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SUPREME COURT
OF THE STATE OF WASHINGTON

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b/h

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' REPLY BRIEF

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ORIGINAL

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I. REPLY TO RESTATEMENT OF FACTS

Respondent John Shmilenko devotes much of his "Statement of Facts" to complaints about Linda Minium's relationship with his wife Patti Shmilenko, who already has protected visitation rights under a third party custody order. (Resp. Br. 6-7) Certainly nothing in his factual recital suggests John has anything more than the "grandparent-grandchild relationship" with M.W. that he asserted in his petition for third party custody. (CP 159) All of the support John claims to provide M.W. in his home is in conjunction with his wife's court-ordered residential time. It includes household basics such as "allergy medicine, a home medical kit, dental care, flossing, and bathing items" (see Resp. Br. 3-4) that would be expected in the home of any grandparent hosting a grandchild overnight.

The "love, care, and guidance" that John and his wife give M.W. (Resp. Br. 4), and John's "lessons about working safely, such as wearing protective eye wear" and teaching "M.W. about fishing and playing music" (Resp. Br. 3), are what one would expect of "teachers, nannies, parents of best friends, adult siblings, aunts, grandparents, and every third-party caregiver" - all loving individuals this Court held should not so easily be able to establish

themselves as *de facto* parents in *Parentage of L.B.*, 155 Wn.2d 679, 712, ¶ 47, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). “John’s admission that his relationship with M.W. is grandparent-like simply shows that he has a firm grip on reality” (Resp. Br. 20) is more than borne out by his “Statement of Facts.” It is a pity that the Shmilenkos do not also grasp the pernicious consequences to this family of his divisive insistence on court-ordered visitation.

II. REPLY ARGUMENT

A. Respondent has no claim for third party visitation under RCW ch. 26.10.

The trial court dismissed respondent’s statutory claim for visitation. (CP 153; 1/13 RP 14) Respondent has waived any challenge to that decision by not appealing it. *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 728, ¶ 92, 309 P.3d 711 (2013) *aff’d*, 181 Wn.2d 186, 332 P.3d 415 (2014); *see also Nord v. Phipps*, 18 Wn. App. 262, 266, fn. 3, 566 P.2d 1294 (1977) (“A notice of cross-appeal is essential if the respondent seeks [] affirmative relief as distinguished from the urging of an additional ground for affirmance.”).

In any event, neither RCW 26.10.030 nor RCW 26.10.040 provide a “statutory remedy” for third party visitation. (Resp. Br.

10-11) As respondent acknowledges, RCW 26.10.030 “speaks only to custody” (Resp. Br. 10); it does not address visitation. RCW 26.10.040(1)(a) also does not support his claim for third party visitation.

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,” not a third party. RCW 26.10.160(1) (“a parent not granted custody of the child is entitled to reasonable visitation rights). While RCW 26.10.170 contemplates a “noncustodial parent,” it does not make any provision for a noncustodial *nonparent*.

The only provision under RCW ch. 26.10 allowing “any person [to] petition the court for visitation rights,” RCW 26.10.160(3), was invalidated as facially unconstitutional by *Custody of Smith*, 137 Wn.2d 1, 19-20, 969 P.2d 21, 28 (1998), *aff’d sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *see also Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, ¶ 36, 109 P.3d 405 (2005). “The effect of holding a statute facially unconstitutional is to render the statute totally inoperative.”

Parentage of L.B., 155 Wn. 2d 679, 714, ¶ 52, 122 P.3d 161 (2005) (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)), *cert. denied*, 547 U.S. 1143 (2006)). Even if the third party visitation statute could be applied constitutionally under the facts of this case, the statute is void and cannot be a basis to grant visitation. 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 fact that respondent is pursuing court-ordered visitation over the objection of the child’s third party custodians – rather than the child’s parents – is irrelevant. (Resp. Br. 11-13) Respondent cites no authority (because there is none), for the proposition that there is a statutory ground for third party visitation when the dispute is between third parties, rather than between a third party and parent.

Third party custodians are entitled to the same protection as legal parents from State and third party interference with their family. *See, e.g., Welfare of R.S.G.*, 172 Wn. App. 230, 255, ¶ 62, 289 P.3d 708 (2012) (services normally offered to parents of children in dependency actions must also be offered to third party

custodians); *see also Custody of S.R.*, 183 Wn. App. 803, 815-16, ¶ 29, 334 P.3d 1190 (2014) (RCW 26.09.260 modification standards must be met before another third party can seek custody under an already established third party custody order). None of the cases where competing third parties sought custody order visitation for the non-prevailing third party. *See e.g. Custody of Brown*, 153 Wn.2d 646, 651, ¶ 9, 105 P.3d 991 (2005) (aunt and grandmother filed competing third party custody petitions); *Custody of S.R.*, 183 Wn. App. at 811, ¶ 18 (aunt and uncle sought custody of child who had been placed with grandparents under separate custody order).

