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No. 64334-7-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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In re the Parentage of
J. M.W.,

MICHAEL A. TIPPIE,

Appellant,

and

MARY V. WILSON,

Respondent.

REPLY BRIEF OF
APPELLANT

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I. INTRODUCTION

Appellant asserts his status as a *de facto* parent of J.W in accordance with the standards outlined in *Parentage of L.B.* 155 Wn.2d 679, 122 P.3d 161 (2005) *cert denied*, 547 U.S. 1143 (2006) because it was the parties' intention to create a permanent parenting relationship between himself and the child, regardless of a formal adoption. This intent was demonstrated by a premarital custody agreement signed by both parties that promised the appellant the right to adopt J.W. on or before the child reached age nine, that developed a visitation plan with the child in the event of the parties' dissolution of marriage, and that gave specific direction to how the father would parent the child in the event of the death of the respondent prior to adoption.

Respondent asserts that all stepparents are precluded from seeking *de facto* parent status under *Parentage of M.F.* 168 Wn. 2d 528 (2010). This reading of *Parentage of M.F.* is overbroad and such a reading serves no legislative or public policy, as it would unfairly restrict the rights of people who choose to marry, as well as unfairly discriminating against the children of divorce. The application of *Parentage of M.F.* is limited to its specific facts, namely, that the parties in that case had established legal

rights that were in conflict with the creation of a *de facto* parenting agreement, therefore, the doctrine did not apply.

The trial court overlooked the intended permanency of the agreement reached by the parties in this case, despite the lack of a formal adoption. Appellant asserts the trial court erred in its reading of the agreement and in its application of the law to the facts.

Appellant seeks that the Court of Appeals reverse the trial court and remand the case for trial on its facts. Appellant further seeks that the trial court appoint a guardian ad litem to investigate the *de facto* elements. Appellant asks the court deny the respondent's motion for attorney's fees.

II. REPLY ARGUMENT

A. The *de facto* parent doctrine is applied on a case by case basis and access to the doctrine does not exclude stepparents as a class. There is legitimate interest served in restricting access to the law based on marital status and to do so violates public policy promoting marriage and discriminates against children of divorce.

Respondent asserts the court should categorically restrict the rights of stepparents, in a dispute over establishing parenting rights to a child and asserts that *Parentage of M.F.* 168 Wn.2d 528 (2010) supports such discrimination. This is an overly broad reading of that case that serves no public interest or legislative policy, and in fact, may violate public policy as discouraging parties from marrying and in discriminating against children of divorced parents. The case of *Parentage of M.F.* is fact

specific and application of the *de facto* parent doctrine should be determined on a case by case basis. The court held in *M.F.* that the stepfather seeking custodial rights to M.F. in that case had access only to a proceeding under RCW 26.10, and he would have to meet the burdens of that statute for it to apply. *Id.* at 533. *M.F.* did not hold as a matter of law that stepparents cannot access the *de facto* parent doctrine. *Id.*

1. The purpose of the *de facto* parenting doctrine is to recognize and establish parental rights in a child where the parties' original intent and agreement was to create permanent parenting rights.

To understand the court's decision to limit application of the *de facto* doctrine to exclude the former stepparent in *Parentage of M.F.*, 168 Wn. 2d 528 (2010) it is important to keep in mind the purpose of the *de facto* parenting doctrine versus the purpose of a proceeding under RCW 26.10, the non parent custody statute. The doctrine of *de facto* parenting was first adopted in the case of *Parentage of L.B.* when a same sex partner alleged that she had a parenting agreement with the biological parents to be the child's parent. *Parentage of L.B.* 155 Wn.2d at 679, 684 (2005). The biological father in that case agreed to forego his rights as father in favor of the same sex parent and the parties' agreement was memorialized in a notarized document that all three parties admitted to, though the actual document had become lost. *L.B.* at 684. Seven years later, when the mother tried to cut off all contact between L.B. and the same sex parent,

the court decided it would fashion a remedy for the parties taking into account “the original intent and agreement of the parties and the lack of a statutory remedy.” Cited from *Parentage of M.F.* 168 Wn.2d 528, 531 (2010). *Parentage of L.B.* , 155 Wn. 2d 679, 707 (2005). The petitioner in *L.B.* was asking the court to recognize her status as parent, a *de facto* parent, as agreed to by both biological parents. *L.B.* at 684. In so doing, she was not alleging that either parent was unfit or unsuitable, to the contrary, she was alleging that while fit, each biological parent made the decision to grant her parenting status. *Id.* The petitioner in *L.B.* had originally sought parenting status under RCW 26.26, the parentage statute. *Parentage of L.B.* 155 Wn.2d 679 (2005). The court declined to grant her parenting status under RCW 26.26, and thus, determined that there was no statutory proceeding by which the petitioner could establish her parenting rights to L.B., but, given the conduct of the parties to that point, it was in the interest of the family unit to create a standard that would apply to protect the family. *Id.* at 704. The court adopted the following test to determine whether the conduct of the parents intended to create a *de facto* parent:

