64334-7 64334-7

No. 64334-7-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

In re the Parentage of J. M.W., MICHAEL A. TIPPIE, Appellant, and MARY V. WILSON, Respondent.	BRIEF OF APPELLANT

2010 FEB 13 PM 4:37

Emily J. Tsai,
Attorney for Michael Tippie, as Appellant

Tsai Law Company, PLLC
WSBA #21180
2101 4th Avenue #1560
Seattle, WA 98121
(206) 728-8000

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing a claim for de facto parentage and finding that a prenuptial agreement between the parties, executed in

July, 2002, was decisive as a matter of law on the issue of the mother's "consent" to a parent-like relationship between J.W. and the father in his claim for standing as a de facto parent when the father and the child's relationship spanned a period of nine years, six of which followed execution of the agreement.

2. The trial court erred in failing to appoint a guardian ad litem or attorney to represent the child's interests in a de facto parenting case to investigate allegations of de facto parenting and the child's interest in the litigation.

II. STATEMENT OF THE CASE

This case involves the parenting and support of a nine year old girl, J.W. (CP 357). The Appellant and Petitioner below is Michael Tippie [hereafter Tippie], who asserts that he is the *de facto* father of J.W. as that term is defined by the common law. (CP 357). The Respondent, Mary Wilson [hereafter Wilson], is the adoptive mother of J.W. (CP 261). Tippie is 52 years old and works as an executive in the biotech industry. (CP 261) Wilson is 56 years old and works for the Attorney General of the State of Washington. (CP 261) The parties are former live in partners, as well as former spouses. (CP 122).

1. Relationship between Tippie and J.W.

Wilson and Tippie met and began a dating relationship in April, 1999. (CP 262). At that time, Wilson was in the process of adopting J.W. in an international adoption proceeding from Guatemala. (CP 262)

Wilson was scheduled to pick up J.W. in Guatemala and invited Tippie to go along. (CP 121). At the time, the parties were in a dating relationship and Tippie viewed this invitation seriously, as he believed it involved a deeper level of commitment in the romantic relationship. (CP 121). Ultimately, he agreed and accompanied Wilson to Guatemala. (CP 121).

J.W. was four months old when Wilson and Tippie went to Guatemala to pick her up. (CP 121). Tippie held J.W. for the first time in Guatemala with Wilson at his side, and it was also the first time Wilson had ever held J.W. (CP 121) Tippie felt an immediate bond to the child. (CP 121). Tippie further tried to insure that J.W. would have a pictorial memory of her home land by taking multiple pictures for posterity. (CP 121). The relationship between Wilson and Tippie deepened, as did the relationship between Tippie and J.W. (CP 122). In December, 2000, when J.W. was one year old, the parties moved in together to live as a family. (CP 263). Prior to that time, Tippie had been spending more and more nights with Wilson and J.W. as the romantic relationship grew and to protect Wilson and J.W. from a potentially violent neighbor. (CP 122)

Early in the relationship, Tippie had his own home, was previously divorced, and had two children who resided with him 50% of the time. (CP 289) In December, 2000, Tippie and Wilson purchased a house

together and moved into that house with J.W. and Tippie's older children, Monika, then age ten years, and Elliott, age eight. (CP 262) From the time J.W. began to speak, she referred to Tippie as "Daddy". (CP 123). At no point did Wilson object to this designation of Tippie as J.W.'s father, and Tippie is the only father J.W. has ever known. (CP 123).

Tippie later proposed marriage to Wilson, and she accepted. (CP 122). The parties agreed to marry in July, 2002. (CP 122).

Tippie was married previously and presented Wilson with a document entitled "Premarital Property Agreement with Provisions for Minor Children." (CP 122 and 130). This document was presented approximately a month before the parties were to marry. (CP 122). Wilson is an attorney and knew what had been presented to her. (CP 264). When Wilson failed to comment to Tippie about the document for several weeks after she'd had it, Tippie told Wilson in no uncertain terms that he would not marry her without a signed prenuptial agreement. (CP 122). Tippie stated that in the document he wanted to define their relationship and their commitment to each other, as well as memorialize the several verbal agreements they had made up to that point regarding J.W. (CP 122). Wilson spent two days revising the document, especially the provisions regarding the custody provisions of J.W. in the event the parties

separated or divorced. (CP 123). Tippie is unaware whether or not in the several weeks she had the document, she ever sought legal advice; however, she denies doing so. (CP 122-123 and 263) The final, signed version of the document provides as follows in section 9, (a) (1) and (2) :