As the U.S. Supreme Court has recognized, “out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which [the courts] have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children.” *Moore v. City of East Cleveland*, 431 U.S. 494, 505, 97 S. Ct. 1932, 1938-39, 52 L. Ed. 2d 531 (1977); *see also Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 844, 97 S. Ct. 2094,

2109-10, 53 L. Ed. 2d 14 (1977) (recognizing the sanctity of familial relationships even absent natural parents, which are “derive[d] from the intimacy of daily association”).

M.W.’s family is no less protected from judicial interference because it is headed by third party legal custodians – his maternal grandparents – and not his parents, who are deceased. The same policy reasons that support protecting parents from third parties demanding visitation with their child are still present here. “The family entity is the core element upon which modern civilization is founded. Traditionally, the integrity of the family unit has been zealously guarded by the courts. The safeguarding of familial bonds is an innate concomitant of the protective status accorded the family as a societal institution.” *Custody of Smith*, 137 Wn.2d at 15.

Even if respondent could pursue statutory visitation under an existing third party custody order, the test would not merely be the “best interests of the child.” (Resp. Br. 13) Instead, respondent would have to prove a basis to modify the existing custody order under RCW 26.09.260, requiring that he prove that there has been a “substantial change in circumstances, the best interests of the child require it, and one of the factors of RCW 26.09.260(2) are present.” *Custody of S.R.*, 183 Wn. App. at 814, ¶ 25. As the

Shmilenkos were married when the original third party custody was entered, but respondent made no effort at that time to be included as a party entitled to visitation, he would not be able to meet the threshold to modify the custody order as there has been no substantial change in circumstances to warrant modification. *Welfare of BRSB*, 141 Wn. App. 39, 47-48, ¶ 23, 169 P.3d 40 (2007) (failure to show a substantial change in circumstances was fatal to father's petition to modify third party custody order).

Because there is no ground for statutory third party visitation, the trial court properly dismissed respondent's petition to be made part of the existing third party custody order granting custody to the Miniums. Respondent has not appealed that dismissal, and has waived any statutory right to visitation in any event.

B. The fact that there is no statutory basis for third party visitation cannot in and of itself be a basis for *de facto* parentage.

Recognizing the weakness of his claim for *de facto* parentage, respondent urges this Court to hold that he is nevertheless entitled to an "equitable remedy" because he otherwise lacks a "statutory remedy." (Resp. Br. 14-16) Respondent's reliance on *Parentage of L.B.*, 155 Wn. 2d 679, 122 P.3d 161 (2005), to claim

that the trial court can grant him an “equitable remedy” for third party visitation even if he cannot meet the *de facto* parent test is especially misplaced (Resp. Br. 14-15) because this Court rejected an identical claim in *L.B.*

In *L.B.*, this Court held that if a third party can establish standing as a *de facto* parent, the court will allow them to pursue visitation “in parity with biological and adoptive parents in our state”. 155 Wn.2d at 710, ¶ 45. But *L.B.* also held if the petitioner in that case could not establish herself as a *de facto* parent, she would be precluded from pursuing visitation. 155 Wn.2d at 714, ¶¶ 51, 52. In doing so, this Court reversed the Court of Appeals, which would have allowed the petitioner to pursue visitation under the invalidated statute if it could be applied without interfering with the parent’s constitutional rights. Thus, this Court in *L.B.* rejected petitioner’s claim, identical to the claim made here, that she should be allowed to pursue visitation as a matter of equity or under the common law. 155 Wn.2d at 713, ¶ 49.

This Court must reject respondent’s invitation to take a less “rigorous” approach in applying the *de facto* parentage factors, which respondent admits is a “rough fit” for this case. (Resp. Br. 16,-17) This Court created its stringent four-part test to establish

standing as a *de facto* parent so that it would be “no easy task” to meet the requirements, in order to avoid opening the door to persons who seek legal rights in children to whom they have not acted as parents, including “teachers, nannies, parents of best friends, adult siblings, aunts, grandparents, and every third-party caregiver.” *Parentage of L.B.*, 155 Wn.2d at 712, ¶ 47.

This Court also must reject the related invitation to create a new equitable right to visitation. (Resp. Br. 21-22) It has long been recognized that the regulation of domestic relations in Washington is wholly statutory. *Goade v. Goade*, 20 Wn.2d 19, 22, 145 P.2d 886 (1944). In this case, just as M.W.’s family unit was statutorily formed under RCW ch. 26.10, any interference with it should too be statutorily based. Another judicially created doctrine is not the answer to the Legislature’s failure to enact a third party visitation statute.