- 1) That the natural parent consented to and fostered a parenting like relationship,
- 2) the petitioner and the child lived together in the same household,

3) the petitioner assumed the obligations of parenthood without expectation of financial compensation, and
4) the petitioner has been in a parental role for a sufficient length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a *de facto* parent is limited to those adults who have fully and completely undertaken a **permanent**, unequivocal, committed and responsible parental role in the child's life. [stress mine]

Parentage of L.B. 155 Wn. 2d 679, 708 (2005).

In this respect, the doctrine acts as a “common law” action for adoption where parties have a private agreement to parent a child, the parties have acted on that agreement, creating psychological bonds between the *de facto* parent and the child, which gives rise to rights in the child, rights which should be considered by the court and protected.¹ *Id.* at 704. A *de facto* parent, once established, stands in parity with an otherwise legal parent. *Id.* at 708. However, the parental privileges are not granted as a matter of right (as in adoption, RCW 26.33 or under the

¹ *De facto* parenting though like an adoption is dissimilar to an adoption proceeding in several respects: the adoption statute requires no preliminary bonding relationship, only a stable home (RCW 26.33.190), an adoption proceeding may terminate the rights of one or more natural parents, (RCW 26.33.150), and the legislative intent of the adoption statute is finding stable homes for children. (RCW 26.33.010). By contrast, the *de facto* parent doctrine requires the active encouragement and participation of a natural or adoptive parent to promote the petitioner child relationship, and requires proof of a bonded relationship. Compare RCW 26.33.010 and RCW 26.33.150 to *Parentage of L.B.* 155 Wn. 2d 679, 708. An adoption proceeding is a far more streamlined process and can be completed from the beginning of the relationship to the end within a year or less. Thus, Wilson's adoption of the child in this case started in 1998 and by the end of 1999 her adoption of J.W. was approved. (CP 183)) She started the international adoption process before she'd even laid eyes upon the child. (CP 183)

parentage statute, RCW 26.26), but only as is determined to be in the best interests of a child. *L.B.* at 708-709.

The *de facto* parenting doctrine incorporates elements of prior recognized case law, including cases of “parenting by estoppel,” a doctrine recognized by the American Law Institute as a modern trend in family law proceedings.² Estoppel arguments have also been applied in the context of parentage actions under RCW 26.26 to allow persons who have parented children under the belief the child was their biological child due to the conduct and representations of the other parent, to disallow genetic testing which may disestablish paternity, if it is in the best interests of the child. *Parentage of S.E.C.*, 154 Wash. App. 111, (2010); *McDaniels v. Carlson*, 108 Wn.2d 299 (1987). Other states have followed similar estoppel arguments under similar statutes confirming parentage of non biological

² In a footnote in *Parentage of L.B.* the court stated as follows:

[T]he American Law Institute’s recent recommendation supports the modern common law trend of recognizing the status of de facto parents. See ALI PRINCIPLES §§ 2.01-2.04, 2.18. The ALI Principles support the establishment of both “parent-by estoppel” and “de facto parent.” Relevant here, according to the ALI’S recommendations, “parent by estoppel” would include an “[i]ndividual who is a co-parent since the child’s birth, pursuant to a co-parenting agreement with the legal parent(s).” Id. § 2.03, at 114 (emphasis omitted)(contemplate[ing] the situation of two cohabitating adults who undertake to raise a child together, with equal rights and responsibilities as parents”). Under slightly different standards than that which we adopt today, the principles support recognition of de facto parents Id. § 2.03, at 108-108 (defining individuals who lived with the child for not less than two years and with the agreement of a legal parent performed caretaking functions equal to or greater than the legal parent. Finally, the principles then recommend an allocation of parental responsibilities to “parent[s] by estoppel” and “de facto parent[s].” Id. § 218, at 385. Tippie would meet the criteria established by the ALI as a parent by estoppel.

children where a parent's conduct fosters a parenting relationship between the non parent and child. *Marriage of K.E.V.*, 883 P.2d 1246 (1994).