> "(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 [J.M.W.] [1]"
>
> (2) In the event of dissolution of the marriage between Michael Tippie and Mary Wilson, Michael will obtain, at a minimum, custody of [J.W.] 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 Michaels birthday. In addition, every other year, Michael will have custody on J.W.'s Spring Break as well as Christmas Day, New Year's Day, Thanksgiving and Halloween.

(CP 134)

Following this statement, were several other provisions governing allowing J.W. to continue in a relationship with her step brother, Elliot and step sister, Monika. (CP 134) Additional provisions included that J.W. would inherit from Tippie's estate (1/4th) as though a legal child and with whom J.W. would reside should Wilson predecease J.W. or Tippie. (CP 134). Tippie states that this document simply encompassed the verbal

[1] In the actual document, the child's full name was spelled out, but for purposes of this brief, this author shall place the child's name in initials, in brackets, when indicating that the child's name was used and replaced by initials, to protect the child's privacy and identity.

discussions and agreements the parties had shared prior to its execution. (CP 123) Both parties signed the agreement on July 16, 2002, and their signatures were notarized. (CP137-138). The parties were married on July 19, 2002. (CP 263)

Over the course of the next six years, until he filed for divorce, Tippie filled the role of J.W.'s father. (CP 123-124). Tippie, Wilson and J.W. lived together on a full time basis. (CP 123) Tippie's older children resided with this family unit half the time, with the exception of a short period when Monika was 15 years old and lived primarily with her mother. (CP 350) Tippie is the only father J.W. knows or has ever known. (CP 123). Until the divorce was filed, Tippie was listed in school records as J.W.'s "parent", and in fact was often the person designated to pick J.W. up after school. (CP 142). Tippie and J.W. have a bonded relationship: they played piano together and they went to the zoo. (CP 350). Tippie and J.W. cook together as part of their bonding experience, without Wilson. (CP 291) Tippie and J.W. frequently went camping together, hiking, and would spend weekends at Tippie's cabin. (CP 292). These activities were encouraged as part of his bonding experience, and Wilson often stayed home. (CP 351)

At times, Tippie held jobs that required a lot of travel for work purposes during the week, but was home with the family every weekend. (CP 294) At times, Tippie was unemployed and was primarily responsible for picking Julia up from school and volunteering at the school Julia attended, and other household chores. (CP 295, 332)

Wilson admits that she consented to J.W.'s relationship with Tippie as her "stepfather" and differentiates this role from the role of "father." (CP 264) Wilson essentially states that Tippie never measured up in his role of father and therefore she held off on allowing a legal adoption. (CP 265) Wilson testifies that she agreed to allow Tippie to adopt J.W. in the prenuptial agreement "to placate him." (CP 263)

2. Procedural History

Tippie filed a petition for dissolution of marriage and made a request for *de facto* parentage in that petition. (CP 125) Wilson moved to sever the *de facto* case from the dissolution. (CP 125). The case was severed and a new petition for *de facto* parentage was drafted. (CP 125 and 357). The new petition left out the element of "consent" in pleading the claim for *de facto* parentage. (CP 358). Tippie moved the court for an order appointing a GAL to investigate the best interests of the child. (CP 326). Wilson opposed the appointment of GAL and the court denied

the appointment until a prima facie showing of *de facto* parentage was made. (CP 300) Tippie moved for the court to make a prima facie finding of his *de facto* parentage, for temporary parenting plan, and for appointment of a guardian ad litem on the family law calendar. (CP 353). Wilson moved for dismissal under CR 12(b)(6) (failure to state a claim for relief) on the civil calendar, alleging Tippie failed to plead the element of "consent to a parent like relationship." (CP 275). Tippie's motions for temporary orders were set for the same day as Wilson's motion to dismiss under CR 12(b)(6). (CP120). Tippie stated his plea of *de facto* parentage included the element of consent as it cited to the common law doctrine of *de facto* parent, it is a notice pleading state, and the element of consent is contained within a claim for *de facto* parentage. (CP 124,) In the alternative, Tippie requested leave to amend his complaint to include the element of consent. (CP124). The court granted Tippie's verbal motion to amend his complaint to include the element of consent. (CP 17) At the hearing on Wilson's motion to dismiss under CR 12(b)(6), the court moved to hear the matter as a CR 56 motion, solely on the element of consent, under summary judgment, rather than as a 12(b)(6) motion. (CP 17) The parties agreed to have the element of consent heard under CR 56 (summary judgment). (CP 17) The court denied Wilson's motion to

