as no surprise that Patti and John were unable to negotiate a new custody schedule when the sunset clause in the 2010 agreed order took effect. The parties hired a neutral third party, Charlotte Rosen, MS, LMHC, to review M.W.'s living arrangements, care, and well-being, and make recommendations regarding a new custody schedule. (CP 174) Ms. Rosen did not find that M.W.'s character had been damaged or his mind confused by Patti. But rather, Ms. Rosen opined that both the Miniums and the Shmilenkos provided M.W. with a loving, playful environment, and that M.W. was doing well. (CP 175-77) In the end, Ms. Rosen recommended a greatly expanded visitation schedule for John and Patti. (CP 182-83)

The Miniums apparently rejected Ms. Rosen's recommendation, refusing further to discuss the matter with John and Patti. (CP 39-40) Patti was left with no choice but to file a modification petition on August 30, 2014. In her petition, Patti specifically stated that she wanted a residential schedule based on the recommendations of Ms. Rosen. (CP 40)

John also filed a petition seeking a stand-alone visitation order so that his access to M.W. would not be terminated should Patti fall ill, become incapacitated, or pass away. (CP 67, 71) John's petition requests visitation under RCW Chapter 26.10 and under the court's equitable powers. (CP 74)

The original temporary order that followed Patti and John's petition, as pointed out in the Miniums' brief, provided them with less time with M.W. due to the fact that he had entered school. Not included in the Miniums' brief is reference to the subsequent temporary order that expanded greatly Patti and John's time with M.W. (CP 250-51)

The Miniums responded to Patti's petition by asking the court vacate the 2010 agreed order. (CP 54) Lest there be any doubt regarding the Miniums' intentions, their trial attorney wrote "Ultimately, the petitioners believe the residential schedule should be terminated." (CP 54-55) At stake in this litigation, from the very beginning, was M.W.'s relationship with John and Patti, the closest living remnant of his father, Zack.

II. STATEMENT OF ISSUES

- A. Does John have a statutory remedy and, if so, does he have the right to petition the court for equitable relief?**
- B. If John is without a statutory remedy, can he make a claim for equitable relief?**

III. ARGUMENT

A. **John has a deep, loving relationship with M.W. that is at risk of being lost.**

The Miniums' characterization of John's relationship with M.W. is not supported by the record. John's relationship goes far beyond bringing salmon and digging holes. John's description of his relationship with M.W. as "grandparent-like" should not be the end of the court's inquiry. M.W.'s relationship with John is going to be different than his relationship with the Miniums due to the fact M.W. spends much more time with the Miniums. That does not mean that John does not parent M.W. The same holds true for Patti. Agreeing to be the noncustodial parent does not, and should not, change how a person is viewed by the courts. A noncustodial father's relationship with his son may evolve into something "uncle-like," especially if the child is being raised by a stepfather, but it does not mean that the father no longer "parents" his child.

The Miniums represent a grave risk to that relationship. The Miniums' goal in this litigation, from the very start, was to end visitation with Patti and John. They can deny this all they want, but their motion to vacate the 2010 agreed order speaks louder than their words. Furthermore, Linda's hatred for Patti is fully exposed in her sworn responses to Patti's discovery requests. Counsel's denial that there is any

evidence that court intervention is necessary to protect M.W.'s relationship with John and Patti is not supported by the record.

- B. Although RCW 26.10.030 and 26.10.040 should provide John with a statutory remedy, the trial court has dismissed John's statutory claim, leaving him with only equitable claims.**

RCW 26.10.030 has not been declared unconstitutional in that it specifically applies only to cases where the child has no fit natural parent. The text of RCW 26.10.030 speaks only to "custody." Counsel for the Miniums advocated a narrow approach to the issue of custody to the trial court, one which left no room for the court to order visitation. Counsel for John argued for a broader interpretation of the term "custody" which would include visitation by noncustodial third parties. The trial court adopted the narrower interpretation of RCW 26.10.030 and dismissed John's statutory claim.

