

DEC 12 2014

Ronald R. Carpenter
Clerk 

No. 90072-8
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.

APPEAL FROM THE SUPERIOR COURT
FOR COWLITZ COUNTY
THE HONORABLE STEPHEN M. WARNING

PETITIONERS' OPENING BRIEF

SMITH GOODFRIEND, P.S.

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I. INTRODUCTION

Petitioners Linda and Greg Minium are the third party custodians and maternal grandparents of M.W., age 7, whose parents were killed in an automobile accident when he was less than a year old. Patti Shmilenko, M.W.'s paternal grandmother, has visitation rights pursuant to an agreed third party custody order with the Miniums. Her husband, respondent John Shmilenko, although married to Patti when the agreed third party custody order was entered, has had no rights to visitation or custody.

Based on its interpretation of this Court's recent 5-4 decisions in *Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013) and *Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013), the trial court found adequate cause for John's petition to establish himself as a *de facto* parent of M.W. – a determination that would place John in “legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.” *Parentage of L.B.*, 155 Wn.2d 679, 708, ¶ 41, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). It is undisputed that John has had, at best, a “grandparent-grandchild relationship” with M.W.; the child's presence in John's home has only been for court-ordered visitation with John's wife, M.W.'s paternal grandmother; and the only financial support John

has provided is during M.W.'s limited presence in his home. Despite John's tenuous connection to M.W. as a "parent," the trial court found there was adequate cause for a hearing on John's petition for *de facto* parentage because no statute authorized third party visitation and M.W. has no living parents whose rights can be measured against John's claim. (2/24/14 RP 24)

In making its decision, the trial court recognized that it was "swimming well away from any established channel markers, legally." (2/24/14 RP 28) Indeed, this Court granted discretionary review of the trial court's adequate cause determination. It should now reverse and dismiss John Shmilenko's *de facto* parentage petition, and award attorney fees to the Miniums.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that John Shmilenko "has assumed the obligations of parenthood without the expectation of financial compensation." (Finding of Fact (FF) 2.4(c), CP 152)

2. The trial court erred in finding that John Shmilenko "has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life." (FF 2.4(d), CP 152-53)

3. The trial court erred in finding that John Shmilenko has established adequate cause to proceed under the equitable remedies of the court as a de facto parent. (FF 2.5(b), CP 153)

4. The trial court erred in entering its “Order re Adequate Cause” on March 10, 2014. (CP 151-55) (Appendix A)

III. STATEMENT OF ISSUE

Whether a step-grandfather, who describes his relationship with the child as “grandparent-grandchild” and whose contact with the child is by virtue of a visitation order that provides his wife with limited residential time, can pursue an action to establish himself as the child’s *de facto* parent in order to pursue a claim for visitation?

IV. STATEMENT OF FACTS

M.W. was born on August 20, 2007 to Libby Minium and Zach Waddle. (CP 99, 100) M.W. lived with his parents in Longview, Washington until Libby and Zach were killed by a drunk driver on August 9, 2008, 11 days before M.W.’s first birthday. (CP 5, 99)

The Miniums, M.W.’s maternal grandparents, also live in Longview, and had been very close to Libby and Zach prior to their deaths. (CP 101) The Shmilenkos, who lived and worked in Portland and traveled frequently, were less involved with M.W. and

his parents. (CP 101) With the exception of visits with Patti Shmilenko, M.W. has lived solely with the Miniums since his parents' deaths in August 2008. (CP 99-100) He calls his maternal grandparents "pa" or "dad" and "ma" or "mom." (CP 100)

In September 2008, the Miniums filed a petition for third party custody of M.W. (CP 1-7) Patti Shmilenko, but not her husband John, responded to the petition, seeking visitation. (*See* CP 10-18)¹ On March 23, 2010, an agreed order designated the Miniums as the third party custodians of M.W., who was then two years old. (CP 16) The Miniums were granted sole decision-making for M.W. (CP 27) Patti was granted two mid-week afternoon visits and one overnight on alternating weekends. (CP 22) No child support was ordered. (CP 10) Instead, the order provided that the Miniums "shall continue to receive the Social Security Death Benefits to help in raising [M.W.]." (CP 10)

Patti and the Miniums agreed that they would revisit the residential schedule when M.W. turned 5 and entered school. (CP

¹ M.W.'s biological paternal grandfather, Richard Miller, also did not respond to the petition. Richard and the Miniums have informally agreed on visitation that allows Richard to continue a relationship with M.W. without court orders. (CP 101) There is nothing in the record that suggests that Patti could not have had visitation with M.W. without a court order as well.