It is therefore,

ORDERED ADJUDGED AND DECREED that Michael Tippies Determination of De Facto Parent Status should be and is hereby DISMISSED WITH PREJUDICE and with statutory costs awarded to the Respondent. The trial date set for September 30, 2009, shall be stricken."

(CP 15)

Tippie appeals the court's dismissal of his case on summary judgment and appeals the court's denial of his request for appointment of a guardian ad litem, which motion was made prior to dismissal of the case. (CP 17)

III. ARGUMENT

1. The trial court erred in dismissing a claim for de facto parentage and finding that a prenuptial agreement between the parties executed in July, 2002, was decisive as a matter of law on the issue of the mother's "consent" to a parent-like relationship between J.W. and the father when the father and the child's relationship spanned a period of nine years, six of which followed execution of the agreement.

A. Standard of review on summary judgment is de novo

The standard of review by an appellate court of a trial court decision on summary judgment is de novo. According to the court of appeals:

"We review summary judgment orders de novo, making the same inquiry as the trial court and considering all facts and reasonable

inferences in the light most favorable to the nonmoving party. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A material fact is one upon which the outcome of the litigation depends. Questions of fact may be determined as a matter of law when reasonable minds can reach only one conclusion."

Jones v. Dep't of Health, 140 Wn. App 476, 487 (2007). Washington courts have also stated that for a motion on summary judgment, the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an "existing factual issue." *Id at* 494. The appellate court has stated:

" A material fact is one upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249 (1993); *Cochran v. Great W. Cas. Co.*, 116 Wn. App. 636, 641 (2003). Like the trial court, we consider facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249. Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437."

Larry Marks v. Washington Insurance Guaranty Association, 123 Wn. App. 274, 277-78(2004); see also *Cameron v. Downs* 32 Wash. App 875 (1982).

The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are

considered in favor of the non moving party. *Goad v. Hambridge*, 85 Wn. App. 98, 931, P. 2d 200 (1997).

B. Governing Law- De facto Parenting

In his claim for standing to seek visitation with J.W., Tippie asserted he was a *de facto* parent under the criteria established in *Parentage of L.B*, 155 Wn.2d 679, 122 P.3d 161 (2005). In *Parentage of L.B.*, the court enumerated the following criteria to establish standing as a *de facto* parent: 1) the natural or legal parent consented to and fostered the parent like relationship, 2) the petitioner and the child lived together in the same household, 3) the petitioner assumed the 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, depended relationship, parental in nature. *L.B.* 155 Wn.2d 679, 708, 122 P.3d 161 (2005). In addition, the de facto parent must demonstrate that he had fully and completely undertook a permanent, unequivocal, committed and responsible parental role in the child's life. *Id.*

In *Parentage of L.B.*, 155 Wn2d 679, 122 P.3d 161 (2005) petitioner was the same sex domestic partner of the natural mother of *L.B.*, was present in the child's life since her infancy and asserted that she

fulfilled the role of psychological and *de facto* parent to the child all of *L.B.*'s life. The petitioner in *L.B.* requested the court recognize her standing as a statutory parent under RCW Chapter 26.26, the Parentage Act. *L.B.* at 683. In the alternative, she requested that the court grant her standing as the *de facto* parent of L.B., a status that should be recognized under Washington common law, because that status was not recognized by statute. *L.B.* at 684. The *L.B.* court refused to grant petitioner standing under the Parentage Act, RCW Chapter 26.26; however, the court did recognize a common law basis for *de facto* parent standing, if the petitioner could meet the four criteria enumerated above. *Id.* at 708.