2. Unlike the *de facto* parent doctrine, the purpose of a proceeding under RCW 26.10 is to protect a child from the negative or careless actions of a parent which may cause or actually causes detriment to a child.

The purpose of a proceeding under RCW 26.10, the non parental custody statute, was to allow third parties, *non parents*, the right to petition for custody of a child when the child is not in the custody of the parent or neither parent is a suitable custodian for the child. RCW 26.10.030. Unlike the *de facto* parent doctrine, the non parental custody statute requires the petitioner to assert that the parents have essentially acted in some way to cause harm or detriment to their child, such as abandoning the child (where the child is not in the custody of either parent), or causing actual detriment to the child (by way of physical, or in some cases, psychological harm) such that the parent should be deprived of their natural right of custody to their child. RCW 26.10.030. Such a petitioner must prove a parent unfit or show actual detriment to the child, as opposed to what is in the child's best interests because the law protects a natural parent and presumes the parent will act in their child's best interests. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 2060 (2000).

It is doubtful an unfit parent could grant a person *de facto* parenting rights; however, a fit parent would not be deprived of custody under RCW 26.10 unless they were causing actual detriment to their child. *Marriage of Allen* 28 Wash.App. 637, 647, 626 P.2d 16 (1981) (the court awarded a stepmother custody of her deaf stepson under a predecessor statute to RCW 26.10, where she had immersed herself and her children in deaf culture and natural parents had not been as involved, detriment to the child could result if child is placed with a natural parent.) A petitioner for *de facto* parent status cannot proceed without the agreement of all natural parents to a parenting relationship with the child. *Parentage of J.A.B.* 146 Wn. App. 417 (2008) (petitioner obtains written consent to adopt from both natural parents, and is later determined to be *de facto* parent.)

By contrast, a petitioner for non parental custody does not need a parent's agreement if the elements under RCW 26.10.030 can be proved. *Custody of Stell* 56 Wn. App. 356, 360 (1989) (an aunt is awarded custody of her nephew over the objections of the child's father as she had become the psychological parent and it would be detrimental to deprive the child of that relationship); See also, *Custody of Shields*, 157 Wn.2d 126, 130 (2006). A proceeding under RCW 26.10 is temporary in nature and does not create a permanent parenting relationship. See *Parentage of J.A.B.* 146 Wn. App. 417, 426 (2008). An action under RCW 26.10 is

almost like a private dependency proceeding where a private party steps into the role of the State to protect the child. RCW 13.34.

3. The case of *Parentage of M.F.* stands for the proposition that where there is no evidence of the intent and agreement of the parents to form a permanent parenting relationship between a child and the petitioner, application of the *de facto* parent doctrine is not appropriate.

Keeping in mind the differences between the *de facto* parent doctrine, and, the non parent custody statute, RCW 26.10, the court stated that the petitioner's remedy, in *Parentage of M.F.*, 168 Wn.2d 528, 531 (2010) if any, was a proceeding under RCW 26.10 and not application of the *de facto* parent doctrine. The facts are very important to understanding the court's reasoning. In *Parentage of M.F.*, the child's biological parents, Reimen (mother) and Frazier (father) separated during M.F.'s infancy and executed a parenting plan governing their respective rights, placing M.F. primarily with Reimen. 168 Wn.2d at 530. After this, Corbin, the petitioner, meets and begins residing with Reimen; they marry and have two biological children. *Id.* Corbin and Reimen then divorce and a parenting plan is entered governing only their two biological children. *Id.* Corbin has bonded parent like role with M.F., but, does not include M.F. in his parenting plan when he and Reimen divorce. *Id.* However, Reimen allows M.F. to accompany Corbin's biological children on visits with him. *Id.* When M.F. is thirteen, Corbin is alarmed that the

mother's boyfriend may be mistreating all the children, including leaving bruising on M.F. in intimate places. *Parentage of M.F.*, dissent at 537. Corbin petitions to modify his parenting plan with Reimen seeking primary care of his biological children. *Id.* at 530. In seeming retaliation, Reimen terminates further contact between M.F. and Corbin. *Id.* Corbin then contacts Frazier and enlists his support to petition for *de facto* parent rights over M.F. to which Frazier, furious about the danger to M.F., agrees. *Id.* at 537.