“The Legislature is the fundamental source for the definition of this state’s public policy and [this Court] must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (*cited in Custody of B.M.H.*, 179 Wn.2d 224, 266-67, ¶ 100, 315 P.3d 470 (2013) (Wiggins, J. dissenting)). The

Legislature's failure to enact a third party visitation statute, 17 years after RCW 26.10.160(3) was invalidated as unconstitutional, is presumably purposeful. The Legislature must be satisfied that a third party should only be allowed to pursue a legal relationship with a child over the objection of legal parents or legal custodians if he can meet the test for custody under RCW ch. 26.10 or can prove a "parent-like" relationship under this Court's decision in *L.B.* See *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 361, 804 P.2d 621 (1991) (silence by the Legislature presumes acquiescence in the prevailing judicial construction).

More fundamentally, this Court should learn from its experience with *de facto* parentage that creating yet another poorly defined common law "equitable" basis to grant rights to third parties over children with whom they could not otherwise form a legal relationship under RCW ch. 26.10 is an unwise – and unconstitutional – misuse of judicial resources. As Chief Justice Madsen recognized in her dissent in *B.M.H.*, "in every case facts will vary. This is not a reason to say a statutory gap exists" and allow courts to tinker with families under their "equitable authority." 179 Wn.2d at 250, ¶ 54.

Further expansion of the *de facto* doctrine will encourage economically advantaged third parties to resort to “equitable remedies” when they cannot meet the requirements of the relevant statutory scheme. If this Court further expands the courts’ authority to grant rights to third parties beyond what is authorized under RCW ch. 26.10, the result will be two parallel schemes – one legislative and one judicial – when what the courts should be following is the law written by the Legislature. *See Custody of B.M.H.*, 179 Wn.2d at 270, ¶ 108 (Wiggins, J., dissenting). While the legislative scheme is controlled by statute, the judicial doctrine has proven over the last decade to be an *ad hoc*, ever-changing moving target.

For instance, although this Court held that it was adopting the *de facto* parentage doctrine in *L.B.* because there was a “gap” in the statute preventing the petitioner from seeking rights to a child she raised as her daughter, 155 Wn.2d at 689, ¶ 14, the Court abandoned that reasoning only eight years later in *Custody of A.F.J.*, 179 Wn.2d 179, 185-86, ¶ 8, 314 P.3d 373 (2013), where this Court held that it was not necessary to show a “statutory gap” before the *de facto* parentage could be applied. In its first case addressing the doctrine after *L.B.*, *Parentage of M.F.*, 168 Wn.2d

528, 534-35, ¶ 17, 228 P.3d 1270 (2010), this Court definitively limited the doctrine by holding that former stepparents could not pursue *de facto* parentage. Yet three years later, in *Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013), this Court held that stepparents *could* pursue *de facto* parentage. 179 Wn.2d at 243-44, ¶ 35. Similarly, in *Blackwell v. State Dep't of Soc. & Health Servs.*, 131 Wn. App. 372, 127 P.3d 752 (2006), Division One held a year after *L.B.* that foster parents could not pursue *de facto* parentage, as they had been compensated for their care of the child by the State. 131 Wn. App. at 378, ¶¶ 10, 11. Yet seven years later, this Court in *A.F.J.* held that foster parents should not be “bar[red] recognition” as *de facto* parents. 179 Wn.2d at 188, ¶ 12.

It is the Legislature’s role to create constitutionally valid laws that do not usurp families’ rights to order their affairs. Families are also entitled to protection from unnecessary judicial interference in establishing and maintaining their associations and social relationships, and to consistent and predictable decision-making in the courts. Manufacturing a case-by-case “equitable” visitation doctrine provides neither. And because respondent admittedly cannot prove he meets the stringent test proving he is a

de facto parent to M.W., he has no right to visitation with M.W. over the objection of his legal custodians.

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

The Miniums formed a family with M.W. when they were designated his legal custodians with sole decision-making in his upbringing. They should not be required to bear any further cost defending against respondent's misguided attempt to obtain a legal right to visitation based on a distorted and strained reading of the *de facto* parentage doctrine and his unsupported demand for an "equitable remedy."

The Shmilenkos are in a far better position to pay attorney fees, and it is their actions in seeking a needless court order that have caused the Miniums to incur fees. Being hauled into court to litigate such claims violates a family's constitutional rights whether or not the action is successful - not only because of the litigation's needless and harmful exploitation of private family matters but because of the enormous financial burdens these actions impose on the family. If this Court chooses to exercise its "equitable authority," it should be only to award the Miniums their attorney fees.

III. CONCLUSION

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

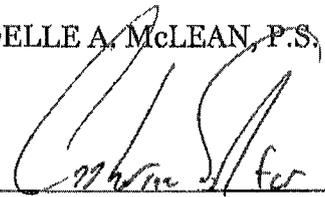
Dated this 24th day of April, 2015.

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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 April 24, 2015, I arranged for service of the foregoing Petitioners' Reply Brief, to the court and to the parties to this action as follows:

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Attached for filing in pdf format is Petitioners' Reply Brief, in the *Custody of Waddle*, Cause No. 90072-8. The attorney filing this document is Valerie A. Villacin, WSBA No. 34515, email address: valerie@washingtonappeals.com.

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