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**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

In Re the De Facto Parentage of:

MASON COTTON MILLER, a minor child,

And

RUSS FULTON, Respondent.

vs.

FRANK MILLER, Father/Appellant

And

MEGHAN COTTON, Mother/Appellant,

**APPELLANTS' REPLY TO ACADEMY OF MATRIMONIAL
LAWYERS AMICUS BRIEF**

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I. INTRODUCTION

This case is about a child, MASON MILLER (hereinafter “Mason”), whose acknowledged father, Respondent, RUSS FULTON (hereinafter “Mr. Fulton”) was properly dismissed under *RCW 26.26.540* after his biological father, Appellant, FRANK MILLER (hereinafter “Mr. Miller”) and biological mother, Appellant, MEGAN COTTON (hereinafter “Ms. Cotton) filed a timely Petition to Establish Paternity within two years of the Mason’s birth. After being dismissed, Mr. Fulton filed a *de facto* parentage and third party custody claim in which the trial court ultimately awarded him parental rights to Mason, creating a 3-way parenting relationship between the biological father, the biological mother and the unrelated party, Mr. Fulton.

The real issue in this case is not what it means to be a parent, “reasonable,” “fit” or otherwise, but whether the facts in this case were so extraordinary that the statutory scheme set out in *RCW 26.26* failed to adequately address the issue of paternity for this child.

The American Academy of Matrimonial Lawyers, at the specific request of this Court, has filed a brief in support of the trial court’s ruling. Utilizing convoluted reasoning and specious analysis, the brief writers would urge this Court to expand the application of *de facto* parentage to encourage the sort of social

engineering that the Uniform Paratage Act (hereinafter “UPA”) was enacted by the Washington State Legislature to prohibit.

II. REPLY OF AMICUS BRIEF

A. THIS COURT HAS NECESSARILY CIRCUMSCRIBED THE APLICATION OF COMMON LAW REMEDIES TO PARENTAGE, CHILD CUSTODY AND VISITATION.

Application of commonly law remedies regarding parantage, child custody and visitation have been properly circumscribed by this Court. As noted in the case of *In re C.S.*, 134 Wn.App. 141, 139 P.3d, 366, at page 153, this Court has noted that:

. . . a common law remedy survives the enactment of a statutroy remedy only ‘if the legislature has not expressed an intention to preempt the common-law remedy and the common-law remedy fills a void in the law. [citing to *In re L.B.*, 121 Wn.App. 460, 476 n.2, 89 P.3d 271 (2004)] There is no void in the law of parentage: the Uniform Parentage Act ‘governs every determination of parantage in this state’ [citing to RCW 26.26.021] and provides a procedure to disestablish a presumed father.

Only in the most extraordinary circumstances should a trial court stray from the legislative mandates of *Title 26* and resort to commonly law remedies in matter of parentage, child custody and visition. Such a case was found in *In re L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). But no such extraordinary circumstances exist in this case and Mr. Fulton had available to him various statuory remedies. See Ex. 25; pg. 4; ln 14-21.

B. CIRCUMSTANCES UNDER THE UNIFORM PARENTAGE ACT AND *IN RE M.F.* PRECLUDE A FINDING OF *DE FACTO* PARANTAGE IN THIS MATTER.

1. The analysis of *In re M.F.* is appropriate.

In *In re M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010), the Washington Supreme Court refused to extend the *de facto* parent status on a step parent because “[a]n avenue already exists to a stepparent seeking a legal, custodial relationship with a child.” *In re M.F.*, *supra*, at page 532. The Court reasoned that since “no statutory void exists in this case, as it did nin L.B., we decline to extend the de facto parentage doctrine to the facts presented.” *In re M.F.*, *supra*, at page 535.

In rejecting *In re M.F.* as suitable basis for this Court’s analysis of the parties’ circumstances and support for Appellant’s contentions, counsel for the American Academy of Matrimonial Lawyers apparently ignore the fact that Mr. Fulton has already sought to assert, with the assistance of competent counsel, statutory remedies under *RCW 26.10* and *RCW 26.26* to maintain his relationship with Mason on two separate occasions. Although statutory remedies were arguably available to Mr. Fulton, he was properly denied statutory parental status, custody and visition on each occasion based upon the facts of the case and Mason’s best interests.