Since adoption of *L.B.* the court of appeals has stated that it is insufficient to merely allege the common law elements, and that a claimant must show a factual basis for stating the elements. *Parentage of M.F.*, 141 Wn. App. 558, 170 P.3d 601 (2007), review granted by *In re Parentage of Frazier*, 163 Wn. 2d 1052, 187 P.3d 752 (2008). Thus, the court has specifically determined that analysis of the elements involves specific determinations of fact and it is not enough for a court to run through the elements in making such a determination. *Id.* at 604.

The element of consent is material in a *de facto* parenting case because the legal parent's "consent" to a "parent like relationship" is the

burden which overcomes a legal parent's constitutional challenge to their right to parent their child in the way they see fit. According to *L.B.,* in meeting a constitutional challenge to a parent's right to parent, the court stated:

> "critical to our constitutional analysis here, a threshold requirement for the status of the de facto parent is a showing that the legal parent "consented to and fostered" the parent-child relationship...The State is not interfering on behalf of a third party in an insular family unit, but is enforcing the rights and obligations of parenthood that attach to de facto parents; a status that can be achieved only through the active encouragements of the biological or adoptive parent by affirmatively establishing a family unit with the de facto parent and child or children that accompany the family." *Parentage of L.B.* at 712.

If the court finds a person has established the criteria that they are a *de facto* parent, then the constitutional challenge to a parent's fundamental parental liberty interest is still protected because the State is not telling the biological parent what they are to do with their child, the State is merely upholding decisions already made by the biological parent in introducing the *de facto* parent into the child's life: the State is recognizing that the natural parent "is fit and has acted in the best interest of the children" in fostering the relationship. *Id.* at 709.

i.- Determining the element of "consent" in looking at a case involving *de facto* parenting is to decide a material issue of fact.

Historically the function of a summary judgment motion was to avoid a useless trial. Courts have stated that "A trial is not useless but absolutely necessary where there is a genuine issue as to any material facts. It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn there from as to ultimate facts such as intent, knowledge good faith, negligence, et cetera, a summary judgment would not be warranted." *Preston v. Duncan*, 349 P. 2d 605, 606 (1960).

Many Washington cases discuss what constitutes an issue of material fact: See *First Class Cartage, Ltd. V. Fife Service and Towing, Inc.* 121 Wash. App 257 (2004) (Holding genuine issue of material fact as to whether the towing company provided proper notice to owners); *Suzan Berger v. John Sonneland* 101 Wn. App. 141 (2000) (question of fact as to whether Ms. Berger was injured by Dr. Sonneland's unauthorized disclosure of confidential information related to health care and was obtained within the physician-patient relationship) *In the Matter of the Corporate Dissolution of Ocean Shores Park, inc.; James R. Jordan et al.*, v. *Gloria Rawson-Sweet* 132 Wn. App. 903 (2006) review denied by *Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 2007 Wash. LEXIS 176 (2007) (The intent of transferors of and the issue of the

effectiveness of the deed was a question of fact); *Gordon Bruce MacMeekin v. Low Income Housing Institute, Inc.* 111 Wash. App. 188 (2002) (the intent of the parties for purposes of a claim to an implied easement, is a question of fact that may not be decided as a matter of law if more than one reasonable inference can be drawn from the evidence).

All of these cases demonstrate a common thread- that the determination of a party's state of mind and the receptor's understanding during a given interaction is a question of fact, and not a question of law. Specifically, in determining an issue of fact, the courts must evaluate the credibility of the parties to determine what truly happened, especially when evaluating allegations of promises or notice provided orally to parties.

In one particular case, the Washington appellate court stated that the dispute over the existence of an oral agreement is a question of fact that may not be decided on summary judgment. *Crown Plaza Corporation v. Synapse Software Systems, Inc.* 87 Wn. App. 495 (1997). In *Crown*, the tenant alleged that he had attempted to move out prior to the termination of the lease in accordance with an oral termination agreement between the parties, which required the tenant to vacate the premises by a certain date. *Id.* at 498. The landlord denied the existence of the oral agreement. On

appeal, the court held that the trial court had erred in granting summary judgment to the landlord because there was a genuine issue of material fact as to whether the tenant breached the lease when it attempted to vacate the premises, or whether it was carrying out its obligations under the oral termination agreement. As the court stated: "Here, Combs stated that he and Tiderington entered into an agreement, and Tiderington denies it. Only a fact finder can determine which of these statements is more credible, considering all the evidence, including the unsigned written agreement and the reasonableness of the agreement. " *Id.* at 501. Essentially, the court has stated that disputes over the existence of oral agreements were not appropriately decided on summary judgment because such disputes depended a great deal on the credibility of the witnesses.