However, RCW 26.10.040(1)(a) provides:

- (1) In entering an order under this chapter, the court shall consider, approve, or make provision for:
 - (a) Child custody, visitation, and the support of any child entitled to support.

RCW 26.10.040(1)(a) not only supports a broader definition of the term "custody" under RCW 26.10.030, it mandates it, and as such, allows

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John to pursue a statutory claim for visitation against a third party custodian such as the Miniums.

Counsel for the Miniums simply passes over the question by stating “this reference [to visitation in RCW 26.10.040(1)(a)] is to visitation to which ‘a parent not granted custody is entitled.’” Although the statute contains no such limited reference, and counsel cites no case law in support of this limited reference, counsel simply moves on. And for good reason, since RCW 26.10.040(1)(a) plainly states that visitation may be awarded as part of “any order under this chapter,” i.e., Chapter RCW 26.10.

Undaunted by this plainly worded statute, counsel for the Miniums moves on to the general statement that under “*L.B.*, *C.A.M.A.*, and *Smith*, there is no statutory authority for third party visitation in RCW Ch. 26.10.” A quick review of these three cases shows that this statement is simply incorrect.

In re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005), involved a dispute over custody and visitation between a natural parent and a non-natural parent and, therefore, constitutional issues that are not applicable to the case at bar dominated the court’s analysis. The *L.B.* court made no reference whatever to RCW 26.10.030 and 26.10.040. To

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the contrary, the *L.B.* court summarized *Smith* and *C.A.M.A.* rulings, stating:

While simply following *Troxel's* narrower holding, *Smith's* invalidation may have been debatable, following this court's holding in *C.A.M.A.*, it is clear that Washington's third party visitation statutes, RCW 26.09.240 and RCW 26.10.160(3), are facially unconstitutional.

L.B., 155 Wn.2d at 714, 122 P.3d 161.

The facts of *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005), are also distinguishable in that this case implicated the constitutional rights of a natural parent. While the *C.A.M.A.* court ruled that RCW 26.09.240 was unconstitutional, it made no mention whatever of RCW 26.10.030 and 26.10.040, nor did it make the broad proclamation suggested by counsel for the Miniums.

And finally, the dispute in *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), was between a natural parent and a nonparent third party, and, therefore, *Smith* is distinguishable. The *Smith* court analyzed the constitutionality of RCW 26.10.160 and RCW 26.09.240, but made no mention, let alone any ruling, with regard to RCW 26.10.030 and 26.10.040. As in *C.A.M.A.*, the court in *Smith* did not make any broad, generally applicable statement that all third party visitation under RCW Chapter 26.10 is unconstitutional or otherwise invalid.

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RCW 26.10.030, as supplemented by RCW 26.10.040(1)(a), allows a trial court to award third party visitation where, as here, the child is in the custody of a non-natural parent. All of the cases cited by the Miniums centered on distinguishable fact patterns that invoked constitutional protections and statutes (RCW 26.10.160 and 26.09.240) that have nothing to do with the case at bar.

In her June 30, 2014 ruling, Commissioner Pierce raised the issue of RCW 26.10.030 and 26.10.040, and asked the parties to provide the court with analysis. The Miniums declined to do so, dismissing the question with generalized statements found nowhere in the three cases they cited. Thus, there appears to be no serious argument that RCW 26.10.030 and 26.10.040 are applicable to the case at bar and, if so, John has a statutory claim for visitation with M.W.

The applicable standard under John's statutory claim would be "best interest of the child." The evidence in the record, as set forth in the statement of facts herein, establishes that it is in M.W.'s best interest to have substantial contact with John, let alone establishing adequate cause for the same.

As discussed in Section D below, the existence of a statutory remedy would preclude John's claim for equitable relief. If the court finds that John has a statutory claim under RCW 26.10.030 and

RCW 26.10.040, then the matter should be returned to the trial court for further consideration.

C. Washington courts have retained equitable jurisdiction to decide issues regarding parentage insofar as that jurisdiction has not been supplanted by legislative action.