10, 22) On August 30, 2013, Patti filed a petition to modify the parenting plan. (CP 35-42) M.W. was by then age 6 and was about to start school. (See CP 35-42) A temporary order was entered reducing Patti's residential time to alternating months of one weekend per month and two weekends per month, plus one mid-week telephone call. (CP 63)

As part of her petition for modification, Patti sought to add her husband, respondent John Shmilenko, as a party, stating that he "has had a close and loving grandparent relationship to the child." (CP 40) On October 28, 2013, Cowlitz County Superior Court Judge Stephen Warning ("trial court") denied Patti's request to make John an additional party. (CP 65) Instead, the trial court permitted John to file his own petition for third party custody or *de facto* parentage. (CP 66)

Apparently realizing that there was no basis for him to bring a petition as a *de facto* parent, John filed a "nonparental custody petition." (See CP 156-61) In his petition, John claimed that he had "maintained a grandparent-grandchild relationship with [M.W.]" (CP 159) John also stated that he "has no other children or grandchildren and treats [M.W.] as if they were biologically related." (CP 159) John claimed that M.W. is his "grandchild in

every way except by birth.” (CP 160) John also alleged that it “is in M.W.’s best interest that John Shmilenko have established visitation that will continue even in the event Patti Shmilenko no longer is able to exercise visitation.” (CP 160) John did not submit any evidence that Patti, age 56, would be unable to exercise her residential time with M.W.

On January 13, 2014, a hearing was held to determine whether there was adequate cause for John’s third party custody petition. The trial court ruled that John could not pursue third party visitation, as there is no statutory basis for third party visitation² under RCW 26.10.160, which had been struck down as unconstitutional in *Custody of Smith*, 137 Wn.2d 1, 21, 969 P.2d 21 (1998), *aff’d by Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). (1/13/14 RP 7-8, 14) However, the trial court once again encouraged John to pursue a claim for *de facto* parentage, and granted him leave to amend his petition. (1/13/14 RP 14-15)

² The court had previously determined that Patti could continue to pursue third party visitation because of the parties’ prior agreed order allowing visitation. *See Marriage of Anderson*, 134 Wn. App. 506, 512, ¶ 13, 141 P.3d 80 (2006) (former stepfather could enforce visitation under parenting plan entered prior to invalidation of third party visitation statutes). The Miniums do not challenge that decision.

On January 31, 2014, John filed an amended petition to establish himself as M.W.'s *de facto* parent. (CP 67-77) Patti joined in John's petition. (CP 77) John admitted that "the *de facto* parent analysis is a rough fit for the facts of this case." (CP 111) John acknowledged that M.W.'s parents had not "consent[ed] and foster[ed] a parent-like relationship" between him and M.W. prior to their deaths, and that M.W. only lived in his household during M.W.'s visitation with Patti. (CP 73) Nevertheless, John alleged that he "has assumed the obligations of parenthood without expectation of financial compensation." (CP 73) In support of this claim, John described purchasing "outdoor" clothing for M.W. (gloves, boots, rain gear), age 6, for their activities together, which John described as walking on the beach and "digging holes and trenches together" on John's property. (CP 114) John also alleged that he had "fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life." (CP 73) In support of this claim, John described teaching M.W. how to fish, play piano, barbecue, and brine salmon. (CP 114)

On February 24, 2014, the parties were once again before the trial court, this time to determine whether there was adequate cause for John's petition for *de facto* parentage. The trial court

reasoned that the “one thing” that differentiated this case from other *de facto* parentage cases was there was no living parent against whom John’s rights could be measured:

Unlike every case that I’ve read, there is no parent to judge anybody else’s rights as against. And that’s the basis of all this *de facto* parent and third party custody and everything else. The starting point is we measure anybody else’s claim of right against the right of the parents.

(2/24/14 RP 24) The court then reasoned that by “virtue” of the third party custody order, “there are three people [the Miniums and Patti Shmilenko] who are considered *de facto* parents.” (2/24/14 RP 25)

Taking a “flexible” approach in determining that John met the “stringent”³ four-factor test⁴ to establish himself as M.W.’s *de facto* parent, the trial court analogized the parties’ circumstances to

³ “Under the common law, a person who meets certain *stringent* criteria may be recognized as a *de facto* parent.” *Parentage of J.A.B.*, 146 Wn. App. 417, 423, ¶ 16, 191 P.3d 71 (2008) (emphasis added).