The case here is similar. The principal issue of fact is whether or not Wilson had consented to and fostered the parent-like relationship between Tippie and J.W. as set forth in the elements of a *de facto* parenting case. The facts surrounding this issue include, but are not solely limited to, the reliance by Tippie on promises made in a prenuptial agreement, whereby the petitioner father was promised the ability to adopt the child, but also discussed support of the child and a visitation/parenting plan even in the absence of an adoption. (CP 134) Facts also exist about

the father's relationship to his daughter, including his role as father, his title as "daddy" before, during, and even after marriage between the parties, and the repeated promises made by the mother to the father that he could adopt their daughter legally over a span of nine years as well as the father's actions in responding and relying upon that promise. (CP 123)

The verity of the mother's repeated oral promises are best left for a trial court to decide, to make the decision after hearing testimony rather than relying on a document executed seven years earlier which may or may not have represented each parties' state of mind at that time. Whether or not Wilson consented to Tippie's parent-like relationship with J.W. is an issue of fact just like the issue of whether or not an oral agreement existed in *Crown*, and therefore should not be decided preemptively by a summary judgment motion. The element of "consent" is partly subjective, whether a person agreed to a state of affairs, and partly objective, whether a reasonable person would understand the consent given. *Crown* at 501. It seems entirely reasonable that when the prenuptial agreement was signed, containing a provision that Tippie would adopt the child by age nine, and that Tippie would have visitation rights to the child in the event of divorce, and even without an adoption, that he

would believe Wilson was consenting to him having parenting rights in J.W. (CP 134)

Tippie outlined several of the parental functions he fulfilled in his declaration in opposition to a motion for dismissal under CR 12(b)(6). In his testimony, Tippie asserted:

> "Mary by referring to me as [J.W.'s] father, having [J.W.] call me Dad and Daddy, and by asking me to commit myself to [J.W.] consented to my de facto parent status. This status was not created by a single document, (such as an adoption petition) or by a single act (by our legal marriage where I became a step parent) or by any one single attendance at an event (such as picking her up from Guatemala)- I allege my status as de facto parent was created over a series of decisions, years and acts which we both consented to, permitted, encouraged and created for [J.W.] the sense of family and security that comes from a two parent household. I am not alleging I am [J.W.'s] stepfather. I am alleging I am [J.W.'s] *de facto* father as defined by earlier case law and set forth in various legal standards."

(CP 123-124)

In addition, Tippie presented additional evidence in the form of declarations of others who witnessed the mother's consent to a parent like relationship between Tippie and J.W., including evenings out together as father and daughter alone, weekend events together as father and daughter alone (CP 173), and standards which Wilson expected from Tippie as the child's father. (CP 177). The court seemed completely

disinterested in the parental role fulfilled by Tippie over the previous nine years, minimizing evidence of his interactions with his child in the findings as nothing more than the "role of stepparent." (CP 15)

Tippie's role as father to J.W. spanned nine years, including a period of three years which preceded marriage. (CP 126) Tippie had, in addition to testimony of multiple witnesses to his parenting role and to Wilson's consent to that role, the prenuptial agreement which outlined his rights in the event of dissolution of marriage, the death of the mother, and his time with the child should either such event occur. (CP 134) The document evidenced Wilson's agreement, her "consent," that, even if Tippie did not legally adopt J.W., he would have parenting rights to her. (CP 134).