The Miniums' argument begins and ends with the *de facto* parent test as if the court's equitable jurisdiction somehow springs from the *de facto* parent doctrine. The truth, however, is exactly the opposite. In formally adopting the *de facto* parent doctrine, the *L.B.* court started its analysis with the Washington court's historical jurisdiction over parentage.

In the face of advancing technologies and evolving notions of what compromises a family unit, this case causes us to confront the manner in which our state, through its statutory and common law principles, defines the terms "parents" and "families." During the first half of Washington's statehood, determination of the conflicting rights of persons in family relationships were made by courts acting in equity. But over the past half-century, our legislature has established statutory schemes intend to govern various aspects of parentage, child custody disputes, visitation privileges, and child support obligations. Yet, inevitably, in the field of familial relations, factual scenarios arise, which even after a strict statutory analysis remain unresolved, leaving deserving parties without any appropriate remedy, often where demonstrated public policy is in favor of redress.

L.B., 155 Wn.2d at 687-88, 122 P.3d 161. (Internal Citations Omitted.)

Balanced against this equitable power, however, was the legislature's authority to enact statutes with regard to parentage. Thus, the threshold

question for the *L.B.* court was whether the legislature had fully supplanted the court's equitable jurisdiction or, in the alternative, whether the court retained its pre-existing common law power with regard to parentage disputes not addressed by statute.

Specifically, we are asked to discern whether, in the absence of a statutory remedy, the equitable power of our courts in domestic matters permits a remedy *outside* of the statutory scheme, or conversely, whether our state's relevant statutes provide the exclusive means of obtaining parental rights and responsibilities.

L.B., 155 Wn.2d at 687-88, 122 P.3d 161. (Internal citations omitted; Emphasis not added.)

As such, the *L.B.* court found that it retained limited equitable authority to act where the legislature has otherwise not provided a remedy.

Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely. With these common law principles in mind, we turn to whether Washington's common law recognizes *de facto* parents.

Id. at 689, 122 P.3d 161.

There can be no question that the lack of a statutory remedy is a prerequisite to John's equitable claim for visitation. In the event that the court agrees with the trial court, and finds that John has no statutory claim, the next question is what equitable claim or claims are available to him.

John's amended petition states a claim under the *de facto* parent doctrine, but also makes a claim for relief under the court's equitable jurisdiction:

In the alternative, Moving Party, JOHN SHMILENKO, petitions the Court for custody/visitation under the equitable powers of the Court as articulated in *In re Parentage of L.B.*, 155 Wn.2d 679, 688-89, 122 P.3d 161 (2008).

As will be discussed herein, the trial court's analysis seemed to conflate John's *de facto* parent claim and his stand-alone claim for an equitable remedy. But the court on review should consider addressing these claims independently.

(i) De Facto Parent Analysis

Counsel for the Miniums rightly points out that the *de facto* parent test as first adopted by this court in *L.B.* and applied afterward is a difficult test to meet. The *L.B.* court affirmed the interests of "parents in the care, custody, and control of their children" as one of the oldest fundamental liberty interests recognized by the U.S. Supreme Court. *LB* at page 709. In the case at bar, however, no such fundamental liberty interests are at stake. If the Miniums have any rights with regard to M.W., these rights would arise from a stipulated third-party custody order. Thus, the rigorous standard set forth in *L.B.*, particularly with regard to the first factor of the *de facto* parent test, makes little sense when applied to the facts of this case.

On the other hand, the application of the “best interests of the child test” from Washington’s common law to cases where the child has no natural parent would not offend the fundamental liberty interests that have driven *de facto* parentage case law. Again and again the *de facto* parent doctrine has been tested against the rights of natural parents, thus resulting in a stringent test that requires the consent of the child’s natural parent.

As such, the *de facto* parent doctrine is a rough fit for the case at bar. Since M.W.’s natural parents died when he was eleven months old, they could not have consented and cannot now consent to a parent-like relationship that would meet this test. However, M.W.’s natural parents also cannot have their fundamental liberty interests offended. The first factor to the *de facto* parent test simply served no purpose in the analysis. For this reason, Judge Warning dispensed with it and moved on to factors two through four.