⁴ This Court has warned that meeting this test should be “no easy task,” as it requires the petitioner to show: 1) the natural or legal parent consented to and fostered the parent-like relationship; 2) the petitioner and 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. *Parentage of L.B.*, 155 Wn.2d 679, 708, 712, ¶¶ 40, 47, 122 P.3d 161 (2005).

one where John was the equivalent of a non-residential biological parent:

Factor 1. Ignoring that it had previously considered the Miniums and Patti Shmilenko to be M.W.'s *de facto* parents, the trial court found that whether "the natural or legal parent consented to and fostered the parent-like relationship" did "not apply" "because nobody here amounts to a natural or legal parent." (2/24/14 RP 27)

Factor 2. In determining whether John and M.W. "lived together in the same household," the trial court found that even if M.W.'s presence in John's home was limited, "the fact that the child doesn't live there as much as in the other household doesn't make a whole lot of difference. 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 the child doesn't live with you, I think they'd be very surprised." (2/24/14 RP 27)

Factor 3. Once again analogizing to a non-residential biological parent, the trial court found that John "assumed the obligation of parenthood without expectation of financial compensation," because "somebody who has a child less than the

other side is still assuming aspects of parenthood.” (2/24/14 RP 27)

Factor 4. In determining whether John 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,” the trial court ignored both Patti and John’s earlier admissions that John’s relationship with M.W. was “grandparent-like” in nature and found that it was putting some “basic faith in kind of the fundamental premise of how we divvy kids up among separating parents, that the one whose not primary is still a parent.” (2/24/14 RP 28)

In undertaking this analysis of the *de facto* parentage factors, the trial court acknowledged it was “swimming well away from any established channel markers, legally. So I do think it’s appropriate to certify this matter immediately.” (2/24/14 RP 28)

On March 10, 2014, the trial court entered its order finding adequate cause on John’s petition to establish himself as a *de facto* parent. (CP 151-55) (Appendix A) The Miniums moved for direct discretionary review of this decision in the Supreme Court. (CP 148) Supreme Court Commissioner Pierce granted discretionary review, and held that a department of the Court will decide in the

“ordinary course whether to retain jurisdiction or transfer the case to the Court of Appeals.” (Appendix B)

In her order, Commissioner Pierce noted that an issue to be addressed on review is whether this Court’s previous holdings that our third party visitation statutes are facially unconstitutional “applies to visitation allowed as part of a custody order under RCW 26.10.030, which necessarily relies on a finding that the child is not in the custody of its parents or that neither of the parents is a suitable custodian.” (Appendix B at 4) Commissioner Pierce stated that the answer to that question may impact the primary issue on appeal, which she characterized as “can a trial court use the *de facto* parentage common law cause of action as an avenue to grant visitation to a third party whose relationship with the child is ‘grandparent-like’ because there is no statute authorizing visitation?” (Appendix B at 5)

V. ARGUMENT

A. **The lack of a third party visitation statute does not open the door to a claim for *de facto* parentage.**

“Washington’s current third party visitation statutes are unconstitutional and inoperative and thus unavailable as [a] ground on which to seek visitation.” *Parentage of L.B.*, 155 Wn. 2d 679,

713, ¶ 49, 122 P.3d 161 (2005) (citing *Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, ¶ 36, 109 P.3d 405 (2005); *Custody of Smith*, 137 Wn.2d 1, 21, 969 P.2d 21 (1998), *aff'd by Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000)). The fact that John Shmilenko is pursuing court-ordered third party visitation over the objection of the child's third party custodians – rather than the child's parents – is of no consequence. “The effect of holding a statute facially unconstitutional is to render the statute totally inoperative.” *Parentage of L.B.*, 155 Wn.2d at 714, ¶ 52 (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)), *cert. denied*, 547 U.S. 1143 (2006).

RCW 26.10.040(1)(a) provides that “[i]n entering an order under this chapter, the court shall consider, approve or make provisions for . . . [c]hild custody, visitation, and the support of any child entitled to support.” But this reference is to the visitation to which “a *parent* not granted custody is entitled.” RCW 26.10.160(1) (“a parent not granted custody of the child is entitled to reasonable visitation rights); *see also* RCW 26.10.050 (“the court may order either or both parents owing a duty of support . . . to pay an amount reasonable or necessary for the child's support.”). As this Court

confirmed in *L.B.*, *C.A.M.A.*, and *Smith*, there is no statutory authority for third party visitation in RCW ch. 26.10.

It has been almost 15 years since our third party visitation statutes were invalidated as unconstitutional. The Legislature's failure to enact a third party visitation statute must be presumed to reflect its intention to not allow third parties to seek court-ordered visitation with children with whom they do not have a "parent-like" relationship. See e.g. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327, fn. 3, 971 P.2d 500 (1999) ("Legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following a judicial decision interpreting it indicates legislative acquiescence in that decision"). Until (and unless) the Legislature enacts a constitutionally viable third party visitation statute, "there exists no statutory right to third party visitation in Washington." *Parentage of L.B.*, 155 Wn.2d at 714-15, ¶ 52.