The court's finding that consent by the legal parent was not made as a matter of law based upon the existence of a prenuptial agreement which stated that the husband would adopt the child no later than the age of nine years, and sooner if the parties agreed, at a time when the child was three years old is reversible error. In fact, if the court applies all reasonable inferences in favor of the non moving party, in this case- Tippie, then the prenuptial document clearly demonstrates the intent to create a parent like relationship between Tippie and J.W. (which

included parenting time and financial support) which could be relied upon with the promise of a legal adoption when the child reached age nine.

ii. The trial court erred by equating the element of consent to requiring a petition for legal adoption of the child under RCW 26. 33.030

The element of consent as set forth in *Parentage of L.B.* does not require that a parent initiate or even agree to a legal adoption of the child. 155 Wn.2d 679, 708, 122 P.3d 161 (2005). In fact, in *L.B.* there was no legal adoption, nor is there mention of any obstacle to having started or pursued a legal adoption.

In addition, in, *Parentage of J.A.B.* where the court granted de facto status to a parent following trial, the biological parents in that case initially consented, then later withdrew their consent to adoption, by the *de facto* parent, yet the element of "consent to and fostering of a parent like relationship" was still found in that case. 146 Wn.App. 417, 421, 191 P.3d 71, 73 (2008). If the court required a *de facto* parent to obtain the consent of a legal parent to an adoption, it would render the entire purpose of the common law cause of action redundant, as virtually any person with a parent's consent would simply adopt the child and there would never be a need for a cause of action for a *de facto* parent.

To hold as a matter of law, as the trial court did, that to prove consent of a legal parent to presently adopt a child as the standard under which consent to be a *de facto* parent must be proven, would essentially undermine the entire cause of action for all *de facto* parents who have invested significant time, love, effort into their children at the invitation of legal parents, simply because they could not or did not pursue legal adoption under RCW 26.33. It does not appear anywhere in the case law that the intent in creating the *de facto* parenting cause of action was to mimic or repeat the statutory standards for adoption of a child and *In Parentage of J.A.B*, 146 Wn.App. 417, 427, 101 P.3d 71 (2008), the appellate court has specifically rejected the procedural requirement that a parent must satisfy the statutory criteria set forth in RCW 26.10 before asserting status as a *de facto* parent. Therefore, it stands to reason that there is simply no support that a parent would have to fulfill the statutory criteria of RCW 26.33 before acquiring standing as a *de facto* parent. Had Tippie been J.W.'s adoptive parent, he would not have needed to pursue a cause of action as a *de facto* parent. In fact, the court in *L.B.* specifically recognized the significance of parent-child relationships that may otherwise lack statutory recognition. *L.B.* at 20. Therefore, the trial court erred in applying such a standard in this case.

iii. The trial court erred in holding that the petitioner's cause of action was barred as a matter of law because solemnization of the legal parent's consent did not occur when the child was an infant, adopted by the mother in Guatemala.

The trial court also erred when it held that the element of "consent" outlined in *Parentage of L.B.* was required to occur at the inception of the relationship between the parties with a solemnizing event. 155 Wn.2d 679, 122 P.3d 161 (2005) In *Parentage of L.B.,* the court did not impose an expiration date on the moment when a legal parent could or could not consent to a parent- like relationship with the child, and in fact, noted multiple cases where the inception of the relationship between the *de facto* parent and the child differed and consent to a parent like relationship was not necessarily obtained at the outset of the relationship. In *Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981) cited by the court of appeals to demonstrate how Washington common law had previously stepped in to protect children in unique circumstances, the child was three years old when the stepmother of a hearing impaired child became involved with the child, and the child was seven years old when the father and the stepmother separated. *Id.* at 641-42. The significance of the relationship between the stepmother and the child in *Allen* was based upon the stepmother's continued parenting and interest in the child's disability

through the years, not a single initiating event. In *Parentage of L.B*, the child was conceived by artificial insemination and the relationship between the non-biological parent and the child began at birth and was disrupted when the child was six years old. *L.B.* at 5. In *Parentage of J.A.B.*, the mother and *de facto* father began a romantic live in relationship when the child was four months old where the father fulfilled the role of breadwinner for the first several years, then later stepped into the role of primary caretaker of the children when the mother had had a nervous breakdown. 146 Wn. App. 417, 420.