Counsel for John had advocated for the application of the common law principles that gave life to the *de facto* parent doctrine, and, as discussed herein, Judge Warning may have been invoking this historical power in deciding to disregard the first factor. While counsel for John would have preferred an explicit ruling on his second equitable claim for visitation, Judge Warning did not provide one.

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The court should also keep in mind John's burden of proof in the proceeding below. The adequate cause hearing is a threshold determination. *In re Custody of B.M.H.*, 165 Wn. App. 361, 267 P.3d 499, review granted 173 Wn.2d 1031, 277 P.3d 668. The moving party must make a showing of adequate cause by setting forth facts supporting the requested order. *Grieco v. Wilson*, 144 Wn. App. 865, 184 P.3d 668.

Under the second *de facto* parent factor, "lived together in the same household," John must show adequate cause to find that M.W. lived together with John. Under the 2010 agreed order, M.W. lived the majority of time with the Miniums, but also with Patti and John. As described in the statement of facts herein, M.W. did more than just visit Patti and John. Most children do not have their own bedroom at their grandmother's house. As described in more detail in the statement of facts, M.W. kept clothing, medicine, personal toiletries, money, reading materials, toys, and other personal items at John and Patti's house. He had a group of friends who were associated with John and Patti's house. When viewed objectively, if someone were to walk into John and Patti's house, one would assume that a little boy lived there.

The Miniums point to the fact that they had more time with M.W. under the agreed order than Patti and John. Judge Warning rejected this cynical argument on well-thought-out policy grounds. Patti agreed in

2010 to allow M.W. to primarily reside with the Miniums. She could have pushed for joint custody, but she put M.W.'s interests first and opted for a custody order that would be less disruptive to his everyday life. As a result, the Miniums now claim for themselves the mantle of "parents," while relegating John and Patti to mere grandparents. Judge Warning pointed out the problem with this reasoning when he stated, "I think if we told people who are not the primary parents in most custody proceedings that because you have less overnights than the other [parent] the child does not live with you, I think they'd be very surprised." (2/24/14 RP 27)

The court should also keep in mind that John does not have to prove his case at the adequate cause hearing; he need only show that there is adequate cause to continue with the litigation. The record establishes adequate cause in favor of the proposition that M.W. had a home at John's house.

With regard to the third factor, "assumed the obligation of parenthood without expectation of financial compensation," John's relationship with M.W. went far beyond brining salmon and digging holes. Counsel for the Miniums simply ignores the record in her statement of facts and argument. The love, care, and guidance that John and Patti describe in their declarations, as well as the other evidence set forth in John's statement of facts, is nearly identical to Linda Minium's description of her relationship

with M.W. With regard to M.W.'s physical needs, John and Patti assumed the obligation of feeding, housing, and providing medical care to M.W. when he was with them. The fact that he was with them less than he was with the Miniums is immaterial.

And, with regard to the fourth factor, "been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature," counsel for the Miniums offers little more than John's reference to his relationship with M.W. as "grandparent-like." There is no question that the Miniums enjoy certain advantages over John and Patti by virtue of the agreed order that gives them custody of M.W. the majority of the time. It makes sense that M.W. would develop a parent-like relationship with them, but it does not follow that he could not have also done the same with John and Patti.

John's admission that his relationship with M.W. is grandparent-like simply shows that he has a firm grip on reality. Throughout this litigation, the Miniums have attempted to portray themselves as M.W.'s parents, even inserting themselves into the *de facto* parent analysis as if they were M.W.'s natural parents. The fact that the Miniums have taught M.W. to refer to them as "mom" and "dad" is evidence of nothing more than their overreaching. Greg and Linda are not M.W.'s father and mother.