The lack of a third party visitation statute does not open the door for a third party to pursue *de facto* parentage of a child with whom the third party does not have a parent-like relationship. This Court adopted the common law equitable doctrine of *de facto* parentage to allow an individual who has "fully and completely

undertaken a permanent, unequivocal, committed, and responsible *parental role* in the child's life” to assert parental rights to the child. *Parentage of L.B.*, 155 Wn.2d at 708, ¶ 40 (emphasis added). A *de facto* parent is placed in “parity with biological and adoptive parents in our state,” and holds a “fundamental liberty interest in the care, custody, and control” of the child. *Parentage of L.B.*, 155 Wn.2d at 710, ¶ 45. Accordingly, this Court held that “attaining such recognition should be no easy task.” *Parentage of L.B.*, 155 Wn.2d at 712, ¶ 47.

In *Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013), a bare majority of this Court allowed a former stepfather to pursue a *de facto* parentage claim because “[w]e are presented with a scenario that was not contemplated by the legislature and that merits an equitable remedy—where an individual forms a parent-child relationship after entering the child's life at birth following the death of the child's biological father. [] Because there is no statutory avenue for Mr. Holt to petition for parentage, the *de facto* parentage doctrine fills this gap and provides for meaningful adjudication of whether Mr. Holt has undertaken a permanent role as B.M.H.'s parent.” 179 Wn.2d at 240, ¶ 30. In *Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013), decided the same day with the

same split, this Court held that a child’s foster mother, who had raised the child since birth, could pursue *de facto* parentage even though she could not establish a “statutory gap” that prevented her from maintaining a relationship with the child, because the existence of a statutory gap is not an “element” of the *de facto* parentage doctrine that must be proved before the court can “apply an equitable remedy.” 179 Wn.2d at 185, ¶ 8.

This Court now needs to clarify for the lower courts that its decisions in *B.M.H.* and *A.F.J.* were not intended to authorize third parties to seek or the lower courts to resort to “equitable remedies” to give third party visitation to individuals who do not have a “parent-like” relationship with the child. The existence of a “statutory gap” does not authorize the *de facto* parentage common law cause of action to allow a third party nonstatutory visitation rights. *Custody of A.F.J.*, 179 Wn.2d at 185, ¶ 8. Instead, the “threshold showing” for a *de facto* parentage cause of action is the existence of a “parent-like” relationship between a third party and a child, whose natural or legal parent consented to and fostered that relationship. *Custody of B.M.H.*, 179 Wn.2d 224, ¶ 30.

Thus, it does not matter whether there is a “statutory gap” that prevents John Shmilenko from asserting a legal right to

visitation. Regardless of the lack of any statutory remedies, the *de facto* parentage cause of action is not available to him because there is no dispute that he has at best a “grandparent-like” relationship – not a “parent-like” relationship. The fact that John cannot show a parent-like relationship with M.W. is fatal to his claim for *de facto* parentage.

B. The trial court erred in finding that a step-grandfather could meet the *de facto* parent test.

The trial court erred by allowing a step-grandfather, whose relationship with the child is “grandparent-like,” to pursue a claim of *de facto* parentage. John Shmilenko’s role in M.W.’s life has been extremely limited compared to the Miniums. Nevertheless, if John were established as M.W.’s *de facto* parent his “rights” as a “parent” would be elevated above the Miniums, who have been the child’s third party custodians for the last 6 years, and over even his wife, Patti Shmilenko, who is only entitled to third party visitation.

This Court established a stringent four-part test to establish standing as a *de facto* parent, making it “no easy task” to meet the requirements in order to avoid opening the door to persons like John who seek legal rights in children to whom they are not parents, including “teachers, nannies, parents of best friends, adult

siblings, aunts, grandparents, and every third-party caregiver.” *Parentage of L.B.*, 155 Wn.2d 679, 712, ¶ 47, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). Failure to meet even one factor is fatal to a *de facto* parentage claim. *Dependency of D.M.*, 136 Wn. App. 387, 397, ¶ 22, 149 P.3d 433 (2006), *rev. denied*, 162 Wn.2d 1003 (2007). Yet John is being allowed to pursue this claim even though he cannot meet any of the *de facto* parentage factors.

The trial court decided to make it “easy” for John to become a *de facto* parent because the child has no living parents. But there is no evidence that M.W.’s parents “*consented to and fostered a parent-like relationship*” between M.W. and John during their lifetime. Nor is there any evidence that the Miniums – the child’s third party custodians - consented to a relationship between John and the child other than one that was “grandparent-like” in nature. *See e.g. Welfare of R.S.G.*, 172 Wn. App. 230, 255, ¶ 62, 289 P.3d 708 (2012) (in a dependency action, third party custodians are provided protection similar to that afforded legal parents).

The relationship that John and M.W. have is a far cry from that in cases where *de facto* parentage was established when the biological parent held out the third party as the other “parent” to her child. *See, e.g., Parentage of L.B.*, 155 Wn.2d 679 (for the first 6 years

of child's life, the biological mother held out her former partner as a second mother to her child, naming her as mother in baby book, listing her as a parent for school records, and sharing parental responsibilities); *Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013) (biological mother and partner agreed to raise child together, gave child both their names, and held each other out as co-parents); *see also Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 71 (2008) (the child always considered petitioner as his father, both child's legal parents fostered this "parent-like" relationship, and the parents had at one point supported the idea of petitioner adopting the child).