First, Mr. Fulton asserted remedies under *RCW 26.26* in an action filed under Snohomish County Superior Court Case No. 09-5-00153-6 (hereinafter “Fulton I”).

However, on August 13, 2009, the competing interest of the parties and the “best interests” of the minor child Mason were considered by Judge McKeeman when he issued his ruling dismissing Mr. Fulton as a “father” to Mason. Ex 25; pg 1-4. Judge McKeeman properly determined the UPA and its related statutes were controlling to this factual situation over any common law claims when he noted that under *RCW 26.26.540*:

. . . we do not get to the issue of a de facto parent unless we are in a situation that the legislature has not gone, because we need to rely on common law principles to use the de facto parent analysis, and that only applies in areas where the legislature has not contemplated a particular situation.

Ex. 25; pg. 4; ln 14-21.

Judge McKeeman then concluded that since Mr. Miller had filed his statutory claim for paternity within two years, there “is no need or justification for the Court to resort to a common law analysis and any determination of a *de facto* parent.” Ex 25; pg 2; ln. 18-20. Accordingly, Judge McKeeman dismissed Mr. Fulton as a party “with no rights to the child when he ruled that Mr. Fulton had no remaining legal relationship with Mason under the statute.” Ex. 25; pg. 4, ln 22-25. Judge McKeeman granted Mr. Miller’s Motion for Summary Judgment and established his parental rights

the statute.” Ex. 25; pg. 4, ln 22-25. Judge McKeeman granted Mr. Miller’s Motion for Summary Judgment and established his parental rights as father to the exclusion of Mr. Fulton. Ex 25; pg. 4; ln 22.

Second, Mr. Fulton asserted remedies under *RCW 26.10* in a second action filed under Snohomish County Superior Court Case No. 09-3-02834-8 (hereinafter “Fulton II”). However, these statutory claims for non-parental child custody were dismissed by Commissioner Gaer at an adequate cause hearing conducted prior to trial. See Ex 8. This dismissal was not properly appealed and is not before this Court.

Clearly, what is important for this Court to weigh in determining whether to apply the doctrine of *de facto* parentage is whether there is a statutory remedy applicable to the circumstances before the trial court, because the doctrine of *de facto* parentage was created to “fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy.” *In re L.B., supra*, at page 707, *In re M.F., supra*, at page 531. More importantly, the crucial issue to the Court analysis is whether a statutory remedy exists – not whether a trial court grants the relief requested by a particular claimant. If a statutory remedy exists and is available, but denied, that does not justify application of doctrine of *de facto* parentage.

2. The analysis of *In re J.A.B.* is inapposite.

Counsel for the American Academy of Matrimonial Lawyers rely upon and urge this Court to extend its ruling in *In re J.A.B.*, 146 Wn.App. 417, 191 P.3d 71 (2008). However, reliance on that case is misplaced as the case is factually distinguishable from the facts of the present controversy.

In re J.A.B. involved application of the *de facto* parentage doctrine to a case under *RCW 26.10*, where the child had lived with the *de facto* parent/petitioner for over seven years at commencement of the proceedings, had limited contact with the natural father (who had encouraged the relationship with the *de facto* parent/petitioner) and the natural mother was found to be unfit.

Here, Mason was under the age of two years when these proceedings started, within the time proscribed by *RCW 26.26.540*, and Mr. Fulton's claims under *RCW 26.10* were dismissed and that dismissal has not been appealed. Moreover, unlike the circumstances confronted by this Court in *In re J.A.B.*, Mason has two fit legal parents who are actively raising him successfully and there is no other relief was necessary or called for.

3. Trial court's unlawful emphasis on relationship.

The trial court erroneously focused its attention on Mason's relationship with Mr. Fulton and his paternal relationship at the time of Mason's birth. But the legislature has already considered this issue in setting a two year (now four year) time period within which to challenge an acknowledged parent's paternity under *RCW 26.26.540*. Therefore, the trial court had no business second guessing the legislature's determination of how a court should adjudicate the claims of an acknowledged parent over a natural parent who challenges the acknowledged parent's rights within the proscribed period of time.