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Counsel for the Miniums places too much weight on John's description of himself as M.W.'s grandfather. The description of M.W.'s relationship with John, as set forth in the record, shows that they enjoy a bond that goes well beyond that of a traditional grandfather and grandson. The question before the court is not how John characterizes his relationship with M.W., but whether the facts in the record establish that John has "parented" M.W. for a sufficient amount of time to establish a bonded, dependent relationship. There is no reason that a grandfather cannot meet this factor simply because his grandson resides primarily with someone else. The evidence in the record establishes the fourth factor.

(ii) Visitation Apart from the De Facto Parent Doctrine

This court's historical equitable power with regard to parentage specifically included the power to award visitation, *LB*, 155 Wn.2d at 699, 122 P.3d 161, and "Washington's visitation law evinces its common law foundation, a lack of legislative intent to preempt the common law, and equally important, its emphasis on the interests of the children at the center of such familial situations." *Id.* at 701, 122 P.3d 161. The *LB* court analyzed its common law authority with regard to visitation and concluded, "Thus Washington's visitation scheme can be seen as largely a codification of common law jurisprudence, with no evidence that the enactment of statutes governing visitation was designed to preempt the court's equitable

jurisdiction over circumstance not within the statute's contemplation." *Id.* at 700, 122 P.3d 161.

Washington's legislature made a clear policy statement in favor of liberal third-party visitation by enacting RCW 26.10.160 and 26.09.240, which adopted the common law "best interests of the child" test. These statutes, of course, ran afoul of the fundamental liberty interests of natural parents and have been ruled facially invalid. As such, subject to John's RCW 26.10.030-.040 argument, a vacuum exists with regard to third-party visitation in cases not involving natural parents. As stated in *L.B.*, the court's historic equitable authority will fill this vacuum in order to protect the best interests of the child. In the event the court finds that John has no statutory remedy and no *de facto* parent claim, the court should find that he has a common law claim for visitation under the best interests of the child standard. Application of this new-but-very-old claim for visitation should be limited to situations that are not addressed by valid legislative action and do not involve natural parents.

D. Attorney Fees

RCW 26.10.080 authorizes the award of attorney fees to a party "maintain or defending any proceeding under this chapter." John's RCW 26.10 claim was dismissed by the court on March 10, 2014. (CP 145) The Miniums presented a cost bill for attorney fees at that time and the court

denied their motion for fees. (CP 248, 147) The Miniums have not assigned error to this ruling.

The only certified for review and accepted for review was whether John could make an equitable visitation claim based on Washington common law. Put another way, since the March 10, 2014 dismissal, John has not “maintained a proceeding” under RCW Chapter 26.10. The issue certified for appeal involved a common law claim that, as a matter of law, exists outside of RCW Chapter 26.10. Equitable parentage claims can only survive in the vacuum created by the absence of legislative action. Thus, it is axiomatic that there cannot be a statutory basis for an award of attorney fees in this case.

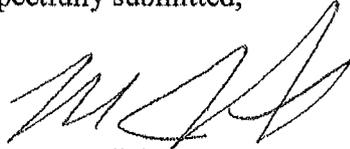
Attorney fees under RCW 26.10.080 were considered but denied in *In re Custody of B.M.H.*, 179 Wn.2d 224, 245, 315 P.3d 470 (2013), which involved a combination of claims under RCW Chapter 26.10 and common law *de facto* parent claims. The Court of Appeal in *In re Parentage of J.B.R.*, 336 P.3d 648 (Wash.Ct.App.Div.3 2014), refused to award attorney fees under the dissolution statute, RCW 26.09.140, where the issue on appeal was limited to consideration of stepfather’s common law *de facto* parent claim.

Furthermore, any award of fees under RCW Chapter 26.10 would first require a showing of relative need on the part of the Miniums. There is

no evidence in the record demonstrating relative need of the parties. The court should not award either party their attorney fees on appeal.

DATED: February 12, 2015.