John also cannot meet the second factor, because other than the visitation that he has had by virtue of his wife's third party visitation order, he has never "*lived together [with the child] in the same household.*" *See Adoption of R.L.M.*, 138 Wn. App. 276, 288-89, ¶ 21, 156 P.3d 940 (2007) (petitioner was not a *de facto* parent because there was no evidence that the petitioner had lived with the child prior to an order allowing her to do so when the child was found dependent), *rev. denied*, 162 Wn.2d 1023, *cert. denied*, 555 U.S. 815 (2008). While no Washington case has examined the extent that the petitioner and child must have lived together to meet this factor, the ALI *Principles of the Law of Family Dissolution*, §2.03 (2000)

provides some guidance. There, the drafters state, “the most significant factor in determining whether an individual has ‘lived with’ a child is whether that individual and the child regularly spend the night in the same residence.” *Principles of the Law of Family Dissolution*, §2.03 at 119.

John also cannot prove the third factor that he “*assumed obligations of parenthood without expectation of financial compensation.*” With the exception of any incidentals that might be provided during M.W.’s residential time with his wife, John has not undertaken any obligations of parenthood – financial or otherwise – to warrant a finding that he is *de facto* parent. While the trial court analogized this situation to one where John was the equivalent of a non-residential biological parent, a non-residential parent would have paid child support to provide support in the other parent’s household. Here, it is undisputed that John has never paid child support nor provided any financial support for M.W.

Finally, John cannot prove the fourth factor that he has been in “*parental role for a length of time sufficient to have established with a child a bonded, dependent relationship, parental in nature.*” John’s relationship with M.W. is one that is “grandparent-like” in nature. This is unlike *Parentage of L.B.*, 155 Wn.2d at 684, ¶ 5, where

there was evidence that the child viewed the petitioner as her mother, called her “mamma,” and the petitioner provided “much of the child’s mothering during the first six years of life.” This is also unlike *Custody of B.M.H.*, 179 Wn.2d 224, 232, ¶ 10, 315 P.3d 470 (2013), where the child referred to the petitioner as his “father” and witnesses testified that the child saw the petitioner “as his one and only father [and] is bonded with [petitioner] as any boy to his father.”

As the Court held in *Parentage of M.F.*, 168 Wn.2d 528, 535, ¶ 17, 228 P.3d 1270 (2010), “attending school functions, helping the child get dressed in the morning, or engaging in the other numerous events that together make up family with a child” alone is insufficient to establish standing for a petitioner to pursue status as a *de facto* parent. And as John himself admits, the circumstances of this case are a “rough fit.” (CP 111) In fact, they are no fit at all. The trial court erred by ignoring the stringent standards required by this Court and allowing him to pursue *de facto* parentage in order to seek nonstatutory court-ordered third party visitation.

C. This Court should award attorney fees to the Miniums.

RCW 26.10.080 authorizes this Court to award attorney fees to a party for “maintaining or defending any proceeding under this

chapter.” This Court should award attorney fees to the Miniums for having to bring this appeal. John Shmilenko sought third party visitation in the existing RCW ch. 26.10 action, which granted the Miniums third party custody of M.W. The Miniums should not be required to bear any further cost defending against John’s misguided attempt to obtain a legal right to visitation under the equitable doctrine of *de facto* parentage after seeking and failing to obtain visitation under unconstitutional third party visitation statutes. This Court should award attorney fees to the Miniums.

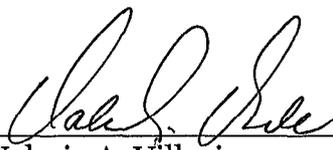
VI. CONCLUSION

This Court should reverse the trial court’s order finding adequate cause on John Shmilenko’s *de facto* parentage cause of action and remand it with directions to the trial court to dismiss his action, and award attorney fees to the Miniums.

Dated this 11 day of December, 2014.

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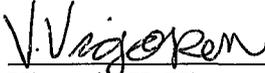
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 11, 2014, I arranged for service of the foregoing Petitioners' Opening Brief, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Noelle McLean Noelle McLean P.S. P.O. Box 757- 415 S 3rd Avenue Kelso, WA 98626	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Matthew Andersen Barry J. Dahl Walstead Mertsching PS 1700 Hudson St., Fl 3 P.O. Box 1549 Longview, WA 98632-7934	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Deliver <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 11th day of December, 2014.