The trial court held that the elements of a *de facto* relationship were established based upon the fact that M.F. was Corbin's stepchild and the duration of the relationship. *Parentage of M.F.* 141 Wn. App 558, 604 (2008). The Court of Appeals, reversed the trial court and held that the court's inquiry should not begin with application of the elements of the *de facto* parent doctrine, but with whether application of the doctrine to the facts was correct and in the case of M.F., the court held it was not. *Parentage of M.F.* 141 Wn.App. 558, 604 (2008).

The Supreme Court agreed with the Court of Appeals procedural inquiry and stated of the *de facto* parent doctrine as follows:

We created this remedy to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy. *L.B.* 155 Wn.2d at 707. We concluded that a common law remedy is available when, in the absence of applicable

statutes, the court is called upon to administer justice according to the promptings of reason and common sense....” *L.B.* 155 Wn.2d at 689 (quoting *Bernot v. Morrison*, 81 Wash. 538, 544, 143 P.104 (1914)). Taking into account the original intent and agreement of the parties and the lack of a statutory remedy, we fashioned a remedy to fulfill the parties’ agreement. But the factors prompting us to recognize a remedy in *L.B.* are not present in this case, as no statutory gaps exist to fill. [stress mine]

Parentage of M.F. 168 Wn.2d 528, 535 (2010).

In *Parentage of M.F.*, the court looked to the intent of the parties as represented by their existing agreements. 168 Wn.2d 528, 531. In *M.F.*, there was a parenting plan between Frazier and Reimen regarding M.F. *Id.* at 529. There was a parenting plan between Reimen and Corbin regarding their shared biological children. *Id.* at 530 There was no document or asserted agreement that would demonstrate that the parties’ intent was for Corbin to replace either of M.F.’s existing parents-“in this case we are faced with the competing interests of parents- with established parental rights and duties- and a stepparent, a third-party who has no parental rights.” *Id.* at 532. In fact, although Corbin had Frazier’s agreement to a parenting relationship by the time he filed his petition for *de facto* parenting, he did not have Reimen’s agreement. *Id.* at 536.

The “original intent and agreement of the parties” should guide in governing whether application of the *de facto* doctrine is appropriate. *M.F.* at 531. In *M.F.*, the very issue that brought Corbin in to court was

more akin to a proceeding for non parental custody under RCW 26.10- criticism of a parent's actions that are said to cause detriment to a child- rather than the promise of both natural parents to a parenting relationship.

The court must look to the facts of the case to determine which law is appropriate. There should not be a hierarchy that precludes application of the law based upon a party's title- applications of the law should depend only on the facts, specifically on the intent and actions of the parties. The two actions, non parental custody, and *de facto* parenting, are completely different, though in certain circumstances, not mutually exclusive. In *Parentage of J.A.B.*, 146 Wn. App. 417 (2008), the court affirmed a trial court application of the *de facto* parent doctrine and held that because that doctrine applied, it was not necessary to proceed under RCW 26.10. In *J.A.B.*, the petitioner, Benjamin, originally sought custody of a child under RCW 26.10, but ultimately pursued a claim as a *de facto* parent. 146 Wn.App. 417, 421 (2008). The original custody order was obtained during a period when the biological mother, was having difficulties with her mental health, could not properly parent the children and the biological father was in another state. *Id.* Although the biological parents initially resisted Benjamin's claim for custody under RCW 26.10, later they agreed that they would allow Benjamin to adopt the child under RCW 26.33. *Id.* At this point, both biological parents clearly agreed to a

permanent parenting relationship between Benjamin and the child, different from the legal relationship they had previously established (the mother and father had a prior parenting plan). When the biological parents later rescinded their agreement to adopt, Benjamin amended his petition to include a claim as a *de facto* parent and, after application of the factors, the court held that he did not have to pursue the remedies under RCW 26.10 because he established his rights as a *de facto* parent. *Id.* at 427.

4. It is against the public policy of our State to exclude stepparents as a class of persons from seeking relief under the *de facto* parent doctrine strictly by virtue of their marital status.

The court in *Parentage of M.F.* noted that there is no statute that permits a stepparent to petition for parental status. *M.F.* at 533. Where a petitioner is not seeking a custodial relationship, but rather a parental relationship, the *de facto* doctrine should apply, if the original intent and agreement of the parties was to create a permanent parental relationship. To restrict application of a law aimed at protecting children's relationships with their parents based purely on the marital status of the parents is against our State's policies when it comes to protecting families.