Respectfully submitted,



MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Respondents, PATTI and
JOHN SHMILENKO

CERTIFICATE

I certify that on this day I caused a copy of the foregoing RESPONSE BRIEF to be mailed, postage prepaid, and emailed to Petitioners' attorneys, addressed as follows:

Valerie A. Villacin
Smith Goodfriend, P.S.
1619 - 8th Avenue North
Seattle, WA 98109-3007
Email: valerie@washingtonappeals.com

Noelle A. McLean (via email only)
Attorney at Law
Email: noelle@noellemclean.com

DATED this 12 day of February 2015, at Longview,
Washington.



HEIDI THOMAS

APPENDIX A

1 Service of this document is
2 hereby accepted this 8
3 day of January 2014
4 **NOELLE MCLEAN** aw 2:53pm
5 Attorneys for Respondents Minium

FILED
SUPERIOR COURT

2014 JAN -8 P 3:27

COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK

BY 

8 SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

9 In re the Custody of

10 MASON WADDLE,

11 Child,

12 JOHN SHMILENKO,

13 Petitioner,

14 and

15 PATTI SHMILENKO, GREG MINIUM and
16 LINDA MINIUM,

17 Respondents.

No. 13 3 00787 2

RESPONDENT SHMILENKO'S
REPLY DECLARATION

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RESPONDENT SHMILENKO'S REPLY DECLARATION - Page 1 of 3

App. A

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

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1 PATTI SHMILENKO declares as follows:

2 1. John Shmilenko's request to join this case is solely based on the fact that if something
3 happens to me, John and none of Mason's paternal extended family would be able to
4 continue their loving bonded relationship with Mason. This would be extremely unhealthy
5 and unfair to Mason. It would be a tremendous loss for Mason not to be able to continue
6 these important family relationships should something happen to me. We had the
7 relationship and history with Zach, Mason's father. Mason would not know who his father
8 was without us. Through counseling, it is my understanding that it's imperative Mason
9 have all the loving supportive relationships possible for him to be able to navigate through
10 these issues as they arise in his life, that he will want to know "who" his Daddy was, what
11 he was like, what his life was like, and where he, Mason, came from.

12 2. Zach's biological father, Rich Miller, had an inconsistent and erratic relationship with
13 Zach. He abandoned Zach when Zach was 18 months old. Mr. Miller would not be able
14 to articulate, express or teach Mason who his father was. I raised Zach, who was a very
15 fine young man whom I adored. We had a loving relationship and have years of his
16 pictures and videos to share with Mason.

17 3. John has been a part of Mason's life since birth. He was at the hospital when Mason
18 was born and has been at 99% of my visits with Mason. John is semi-retired and has bent
19 over backwards to be with Mason at every opportunity. Mason has always called John
20 "Pa John", but since the present court case started, Mason is confused as to what to call
21 him, apparently caused by the Minium's influence and attempts to manipulate Mason's
22 feelings. The Minium's behavior has become disturbing because they are increasingly
23 misconstruing events out of context, exaggerating any alleged past deficiencies, and
24 ignoring all the good things we have done for Mason. My concern with this type of
25 behavior is that it is an ongoing alienation attempt.

1 4. Linda Minium did not know Zach the way she claims. Factually, Libby moved in with
2 Zach prior to Mason being born when they established a permanent residence/home
3 together. We were building Zach, Libby and Mason a new home after showing them many
4 homes, as they were making plans for the future. They often came to my and John's
5 house on the Columbia River, a home Zach dearly loved and Libby seemed to really enjoy
6 and was excited to move into. I dispute Linda had more contact with Zach than I did
7 during Zach's relationship with Libby. Regarding our relationship with the Miniums, our
8 home has always been open to them and they have rejected having a relationship with us.
9 We are not allowed at their house and I am required to pick up Mason in the Walgreen's
10 parking lot. I offered financial support for Mason but they refused. Our only choice for
11 solutions is the Court process. The reason the Miniums and we have attorney bills is
12 because the Miniums appear to have no interest in having a working relationship with us
13 and Mason's paternal family. I have previously paid in full for a well-qualified licensed
14 mental health counselor to investigate and provide recommendations regarding Mason's
15 best interests in future visitations.