Victoria K. Vigoren

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ENDORSED FILED
SUPERIOR COURT

MAR 10 2014

COWLITZ COUNTY
BEVERLY R LITTLE, Clerk

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

In re the Custody of

MASON WADDLE,

Child,

GREGORY SCOTT MINIUM and
LINDA MINIUM,

Petitioners,

and

PATTI SHMILENKO,

JOHN SHMILENKO,

PATTI SHMILENKO, and
GREG and LINDA MINIUM,

Respondents.

No. 08 3 00476 1

ORDER RE ADEQUATE CAUSE
(NONPARENTAL CUSTODY)

Clerk's Action Required

I. BASIS

1.1 A petition requesting that visitation of the child be granted to the Moving Party,
JOHN SHMILENKO, has been presented to the Court.

1.2 A hearing was held on January 13, 2014.

1 II. FINDINGS

2 *The Court Finds:*

3 2.1 JURISDICTION.

4 This court has jurisdiction over the proceeding and the parties.

5 2.2 SERVICE ON NONMOVING PARTY.

6 Respondents GREG MINIUM and LINDA MINIUM were served with a copy of the
7 Nonparental Custody Petition, Summons, and Petitioner's Amended Proposed
8 Residential Schedule, as follows:

9 a. GREG MINIUM was personally served on November 17, 2013.

10 b. LINDA MINIUM was personally served on November 17, 2013.

11 2.3 TIME ELAPSED SINCE SERVICE ON THE NONMOVING PARTY.

12 More than 20 days have elapsed since the date of service on Respondents
13 GREG MINIUM and LINDA MINIUM who were served within the state of
14 Washington.

15 2.4 DE FACTO PARENT STATUS

16 There is adequate cause to proceed with the De Facto Parent based on the
17 following findings:

18 a. MASON WADDLE ("MASON") has no living parents that are able to
19 consent to and foster a parent-like relationship as provided in Section 2.5;

20 b. Respondent JOHN SHMILENKO and the child have lived together in the
21 same household during all visitations as provided in Section 2.5.

22 c. Respondent JOHN SHMILENKO has assumed the obligations of
23 parenthood without expectation of financial compensation as provided in
24 Section 2.5.

25 d. Respondent JOHN SHMILENKO has fully and completely undertaken a
26 permanent, unequivocal, committed and responsible parental role in the

1 child's life as provided in Section 2.5.

2 2.5 ADEQUATE CAUSE FINDING.

3 a. The Court finds that there is not adequate cause for Respondent JOHN
4 SHMILENKO to move forward with a nonparental custody petition under
5 RCW 26.10.

6 b. The Court finds that Respondent JOHN SHMILENKO has established
7 adequate cause to proceed under the equitable remedies of the court as a
8 de facto parent and grants leave to allow the Respondent JOHN
9 SHMILENKO to amend his nonparental custody petition to include a
10 request for custody/visitation under the court's equitable powers.

11 *see attached "A" and "D."* ORDER *3/10/14*

12 **It is Ordered:**

13 The matter is set for trial at the date and time previously established, *see*

14 DATED: *March* ~~February~~ 10, 2014. *attached 3.1 through 3.4, 3/10/14*

15
16 
JUDGE STEPHEN M. WARNING

17 Presented by:

18 
19 BARRY J. DAHL, WSBA #3309
20 Of Attorneys for Respondents SHMILENKO

Dated: February 3, 2014

21
22 Approved for entry:

23 
24 NOELLE A. McLEAN, WSBA #22921
25 Of Attorneys for Petitioners/Respondents MINIMUM

26 Dated: *March* February 10, 2014

1 ~~2.2 SERVICE ON NONMOVING PARTY~~

2 The nonmoving parties, Greg Minium, Linda Minium, and Patti Shmilenko, were
3 served with a copy of the Second Amended Nonparental Custody Petition on
4 January 31, 2014, through their respective attorneys' offices.

5 2.3 TIME ELAPSED SINCE SERVICE ON THE NONMOVING PARTY.

6 More than 20 days have elapsed since the date of service on all nonmoving
7 parties served within the state of Washington.

8 ~~2.4 ADEQUATE CAUSE FINDINGS AND CONCLUSIONS~~ DAB/10/14

9 A. Linda Minium moved to strike her Discover Answers that were filed by
10 Matthew Anderson on 02/19/2014. The court considered the discovery
11 answers, but did not give much weight to the same. Ruling on the
12 individual objections within the Discovery Answers were not determined by
13 the court and are reserved for further ruling.

13 ~~B. De Facto Parent requires an adequate finding based upon the 4-prong
14 test established in **Parentage of L.B.**, 155 Wn.2d 679, 710, ¶ 45, 122 P.3d
15 161 (2005), cert. denied, 547 U.S. 1143 (2006).~~

15 1. Mason Waddle's parents were untimely killed when he was
16 approximately one (1) year old. Since that time, Mason Waddle has
17 resided primarily with Greg and Linda Minium pursuant to a
18 Nonparental Custody Decree entered on 03/23/2010.