In the case at bar, the father first held the child, even before the mother in Guatemala, and the relationship between J.W. and Tippie blossomed, until the date the parties separated nine years later. (CP 126). J.W. has no other father, has referred to Tippie as her "daddy" since she could first speak, was read to by him, attended events with him and developed a parent like relationship with him fully encouraged and approved by Wilson. (CP 123) Tippie's daughter, Monika, testified that J.W. is her little sister, that J.W. grew up in a family with a mother, a father, a sister and a brother. (CP 351) Monika testified that Wilson seeks to deprive J.W. of that family due to issues of him not meeting Wilson's expectations. (CP 351) The court should have allowed a trier of fact to

consider the evidence presented by Tippie as to the consent to a parent like relationship that had occurred over the span of the nine years of J.W.'s life- not arbitrarily cut off any such action based upon the lack of an adoption proceeding seven years earlier.

2. The court erred in failing to appoint a Guardian Ad Litem to investigate the relationship between Tippie, Wilson and J.W. when Tippie requested the same before the court.

Prior to the motion for 12(b)(6), Tippie moved the court for appointment of a Guardian Ad Litem to investigate and protect J.W.'s best interests. (CP 300) Wilson opposed said motion, arguing that Tippie had no statutory or common law basis in which to request appointment of a guardian ad litem, and further, that Tippie was required to prove his status as a *de facto* parent before he could move the court for appointment of a Guardian Ad Litem. (CP 326)

A. The Court Findings Regarding Appointment of a GAL.

The court findings regarding the issue of the appointment of the guardian ad litem specifically state:

"The court finds this is an evolving area of law (de facto parent) and undefined by statute. The court finds there needs to be at least a prima facie threshold hearing before the court appoints a guardian ad litem, and there is no authority for the court to do so..."

(CP 300)

Tippie revised the family court commissioner, the Judge denied the revision, and further held that either party could move the court for appointment of an attorney for the child on reconsideration. (CP 300)

Under *Parentage of L.B.*, the court stated that the petitioner in that matter did not have standing under RCW 26.26 the parentage statute, to assert her status as a legal parent; however, she did have standing to prove she was a *de facto* parent and if so determined, to petition for the corresponding rights and obligations of parenthood. 155 Wn.2d at 39. Additionally, it may be noteworthy to point out that procedurally, after *L.B.* was decided at the appellate level, the trial court appointed a guardian ad litem to investigate the matter, prior to a trial establishing Carvin as a *de facto* parent. *L.B.* at 687, footnote 4.

Because *L.B.* was decided based upon the common law, specifically because no statutory provision applied to that relationship, there is no specific statutory provision regarding appointment of a guardian ad litem in a case involving the investigation of a parenting plan in a *de facto* parenting matter. However, as the court in *L.B.* so aptly stated:

> Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations. Yet simply because a statute fails to speak to a specific situation should not and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned. We cannot read the legislature's pronouncements on this subject to preclude any potential redress to Carvin or L.B. In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law- to effectuate the best interest of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state."

Parentage of L.B. at 47.

There is clear statutory authority to appoint a guardian ad litem for a person who is incapacitated due to their minority. RCW. 11.88.010(d) Further, it is incumbent upon a court to protect the interests of minor children by appointment of a guardian ad litem, especially where the interest of a legal parent may be adverse to that of their child. *Ponti v. Hoffman*, et al., 87 Wash. 137, 140; 151 P. 249 (1913).

It is also apparent in *L.B.* in dicta, that the court is recognizing that the child may have a constitutional interest in the family unit separate from the claimant and from the legal parent, and that appointing counsel to represent the children separate from the GAL, to act on their behalf and to represent their interests may be appropriate and in the interests of justice.

Parentage of L.B. at 58, ft 29. It is clear from the line of *de facto* cases, that specific inquiry should be made into the relationship between the claimant and the child to protect the interests of the family unit. In *Parentage of L.B.*, the court cited the reasoning of a Massachusetts case in adopting the *de facto* parent doctrine. In weighing the legal parent's constitutional rights against the rights of her partner the court noted that "the family unit deserving protection was the family unit consisting of the biological mother, the lesbian partner, and the child, *id.* at 833, and the child's interest in maintaining his filial ties with the plaintiff counters the biological mother's custodial interest." *L.B.* at 42, citing from *E.N.O. v. L.M.M.,* 429 Mass, 824, 833, 711 N.E.2d 886, cert denied, 528 U.S. 1005, (1999). The court went on to note, in that case, that the non traditional family unit was "the only family the child has ever known." *Id.*