In *Parentage of L.B.*, the court summarized the legislative history from which it outlined the underlying policies of our State's approach to families:

1) our state's certain and unwavering emphasis on the "best interest of the child" and on a child centered approach to resolving custody and visitation disputes; (2) the legislature's recent proclamation supporting previous common law holdings, that the marital status of a child's parents shall have no bearing on the child's rights to a legally cognizable relationship with parents, see RCW 26.26.106; *Kaur*, 11 Wn.App. at 364 (3) our legislature's commitment to the principle that sex and gender roles do not serve as a proper basis for distinction between parenting parties, see RCW 26.26.051; Const. Art XXXI §1 and (4) the recognized and accepted role of the judicial branch of our government in resolving family law disputes, especially when the legislative enactments speak to an issue incompletely. See *supra* pp 688-690. [stress mine] *L.B.* at 701.

Given the above cited legislative policies, it makes little sense to categorically exclude "stepparents" as a class of persons to whom the *de facto* parenting doctrine would apply and to limit a stepparent's sole measure of relief under the law to that outlined in RCW 26.10 (the non-parent custody statute) or RCW 26.33 (the adoption statute), both of which are also available to non-stepparents.³

The court in *Parentage of M.F.* expressed concern that the elements of the *de facto* parenting doctrine were ill suited in the stepparent context because in most cases they will be easily satisfied. *Parentage of M.F.* at 534. These comments are *dicta* because the court in *M.F.* did not apply the elements of the *de facto* parent doctrine to the case before it. *Id.*

³ In fact, prior statutes such as RCW 26.09.240 tried to make visitation more accessible to stepparents and grandparents than strangers, but were held to be an unconstitutional imposition on the rights of parents. Nevertheless, it did not appear that in protecting parents, the court's intention was to make the road for stepparents and grandparents more difficult than for live in non-marrying partners.

In addition, in the following instances non stepparents could also easily satisfy the elements of a *de facto* parentage action for the same reasons as a stepparent: 1) a partner in a meretricious relationship, 2) a partner in a domestic partnership, 3) a live in partner who chooses not to marry, 4) an intimate partner who chooses not to marry, or 5) a same sex partner who is barred from marriage. Therefore, the only result to such a restrictive reading of the law would be to create a potentially chilling effect on marriage which is against our State's public policy. *Van Dyke v. Thompson*, 95 Wn.2d 726, 732 (1981). It is illogical for Tippie to have had greater access to parental rights by not marrying Wilson, than having married Wilson. But more importantly, why should a child of divorcing parents, where one party makes a claim that they are a *de facto* parent, need *less* protection by the law than a child with parents who never married? The title held by the party should be irrelevant to the determination of whether or not the doctrine applies and we ask that the court disregard such a broad restriction of the law based upon *dicta* in *M.F.*.

5. The de facto doctrine applies to Tippie because it was the parties' original intent and agreement to create a parenting relationship between Tippie and J.W.; not a stepparent relationship which would have occurred automatically by operation of law.

The “original intent and agreement of the parties” is extremely important to determining when the *de facto* parent doctrine applies. The seminal question before the court should be: Whether it was the parties’ specific intent to create a *permanent* parenting relationship between the petitioner and the child that would carry with it “parental rights and responsibilities”? *Parentage of L.B.*, 155 Wn.2d 679, 709 (2005)

A stepparent relationship is not a *per se* permanent parenting relationship that could afford a person access to the *de facto* doctrine. *Parentage of M.F.*, 141 Wn.App. 558, 565 (2008). The petitioner in *M.F.* could not rely solely upon the marriage or duration of the relationship, or even the implied actions of the biological parents to demonstrate the intent to create a *permanent* parenting relationship. *Parentage of M.F.* 168 Wn.2d 528, 532.

In contrast, in our case, Wilson executed a Premarital Custody Agreement with Tippie which was clearly at odds with the adoption certificates she had obtained by the courts to parent J.W. as a single parent. (CP 134) Tippie testified he would not marry Wilson without the Prenuptial Agreement. (CP 122). Wilson revised and redrafted portions of the Premarital Custody Agreement to her satisfaction, and ultimately, the parties clearly agreed to a *permanent* parenting relationship between

Tippie and J.W. intended to survive the parties' divorce and either party's death. (CP 123) The relevant portions of that agreement state:

Prenuptial Custody Agreement

...

a) We mutually believe and agree that it is in the best interest of children for them at all times and under any circumstances, to continue to have a continual substantial loving relationship with both their mother and father. We believe that not to have a substantial involvement of both a mother and father in a child's life would be detrimental to healthy psychological and spiritual growth in the child, hence it is our honest and dedicated intention to hereby foster such a cooperative relationship between the children and both parents at all times and at all costs. We recognize that while divorce between parents may terminate the marriage relationship for the parents, it does not ever diminish a mother's or father's parental relationship or responsibilities. Consequently we stipulate the following:

1. After the parties marriage on 7/19/02, upon Julia turning nine years of age, or when the Parties agree to do so, whichever comes first, Michael Tippie will adopt Julia Marisol Wilson.
2. In the event of dissolution of marriage between Michael Tippie and Mary Wilson, Michael will obtain at a minimum, custody of Julia every other weekend and one day midweek as well as at least four weeks in the summer through Labor Day, Christmas Break excluding Christmas Day, Father's Day and Michael's birthday. In addition, every other year Michael will have custody on Julia's Spring Break as well as Christmas Day, New Year's Day, Thanksgiving and Halloween.
3. Each parent will pay for that proportion of child support costs, medical and dental costs and child care costs for which they have physical custody of Julia.
4. Both parents will have access to school, medical and legal records.
5. Michael will pay for the entirety of Julia's post secondary undergraduate education and half of any graduate work she may undertake up to the time she is 30.

6. In the event Michael dies after dissolution of marriage, Julia will be entitled to $\frac{1}{4}$ of Michael's estate.
7. In the event Michael predeceases Mary while Julia is a minor, liberal visitation between Monica and Elliott Tippie and Julia Wilson will be the norm. In the event Mary predeceases Michael, custody of Julia will be joint between Michael Tippie and Soney Wilson of Richland, WA as stipulated in clauses 8-11 below.

CLAUSES 8-11 ONLY APPLY UPON MARY'S DEATH PRIOR TO THE ADOPTION OF JULIA BY MICHAEL.

...
(CP 134) [underline stress mine, bold print in original]

It is therefore clear in the above agreement that the parties contemplated a *permanent* parenting relationship with Tippie both under the scenario of adoption, which was to occur on or before age nine, *or* if events occurred to interfere with the adoption (such as death or divorce), and even absent adoption of the child by Tippie. Thus, the intention of an ongoing, permanent, parental relationship is clear in the parties' intent and agreement. The parties intended that J.W. have *two* parents, a mother and a father; and a family, a brother and a sister, regardless of whether the parties continued with their own relationship.

In addition, following signature of that agreement, the parties married, thereby fulfilling the only conditional clause in the agreement. (CP 263) In this case, it is appropriate for the court to protect the family unit created by Tippie and Wilson for J.W. (CP 134) Like the petitioner

in *Parentage of L.B.*, there is no statute that protects the parenting rights of the family unit created by Tippie, J.W. and Wilson. *L.B.* at 704.

The enforceability of parenting agreements are typically raised between *two parents* and are weighed by the courts according to what is in the best interests of the children. *In re Marriage of Their*, 67 Wn.App. 940, 944,(1982) (the terms of an agreement pertaining to child custody are not binding on the trial court, but are subject to application of statutory factors). In this sense, Wilson and Tippie acted as two parents would act to minimize conflict in the life of their daughter, J.W. (CP 134). Unlike Corbin in *Parentage of M.F.*, Tippie immediately sought to enforce his parenting rights in J.W. upon his dissolution of marriage. (CP125 and CP 357) Tippie did not rely upon Wilson's authority as J.W.'s sole parent; Tippie asserted that he was J.W.'s other parent and as such that he deserved parenting rights. (CP 125 and CP 357)

The trial court's preliminary ruling denying Wilson's 12(b)(6) motion was tantamount to a holding that Tippie has established a *prima facie* case for a *de facto* parent. (CP 14) The trial court's error was in failing to allow evidence of the elements of the *de facto* parenting claim to proceed to trial.

B. Respondent did not present any argument nor cite any law which supports the contention that the "consent" factor can be decided as a matter of law.

The respondent did not dispute that consent is an issue of fact, to be decided by the trier of fact and therefore, there is no need to reiterate in reply, the law regarding consent. There is a solid dispute of fact in this case- Tippie presented significant evidence, a signed and notarized typed agreement to parent, (CP 134), his own declaration outlining the parenting rights and responsibilities imparted to him both before, during and after marriage, (CP122-139 CP 286-297) the declaration of an adult member of the household, Monika, regarding Tippie's parental relationship with J.W., (CP 349-352), the declaration of family friends, (CP173-174) school records identifying respondent's care relationship, (CP141-171) even a journal post-separation kept by Tippie that Wilson consented to and fostered a parent-like relationship between himself and J.W. (CP 332-348) Wilson is contesting that she gave consent based solely upon her post relationship/post divorce statement with *no evidence* that she revoked the agreement to parent prior to a *de facto* relationship having been established. (CP 134) The issue of her "consent and fostering of a parent like relationship" should have proceeded to trial.

