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No 67748-9

**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,

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPELLANTS' OPENING BRIEF

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ORIGINAL

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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 child’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 *de facto* father, Mr. Fulton.

The real issue in this case is not what it means to be a parent, 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.

It is Appellants’ position that the trial court erred because it refused to consider the perfectly adequate statutory remedies available under *RCW 26.26*, in favor of the extraordinary common law remedy of *de facto* parentage, believing the facts of this case to be so unique and the statutes so ambiguous that the statutory remedies were inadequate to address the parentage claims made by

these parties, relying on *In Re L.B.* and other related cases. Although the trial court found that Mr. Fulton satisfied all the factors of *de facto* parentage because he was the acknowledged father and he had a 14-month parental like relationship with the child prior to the filing of his paternity action in April 2009, it is Appellants' contention that almost every paternal claimant could meet the trial court's conditions for *de facto* parentage, thus rendering the applicable statutes meaningless.

The two biological parents in this action, Mr. Miller and Ms Cotton have been forced to endure with Mr. Fulton's *de facto* parentage despite his being dismissed as having no legal relationship with the child on August 13, 2009, as required under statutory law. Paternity was established in this matter to the exclusion of all others on August 20, 2009.

The particular factual situation in which a biological father asserting his rights of parenthood within two years of an acknowledged paternity is precisely the scenario that the Washington Legislature intended the statute to cover when it enacted the Uniform Paternity Act (hereinafter "the UPA") in 2002. *RCW 26.26.540* establishes a bright-line rule of dismissal and severance of the acknowledged parental relationship for the non-prevailing party and this dismissal has been upheld as in the best interests of the child. Mr. Fulton should have no legal

relationship with Mason and the trial court erred when it found Mr. Fulton to be a *de facto* parent under a common law claim despite his failure to meet the requirements for parentage under the UPA.

The only way paternity is determined under Washington law is first apply a strict statutory inquiry under the UPA. If, after application of the UPA, a specific factual circumstance not contemplated by the statute is confronted, the trial court is permitted to consider common law doctrines to determine paternity. It is Appellants' contention that the trial court erred when it adjudicated Mr. Fulton a *de facto* father/parent to Mason Miller under common law as he had two fit biological parents and any adjudication after August 2009 was clearly contrary to the Laws of the State of Washington.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it found that:

“Mr. Fulton has a right to have the issue decided.”

RP 3: 23-24; 6/16/2011.

2. The trial court erred when it found that:

“The Doctrine of *Res Jusdicata/Claim Preclusion* is not applicable to the facts of this case because, as a matter of law, Mr. Fulton could not claim *de facto* parentage under the Uniform Parentage Act.”

CP 136: pg. 2. No. 3.

3. The trial court erred when it found that:

“as a matter of a law the requirement under *In re MF* that a party pleading de facto parent[age] state must show adequate cause to modify the original parenting plan of the minor child is not applicable to the facts in this matter as the plan entered in Fulton I was only a temporary plan.

CP 136: pg. 2. No. 4.

4. The trial court erred when it consolidated the Paternity action filed in April 2009 with the de facto parentage action filed in November 2009 after the statutory dismissal of Mr. Fulton.

RP 136: pg. 2. No. 4.

5. The trial court erred when it ruled that a party statutorily dismissed under the UPA:

“can fall back on de facto common law if you otherwise meet certain requirements” to make the claim.

RP 5: 14-16; 6/16/2011.

6. The trial court erred when it made the following finding:

“I am finding, as a matter of law, that under the circumstances that are undisputed in this case, the issue of de facto parenting can be litigated, because we have a situation where the biological mother, without dispute, agreed to have Fulton be the father.”

RP 9: 8-12; 6/16/2011.

7. The trial court erred when it did not enter a directed verdict dismissing the *de facto* parentage claim when it made the following finding:

“... I conclude, if the facts are as proved, that the mere fact that you have a biological father and a biological mother and a child under two does not wipe out the chance to raise a de facto parenting under this unique circumstance where the third party, Mr. Fulton – who is really the first party, or maybe the second—was the original family nucleus” under the UPA.

RP 9: 16-22; 6/16/2011.

8. The trial court erred when it entered the following conclusion of law/order:

“I find that there has been a triggering factor in this case. . . I find it to be a true fact, that they will not agree to giving any visitation to Mr. Fulton”

RP 1: 4-12; 6/27/2011.

9. The trial court erred when it ruled on the following conclusion of law/order:

“I do find as fact he’s a de facto parent. This is what I just did for the last half hour in finding the five factors that are required under L.B..”

RP 22: 8-10; 6/27/2011.

10. The trial court erred when it entered the following conclusion of law/order:

Russ Fulton is a de facto father of this child and entered a parenting plan and child support order allowing Mr. Fulton all rights and responsibilities to the minor child of the biological parents Frank Miller and Meghan Cotton.