19 2. The court finds there is no parent to judge rights as against under the
20 De Facto Parent Analysis. The Nonparental Custody Orders entered
21 in 2010 placed custody of Mason Waddle with Greg and Linda
22 Minium, and conferred a right to visitation with Patti Shmilenko.
23 Neither of these three (3) parties have rights under a traditional
24 theory, and the court considers Greg and Linda Minium, and Patti
25 Shmilenko as De Facto Parents.

26 3. John Shmilenko claims under the parameters established by the
27 Nonparental Custody Order entered in 2010, that he is also a de facto
28 parent.

29 4. Adequate Cause is a necessary gatekeeping function in all domestic
30 cases, including de facto parent. The intent is to keep frivolous cases
31 out of court. DAB 3/10/14

- a. The court assumes John Shmilenko has established a bonded and dependent relationship with Mason during the visitation afforded Patti Shmilenko pursuant to court order.
 - b. The court analogizes this factor to one where children of separating parents have a visitation schedule, but that doesn't change the bond the children have established with the parent prior to the entry of the court order.
 - c. The court recognizes the level of John Shmilenko's relationship will be tested and proven at the time of trial.
- C. Adequate cause for hearing the petition has been established by court order after a contested hearing. *MSA*
DL 3/17/14
- D. This court certifies under RAP 2.3(b)(4) that its ruling involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review by the Court of Appeals may materially advance the ultimate termination of the litigation, which is in the best interests of all the parties, including the child.

III. ORDER

IT IS ORDERED:

- 3.1 The court enters a Finding of Adequate Cause on the Second Amended Nonparental Custody Petition filed by John Shmilenko related to De Facto Parent.
- 3.2 The court reserves ruling on the Objections contained in Linda Minium's Discovery Answers that were filed with the court on or about 02/19/2014.
- 3.2 Trial shall be set on this matter on a subsequent date.
- 3.3 The court certifies this ruling pursuant to Rules of Appellate Procedure 2.3(b)(4). *MSA*
- 3.4 The Minium request for attorney fees is denied. *DL 3/17/14*

DATED: _____

JUDGE/COMMISSIONER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Custody of M.W.,

Child,

GREGORY SCOTT MINIUM and
LINDA MINIUM,

Petitioners,

and

PATTI SHMILENKO,

Respondent,

JOHN SHMILEKO,

Respondent.

NO. 90072-8

RULING GRANTING REVIEW

Filed
Washington State Supreme Court

JUN 30 2014

Ronald R. Carpenter
Clerk

Petitioners Greg and Linda Minium are the maternal grandparents of a six-year old boy whose parents were killed in an automobile accident on August 9, 2008, days before his first birthday. In September 2008 the Miniums filed a petition for third party custody of the child pursuant to RCW 26.10.030(1). Their petition named Patti Shmilenko as the respondent. Ms. Shmilenko is the child's paternal grandmother and her husband, John Shmilenko, is the child's step-grandfather. The petition stated that the child had resided with the Miniums since the time his parents were killed, and that no other persons claimed custody of the child. The petition went on to note: "It is the petitioners' understanding however, that the paternal grandmother and the step-grandfather, John and Patti Shmilenko, would like to have court-ordered visitation."

Ms. Shmilenko responded to the petition by seeking visitation. A March 2010 agreed nonparental custody decree granted the Miniums custody of the child and provided visitation for Ms. Shmilenko as set forth in an agreed residential schedule. Generally, the child was to reside with the Miniums with visitation with Ms. Shmilenko two afternoons a week and every other weekend and specified holidays. A statement in the residential schedule recognized it would be appropriate to review visitation when the child reached school age.

When the child reached school age and the grandparents could not agree on a residential schedule, Ms. Shmilenko moved to modify the schedule and her husband moved to be added as a party to the nonparental custody proceeding. The trial court denied Mr. Shmilenko's motion, finding he was not an appropriate additional respondent, but indicated that in the event he filed a separate third party custody or de facto parentage petition, the court would consolidate the matters. Mr. Shmilenko subsequently filed a "Nonparental Custody Petition" pursuant to chapter 26.10 RCW in which he alleged he has maintained a grandparent-grandchild relationship and has developed "a close and loving grandparent bond" with the child. The Shmilenkos asserted it would be in the child's best interest that Mr. Shmilenko have established visitation that would continue in the event Ms. Shmilenko were no longer able to exercise visitation. The Miniums responded that Mr. Shmilenko did not have legal standing to request visitation pursuant to chapter 26.10 RCW and further "den[ied] there is adequate cause for visitation to the petitioner, pursuant to RCW 26.10.160(3) and *In re Custody of Smith*, 137 W[n].2d 1, 969 P.2d 21 (1998), which held that nonparental visitation is unconstitutional." The trial court scheduled a hearing to determine whether there was adequate cause to proceed to trial on the step-grandfather's third party custody petition. RCW 26.10.032. Following the hearing, the trial court concluded there is no statutory basis for third party visitation because the