1. Wilson's analysis of a "one parent" household do not apply because J.W. never resided in a one parent household.

Wilson does not adequately address why she should receive greater constitutional protection against the *de facto* parent doctrine because she

adopted J.W. as a single parent. The law does not discriminate against a single adoptive parent and she is at no greater risk of consenting to a parental relationship for her child than any other parent, married, single, widowed or domestic. There simply is no policy purpose served in creating hierarchies under the family law which differentiate protection based upon one's title as single parent, dual parent, stepparent, or same sex parent. The court's primary inquiry should be whether the legal parent in the exercise of their constitutional rights to their children, agreed to create a new parenting relationship and if so, how to protect the child's right to a stable and healthy family life. *Custody of Shields*, 157 Wn. 2d 126, 151 (2006). Constitutional protections require both an agreement to a permanent parenting relationship *and* implementation of the agreement under the standards set forth in *L.B.* 155 Wn.2d 679, 712. In *State ex rel. D.R.M.*, 109 Wn. App. 182, 190, 34 P.3d 887 (2001), the court declined to impose a common law obligation of child support on a same sex partner who agreed to create a family by having a child with the biological mother, but whose relationship was severed by the biological mother before the child was born. *Id.* at 187. Thus, agreement alone is insufficient to create parenting rights *or* responsibilities; application of the *de facto* doctrine elements would be required.

Wilson may have intended to create a one parent household *before* she met Tippie, but, Tippie's claim to *de facto* parenting is born out of her agreement to the two parent household they created together. Tippie received the consent of the only lawful parent J.W. had, Wilson, to explicit parenting rights, in writing, with signatures notarized. (CP 134) She differs from the parents in *M.F.* because the rights created by the custody agreement she signed with Tippie were inconsistent with the decree of adoption Wilson had received naming her as sole parent to J.W.

Wilson's agreement to a permanent parenting relationship between Tippie and J.W. occurred after the parties signed the agreement, the parties then performed the only condition in the agreement, they married. Julia's age was not a condition to consent to adoption- the adoption was to occur upon *earlier* of mutual agreement or upon Julia turning nine years of age. (CP 134). The fact that consent was revoked seven years after consent was given is what should have created an issue of fact for the trial court in applying the *de facto* parent doctrine.

Application of the *de facto* doctrine in this case does not create for Wilson or Tippie a "limbo of doubt" as to whether one's conduct might result in another demanding parenting rights as may have been feared by the New York Court of Appeals in *Debra H. v. Janice R.*, ___ N.E.2d ___ (N.Y. May 4, 2010). The agreement between Tippie and Wilson

carefully spelled out exactly what each party understood would be their rights, and their responsibilities to this child.

C. The court should have appointed a Guardian Ad Litem to protect the rights of J.W. to her parenting relationship with Tippie as Wilson has a conflict of interest in representing J.W.'s rights.

An action for Parentage under RCW 26.26 is more analogous to an action for *de facto* parent than any other action. In considering the indispensability of the child to such an action, courts have held that constitutional considerations require that children be parties to actions determining their paternity in recognition of the principle that “no individual should be bound by a judgment affecting his or her interests where he has not been made a party to the action.” *State v. Santos*, 104 Wn.2d 142, 146, (1985), See also *Parentage of Q.A.L., D.M.G.*, 146 Wn. App. 631, 636 (2008). Moreover, there is a presumption arising from of case law that the biological parents cannot decide the possibly conflicting interests of their children when paternity is in doubt. *In re Burely*, 33 Wn.App. 629, 633 (1983). Similarly, in the course of a proceeding where a parent is terminating or relinquishing rights to their children, the child’s interests must be represented by a guardian ad litem or the termination shall be voidable. *Marriage of Furrow*, 115 Wn.App. 661, 673 (2003).

To this point, J.W.’s interests haven’t been heard. Wilson has adamantly opposed that J.W.’s interests be heard. (CP 300) It is clear that

Wilson's interests in the matter are in direct conflict with J.W.'s interests in having Tippi as J.W.'s father.