16 I declare under penalty of perjury under the laws of the state of Washington that the
17 foregoing is true and correct.

18 Signed at Portland, Oregon on January _____, 2014.

19
20 [See attached signature by facsimile]
21 PATTI SHMILENKO
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1 4. Linda Minium did not know Zach the way she claims. Factually, Libby moved in with
2 Zach prior to Mason being born when they established a permanent residence/home
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17 foregoing is true and correct.

18 Signed at Portland, Oregon on January 8th, 2014.

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PATTI SHMILENKO

1
2 SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

3 In re the Custody of

4 MASON WADDLE,

5 Child,

6 JOHN SHMILENKO,

7 Petitioner,

8 and

9 PATTI SHMILENKO, GREG MINIUM and
10 LINDA MINIUM,

11 Respondents.

No. 13 3 00787 2

AFFIDAVIT REGARDING FILING
DOCUMENT TRANSMITTED BY
FACSIMILE/EMAIL

(No Mandatory Form Developed)

12 STATE OF WASHINGTON)
13 County of Cowlitz) ss.

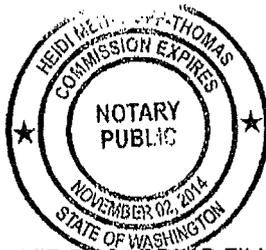
14 KAREN MURPHY being first duly sworn, on oath, deposes and says as follows:

15 1. I am the legal assistant to BARRY J. DAHL, counsel for Petitioner, JOHN
16 SHMILENKO, in the above-entitled action.

17 2. I received the attached RESPONDENT SHMILENKO'S REPLY
18 DECLARATION by facsimile or email transmission. I have examined the attached
19 RESPONDENT SHMILENKO'S REPLY DECLARATION, determined that it consists of
20 four pages (including this page), and it is complete and legible.

21 Karen Murphy
KAREN MURPHY

22 SUBSCRIBED AND SWORN to before me this 8 day of January 2014.



Signature Heidi Melhoff-Thomas
Printed Name Heidi Melhoff-Thomas
Notary Public for the state of Washington
My Appointment Expires NOV. 2, 2014

APPENDIX B

1 Service of this document is
2 hereby accepted this 8
3 day of January 2014
4 NOELLE MCLEAN aw 2:53pm
Attorneys for Respondents Minium

FILED
SUPERIOR COURT
2014 JAN -8 P 4:39
COWLITZ COUNTY
BEVERLY R. LITTLE, CLERK
BY 

8 SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

9 In re the Custody of

10 MASON WADDLE,

11 Child,

12 JOHN SHMILENKO,

13 Petitioner,

14 and

15 PATTI SHMILENKO, GREG MINIUM and
16 LINDA MINIUM,

17 Respondents.

No. 13 3 00787 2

PETITIONER'S REPLY
DECLARATION

18 JOHN SHMILENKO declares as follows:

19 1. I have requested I be included in this court case because I am very, very concerned
20 that in the unlikely event something should happen to Mason's paternal grandmother Patti,
21 Mason would not be allowed to continue to have a relationship with his father's side of the
22 family. By being technically included as a party, I would legally be able to continue the
23 loving bonded relationship Mason has with his paternal extended family. Mason has a
24 close bonded relationship with Patti and I, and with his father's cousins, aunts, uncles, and
25 close friends. They, Patti and I have been a part of Mason's life since birth. The way
26 Mason knows his father is through his connection with Patti; and in her absence, myself.

PETITIONER'S REPLY DECLARATION - Page 1 of 2

App. B



Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

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1 Since the death of Mason's parents, the only allowed visitation time with Mason I missed is
2 when I had the flu. Greg and Linda Minium have an ongoing pattern of wanting to limit
3 Mason's contact with us and his father's side of the family.

4 2. I am extremely disappointed with the Minium's reckless and deceptive accusations.
5 It has been cruel and unfortunate that there has been an attempt to denigrate Patti and I.
6 We are eager and well able to disprove these false accusations.