statutes providing for such visitation (apparently referencing RCW 26.10.160(3) and RCW 26.09.240) have been held facially unconstitutional. While the trial court concluded the parties' prior agreed order allowed Ms. Shmilenko to continue third party visitation even though these statutes had been ruled unconstitutional, the court observed, "I think Mr. Shmilenko is limited to the de facto parent option." The court granted Mr. Shmilenko leave to amend his petition to pursue a claim for de facto parentage.

In January 2014, Mr. Shmilenko filed an amended petition again alleging he has a grandparent-grandchild bond with the child and adding the allegation that he has undertaken a parental role in the child's life. His petition requested that "the court enter an order finding there is adequate cause for hearing this petition under [chapter] 26.10 RCW nonparental custody and under the Court's equitable powers." Ms. Shmilenko joined in the petition. At a March 2014 hearing the trial court determined Mr. Shmilenko could not move forward with a nonparental custody petition under chapter 26.10 RCW, but found "adequate cause" to proceed under the court's power to recognize the equitable remedy of de facto parentage. In its oral ruling the court stated: "So, I am going to find adequate cause. We are swimming well away from any established channel markers, legally. So I do think it's appropriate to certify this matter immediately." The court's order certified that its ruling "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review by the Court of Appeals may materially advance the ultimate termination of the litigation, which is in the best interests of all the parties, including the child." *See* RAP 2.3(b)(4).

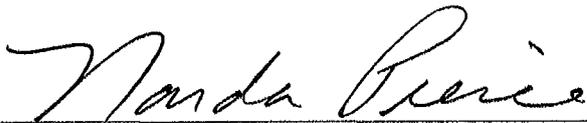
The Miniums contend discretionary review is called for because the issue of whether a step-grandparent whose contact with the child has been through his wife's court-ordered visitation can establish himself as a de facto parent is a

controlling question of law that will “materially advance the ultimate termination of the litigation” because it will avoid a trial. While discretionary review can be granted to avoid a useless trial, *Douchette v. Bethel School District No. 403*, 117 Wn.2d 805, 808-09, 818 P.2d 1362 (1991), this cannot be the only criterion, as any time a trial court erroneously denies a well-founded determinative motion, pretrial review would prevent a useless trial. Yet the appellate courts rarely grant discretionary review of such trial court orders. See Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1547 (1986). But here there are additional reasons for such review. This court has noted the “adequate cause” provision places a high threshold burden on a petitioner seeking nonparental custody in order to limit disruptions in family life. *In re Custody of B.M.H.*, 179 Wn.2d 224, 236, 315 P.3d 470 (2013). And the trial court has certified and I agree that the question of whether the common law de facto parentage doctrine applies in these circumstances is a controlling question of law as to which there is substantial ground for a difference of opinion. In these circumstances I conclude that discretionary review is called for under RAP 2.3(b)(4).

However, I am not persuaded that the issue presented necessarily calls for direct review under RAP 4.2(a). While petitioners assert and the trial court concluded that there is no statutory basis for the trial court to order visitation, this assertion may be too sweeping. In context, this statement summarizes this court’s rulings that RCW 26.10.160(3) and RCW 26.09.240 are facially unconstitutional because each of these statutes allows court ordered visitation over the objections of a fit parent. See *In re Parentage of L.B.*, 155 Wn.2d 679, 714, 122 P.3d 161 (2005). But one question on review will be whether this statement applies to visitation allowed as part of a custody order under RCW 26.10.030, which necessarily relies on a finding that the child is not in the custody of its parents or that neither of the parents is a suitable custodian. RCW

26.10.030 permits the intervention of “other interested parties,” and RCW 26.10.040(1)(a) provides that “[i]n entering an order under this chapter, the court shall consider, approve, or make provision for” child custody, visitation, and child support. The question of whether these statutory provisions read together provide a statutory basis for court ordered visitation in these circumstances may affect the consideration of the issue the motion for discretionary review presents: “Can a trial court use the *de facto* parentage common law cause of action as an avenue to grant visitation to a third party whose relationship with the child is ‘grandparent-like’ because there is no statute authorizing visitation?” Briefs more fully addressing the threshold determination of whether there is a lack of a statutory remedy as well as how the multifactor test for establishing *de facto* parentage applies in these circumstances will better inform the decision of whether the case needs to be decided in the first instance by this court.

The motion for discretionary review is granted. A department of the court will decide in the ordinary course whether to retain jurisdiction or transfer the case to the Court of Appeals.


COMMISSIONER

June 30, 2014