The important difference between *In re L.B.* and *In re M.F.* was not "whether or not the petitioner came into the relationship with the child as one of the parents in the original family unit. . . , but whether there exists a statutory void that can only be filled by application of the doctrine of *de facto* parentage. *In re M.F.*, *supra*, at pages 532-535

4. Application of *RCW 26.09.240*.

In an extraordinary flight of sophistry, counsel for the American Academy of Matrimonial Lawyers argue that those portions of *RCW 26.09.240*, that were deemed to be unconstitutional in *Troxell v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) and *In re C.A.M.A.*, 154 Wn.2d 52,

109 P.3d 405 (2005), provide a basis to argue the UPA contemplates Mr. Fulton's right to *de facto* parentage status now.

Without a single cite to the legislative record or case law, counsel for the American Academy of Matrimonial Lawyers argue that after the Washington Supreme Court struck down *RCW 26.09.240* in its entirety in *In re C.A.M.A, supra.*, the legislature impliedly intended *RCW 26.26.130(7)* to be the vehicle to accomplish that which the U.S. Supreme Court and Washington Supreme Court found to be unconstitutional. But if *RCW 26.09.240* was unconstitutional, *in toto*, on what legal basis can *RCW 26.26.130(7)* resurrect any portion of the statute? The legislature has not seen fit to revisit the provisions of *RCW 26.09.240*, so how is one to fathom the legislature's intentions subsequent to *In re C.A.M.A* when the legislature has taken no action? No reported Washington case has ever made this sort of leap of logic for any statute, much less to resurrect a statute the Washington Supreme Court and the U.S. Supreme Court have determined to be unconstitutional.

In the matter of *In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998), the Washington Supreme Court concluded:

Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. State intervention to better a child's quality of life through third party visitation is not justified where the child's circumstances are otherwise satisfactory. To suggest otherwise would be the logical equivalent to asserting

that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a "better" decision.

(Emphasis added)

See also *In Re the Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001), citing *In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998), *aff'd sub nom; Troxel v. Granville, supra*.

The trial court in this case, ignoring the unrebutted testimony of the only expert to provide evidence at time of trial, Dr. Herman Gill, PhD., who opined that Mr. Fulton's further involvement with Mason would be detrimental to the child, essentially concluded that Mr. Fulton would make a "better" parent than Mr. Miller and Ms. Cotton. This is the sort of social engineering that counsel for the the American Academy of Matrimonial Lawyers would have this Court encourage. But this is the very sort judicial behavior the Washington Supreme Court has specifically admonished courts to avoid. *In re Custody of Smith, supra*.

III. CONCLUSION

The parenting plan entered in this case is inconsistent with the statutory scheme of the UPA and violates the constitutionally protected parental rights of Mr. Miller and Ms. Cotton, Mason's legal and natural parents. The facts of this case were not unique

and beyond the contemplation of the Washington Legislature when it adopted *RCW 26.26.540*. Indeed, the facts of this case fit well within the statutory scheme.

What is most troubling about the trial court's analysis is that it appears to be utilizing the common law *de facto* parentage doctrine to engage in social engineering, believing Mr. Fulton to be a "better" parental role model than Mason's biological and legal parents. This is the sort of judicial behavior *RCW 26.26* was designed to discourage and the Washington Supreme Court has admonished courts to avoid.

The trial court's rulings were clearly erroneous, entered in contradiction to well established Washington statutory and case law and should not be permitted to stand. Mr. Miller and Ms Cotton respectfully request this Court to reverse the findings and conclusions of the trial court and remand the matter back for further hearing to repair the damage that has been inflicted on this family. Justice demands no less.

DATED this 13th day of May, 2012.

RICHARD LLEWELYN JONES, P.S.



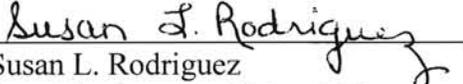
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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that the foregoing Reply Brief was served on the following parties in the manner indicated.

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