7 3. Regarding the cost of litigation, I detest "wasting" hard earned income by hiring
8 lawyers and going to court. This action is a last resort as Patti and I have been left no
9 other option.

10 4. It is a privilege and, most importantly, a "tremendous responsibility" for the Miniums,
11 Patti and I to have a relationship with Mason. Because of the loss of his parents, such
12 relationships are in Mason's best interests and are paramount to any "personal wants" and
13 "conveniences" of either the Miniums or Patti and I. Non-parental custody should not be
14 used as an opportunity to keep Mason from those who love him for selfish and unhealthy
15 motives.

16 I declare under penalty of perjury under the laws of the state of Washington that the
17 foregoing is true and correct.

18 Signed at Portland, Oregon on January _____, 2014.

19
20 [See attached signature by facsimile]
21 JOHN SHMILENKO

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2 when I had the flu. Greg and Linda Minium have an ongoing pattern of wanting to limit
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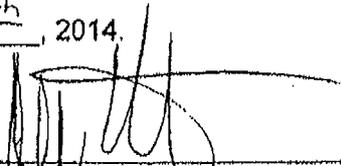
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14 used as an opportunity to keep Mason from those who love him for selfish and unhealthy
15 motives.

16 I declare under penalty of perjury under the laws of the state of Washington that the
17 foregoing is true and correct.

18 Signed at Portland, Oregon on January 8th, 2014.

19
20 
21 _____
22 JOHN SHMILENKO
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1
2 SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

3 In re the Custody of
4 MASON WADDLE,
5 Child,
6 JOHN SHMILENKO,
7 Petitioner,
8 and
9 PATTI SHMILENKO, GREG MINIUM and
10 LINDA MINIUM,
11 Respondents.

No. 13 3 00787 2

AFFIDAVIT REGARDING FILING
DOCUMENT TRANSMITTED BY
FACSIMILE/EMAIL

(No Mandatory Form Developed)

12 STATE OF WASHINGTON)
13 County of Cowlitz) ss.

14 KAREN MURPHY being first duly sworn, on oath, deposes and says as follows:

15 1. I am the legal assistant to BARRY J. DAHL, counsel for Petitioner, JOHN
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17 2. I received the attached PETITIONER'S REPLY DECLARATION by facsimile
18 or email transmission. I have examined the attached PETITIONER'S REPLY
19 DECLARATION, determined that it consists of three pages (including this page), and it is
20 complete and legible.

21 Karen Murphy
KAREN MURPHY

22 SUBSCRIBED AND SWORN to before me this 8 day of January 2014.



23
24 Signature Heidi Mehlhoff-Thomas
25 Printed Name Heidi Mehlhoff-Thomas
Notary Public for the state of Washington
26 My Appointment Expires Nov. 2, 2014

OFFICE RECEPTIONIST, CLERK

To: Heidi Thomas
Cc: Catherine Smith; Valerie Villacin; Victoria Vigoren; Noelle McLean; Dana Walker; Matthew J. Andersen; Karen L Murphy
Subject: RE: In re the Custody of Waddle, Cause No. 90072-8

Rec'd 2/12/15

From: Heidi Thomas [mailto:thomas@walstead.com]
Sent: Thursday, February 12, 2015 3:42 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Catherine Smith; Valerie Villacin; Victoria Vigoren; Noelle McLean; Dana Walker; Matthew J. Andersen; Karen L Murphy
Subject: In re the Custody of Waddle, Cause No. 90072-8

Attached for filing in pdf format is the Brief of Respondent, in the *Custody of Waddle*, Cause No. 90072-8. The attorney filing this document is Matthew J. Andersen, WSBA No. 30052, email address: mjandersen@walstead.com.

--

Heidi M. Thomas
Legal Assistant
WALSTEAD MERTSCHING
--ATTORNEYS AT LAW--
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, WA 98632-7934
A Professional Service Corporation
mail to: thomas@walstead.com
(360) 423-5220 / (360) 423-1478 (fax)
www.walstead.com

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