In addition, in *Parentage of J.A.B.*, the court rejected any requirement that a claimant satisfy statutory criteria outlined in RCW 26.10 before alleging the factors in the *de facto* parent cause of action because the court stated that such statutes focus on the relationship between the legal parent and the child, rather than the relationship between the claimant and the child. 146 Wn.App. 425. As such, the child's interest may very well be at odds with the legal parent's interest, and

appointment of a guardian ad litem, at the very least, and perhaps an attorney if the court is going to terminate the child's relationship with the claimant, is warranted.

In this case, the court essentially terminated the rights of Tippie to have any further contact with J.W. without any investigation into the child's relationship with Tippie whatsoever. (CP 17) Tippie first held the child at the age of four months. (CP 121) Tippie and the child resided in the same home together for a period of more than 7 years. (CP 123) J.W. called Tippie her "Daddy." (CP 123) J.W. lived with Tippie's children, her brother and sister, for those same 7 years. (CP 350) J.W. has no other father than Tippie. (CP 123) In addition, Monika testified that Wilson was bearing a grudge against Tippie and that J.W., the child, was essentially collateral damage in that grudge. (CP 350)

In this matter, the court denied the petitioner's motion under 12(b)(6), thereby establishing that Tippie had asserted a prima facie cause of action for *de facto* parenting. But the court dismissed the action without the investigation of a guardian ad litem on behalf of the minor child's relationship with Tippie. (CP 15) At such time as the court found the plaintiff had alleged a cause of action that would have such a significant impact on the child's future, the court should have appointed a

GAL because at that point, the child's interest in maintaining a relationship with a *de facto* parent may have conflicted with the legal interests of the parent. The court should remand and order that the trial court appoint a guardian ad litem or an attorney to protect the interests of the child.

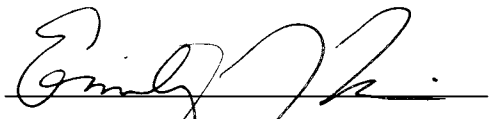
CONCLUSION

The Appellant in this case requests that the court reverse the trial court's order of summary judgment and remand the case for trial on the merits. The issue of whether or not Wilson consented to and fostered a parent like relationship between Tippie and J.W. was a disputed issue of fact. Tippie put forth sufficient evidence of Wilson's actions in consenting to and fostering a parent like relationship between J.W. and Tippie to have the issue considered at trial, where the veracity of each party and witness would be subject to the scrutiny of the court. The evidence demanded by the court that Tippie would have to file for adoption and obtain Wilson's consent before he could demonstrate consent under the *de facto* parent laws would have rendered the law of *de facto* parenting meaningless and redundant. The requirement that Tippie obtain consent of Wilson at the inception of his relationship with J.W. seemed an arbitrary requirement unsupported by case law.

Tippie therefore requests that the court reverse the trial court with a direction that the issues raised by Tippie are sufficient to take to trial. In addition, Appellant Tippie requests that on remand the court direct the trial court to appoint a guardian ad litem for J.W. and/or an attorney for J.W. to investigate the relationship between the parties and to protect the interest of the child in maintaining filial ties to her entire family unit. For these reasons, the trial court should be reversed and the case should be remanded for trial.

Dated this 18th day of February, 2010.

Respectfully submitted,



Emily J. Tsai, WSBA #21180

Attorney for Appellant Tippie

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 February 18, 2010, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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Office of Clerk Court of Appeals-Division I One Union Square 600 University Street Seattle, WA 98101	____Facsimile __x__Messenger ____U.S. Mail ____Overnight Mail
Ms. Ann M. Johnson Attorney at Law 110 Main St., Suite 100 Edmonds, WA 98020	____Facsimile ____Messenger x____U.S. Mail ____Overnight Mail
Ms. Catherine W. Smith 500 Watermark Tower, 1109 First Avenue Seattle, WA 98101-2988	____Facsimile __x__Messenger ____U.S. Mail ____Overnight Mail

Dated at Seattle, Washington this 18TH day of February, 2010.

Melissa S. Flores

Melissa Flores