As such, appointment of a guardian ad litem for a child should occur on determination that a petitioner in a *de facto* parent case has set forth a *prima facie* case and that such appointment would be in the best interests of the child. To require a petitioner to demonstrate "adequate cause" is too high a burden given the possible vulnerabilities of the child and the position of the parties. Unlike a non parental custody action, under RCW 26.10.030, or an action for modification of parenting plan under RCW 26.09.260, the petitioner in a *de facto* parenting case is attempting to maintain the status quo relationship between themselves and the child, which the legal parent seeks to alter. In contrast, in a modification of parenting plan, or in a non parental custody case, the petitioner is seeking to shift the status quo to something different; modified from the facts as they stand. To protect the interests of the child, the court should maintain status quo and investigate the allegations made by the petitioner if it is in the child's best interests. Therefore, a lower burden of proof is required to protect the child in a *de facto* parenting action than in modification or non parental custody cases.

The constitutional rights of the parents are protected from unlawful inquiry because the threshold question that should be asked

before the doctrine is applied is whether or not the lawful parents agreed to a permanent parenting relationship between the petitioner and the child. If evidence demonstrates it is more likely than not the parties agreed that the petitioner adopt a permanent role as a parent in the child's life, then a guardian ad litem should be appointed to investigate the child's best interests. Thus, as pointed out in *L.B.*, "the two principles, the welfare of the child and the right of the parent must be considered together, the former being the more weighty." *L.B.* at 698.

Tippie made a *prima facie* showing that he is the *de facto* parent of J.W. (CP 14) The court affirmed that Tippie brought a *prima facie* case by denying the respondent's motion for CR 12(b)(6). (CP 14) The court erred in granting summary judgment and should have immediately investigated the child's rights before terminating her relationship with the only father J.W. has. Failure to do so was error and warrants remand.

D. The respondent's claim as a *de facto* parent is not frivolous; this is an evolving area of law and respondent's claim is valid in light of Wilson's proven agreements.

It is ironic that Wilson is the party in breach of a parenting agreement she made, she drafted, signed and stood by for seven years, and she is the one to try to claim that Tippie is acting in a litigiously and frivolously. (CP 123) It is Wilson who is seeking to cut Tippie from J.W.'s life because she is angry that he divorced her and cannot see past

that anger to J.W's interests. (CP 350). The trial court denied respondent's claim for CR 11 attorney's fees. The trial court's discretion in determining whether an action is frivolous will not be disturbed on appeal absent a showing of abuse of discretion. *Clark v. Equinox Holdings, Ltd.*, 56 Wn.App.125, 132, review denied 113 Wn.2d 1001 (1989). The respondent fails to show any abuse of discretion by the trial court, but instead seeks to inflame the passions of the Appellate Court by making Tippie appear unsympathetic and alleging he is trying to harm the mother financially. Clearly, there is absolutely no evidence demonstrating harm to the mother as a motive in Tippie's action, financial or otherwise. In fact, Tippie is trying to enforce the parties' agreements to protect his daughter's relationship with her only father.

The facts of Tippie's case are so distinctly different from the facts in *Parentage of M.F.*, 168 Wn. 2d 528 (2010) it would be error to follow the outcome. Respondent's reliance on *dicta* in the *Parentage of M.F.* to try to exclude an entire class of individuals from the law based upon titles does not reflect our State's policy to protect families. This appeal is not frivolous and pursuit of it should not be sanctioned.

III. CONCLUSION

This case involves a parent who explicitly agrees to create parenting rights in another person, and garners a reciprocal agreement

from the other person to support that child, to make that child an heir, and acts on that agreement without repudiating it for *seven years*. How can that parent later claim that they were unaware that such a person would pursue an ongoing relationship with the child? At the point where a person has agreed to a parenting relationship in writing, and the other person relies upon that agreement, and engages in a deeply bonded relationship with the child, then the rights of that petitioner and the child, the family created by the parties, should be considered before the relationship is terminated.

Petitioner asks that this case be reversed and remanded to the trial court for a trial on the merits. Petitioner further requests appointment of a guardian ad litem for the child to protect J.W.'s interests. Petitioner asks the court to deny any claim for attorney's fees.

Dated this 9th day of June, 2010.

TSAI LAW COMPANY, PLLC

BY 

Emily J. Tsai, WSBA #21180

Attorney for Appellant

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 June 9, 2010, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals-Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ms. Ann M. Johnson Attorney at Law 110 Main St., Suite 100 Edmonds, WA 98020	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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Dated at Seattle, Washington this 9th day of June, 2010.

Melissa S. Flores

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