CP 137: 66-68.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a former acknowledged father have the right to make a *de facto* parentage claim if a timely adjudication and dismissal of the party was entered under statutory law as laid out in *RCW 26.26.540*? (Assignments of Error 1, 2, 3, 4, 5, 6).
2. Did the trial court correctly interpret the rights of a party to make a common law claim if the facts in this matter were contemplated under the *RCW 26.26.540* claim and the issue of determining the parents to the child had already been decided? (Assignment of Error 2, 3, 4).
3. Did the trial court err when it found that the use of the statute *RCW 26.26.540* was the triggering factor to allow a *de facto* claim proceed under *In re L.B.*? (Assignment of Error 8).
4. Is *RCW 26.26.540* so ambiguous and the facts of the present case so extraordinarily beyond the circumstances contemplated by the Legislature as to justify the trial court's application of the common law remedy of *de facto* parentage despite the existence of two fit biological parents? (Assignment of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 10).
5. Did the trial court err when it entered a Decree of Custody, Parenting Plan, and Child Support Order using the best

interests of the child standard when a competing Decree and Parenting plan previously determined the best interests of this child in August 2009? (Assignment of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 10).

IV. STATEMENT OF THE CASE

A. Judge McKeeman Dismissed Mr. Fulton under statutory law and the best interests of the child standard.

Mason was born to Meghan Cotton on December 21, 2007.

Ex 1; pg 1.¹

On December 24, 2007, Mr. Fulton andn Ms. Cotton both executed a paternity affidavit, acknowledging to the best of Ms. Cotton's belief that Mr. Fulton was Mason's father. Ex 1; pg 1.

In early January of 2009, Mr. Miller took a DNA test with the results being 99.9997 that he was Mason's father. Ex 33, page 2, Ln. 8-9. It was determined that "there was Genuine Issue of Material Fact exists as the the parentage of this child.". Ex.36; pg 2; ln18-20.

In April 2009, Meghan ceased to hold out Mr. Fulton as having any type of parental relationship with the child when she filed a joint Summons and Petition for Paternity under *RCW* 26.26.540, under Snohomish Superior County Cause No. 09-5-00153-6. Ex 23.

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References to "Ex." refer to those exhibits introduced and admitted at time of trial.

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 determined the UPA and its related statutes were controlling to this factual situation over any *de facto* claim when he noted that under *RCW 26.26.540*, noting:

... 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 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 as father to the exclusion of Mr. Fulton. Ex 25; pg. 4; ln 22.

On August 20, 2009, Judge McKeeman entered orders finding Mr. Miller to be the of Mason. Ex 29; pg. 3; sc 4.1. Judge

McKeeman entered a transitional Parenting Plan that placed Mason into the primary care of Mr. Miller. Ex. 31; pgs. 1-9. Under the terms of the Parenting Plan, Mr. Miller had sole-decision making and was named custodian of Mason. Ex. 31; pg. 5; lns. 3-7. Judge McKeeman wanted a 'transitional plan that would allow Mason to adjust to his changed circumstances in a way that will minimize the psychological trauma he is facing from this difficult situation that is no fault of his own.' Ex 25; pg. 4; lns. 4-8.

Subsequent to the entry of Judge McKeeman's Findings, Conclusions, Order and Parenting Plan, Mr. Fulton filed an appeal which was considered under Court of Appeals, Division I, Case No. 64124-7-I. Ex. 33; pgs. 1-11.

B. Mr. Fulton files a Common Law Claim after being dismissed and determined to be a non-parent.

On or about November 6, 2009, Mr. Fulton brought a third action in the Snohomish County Superior Court, entitled Petition for Establishment of De Facto Parent Status and/or Nonparental Custody, under Snohomish County Superior Court Case No. 09-3-02834-8. CP 214-219. Mr. Fulton sought a "finding that the Petitioner [Mr. Fulton] is the *de facto* father of the minor child Mason Fulton" or, in the alternative, "award the Petitioner [Mr. Fulton] nonparental custody of the minor child Mason Fulton." CP 214-219.

On July 6, 2010, this Court entered its decision affirming Judge McKeeman's Orders of August 13, 2009 and August 20, 2009. At the end of the opinion, this Court states:

"Finally, Fulton contends that a common law claim for de facto parent status is available to him. However, Fulton did not properly raise this issue before the trial court and the trial court did not formally rule upon it. Accordingly, it is not properly before us. We decline to address it."

(Emphasis added) Ex 33; pg. 11.

However, Mr. Fulton never sought to modify the original Parenting Plan entered by Judge McKeeman in the paternity. Ex. 31; pg.3.

On February 26, 2010, six days after expiration of Mr. Fulton's rights under the transitional Parenting Plan entered by Judge McKeeman on August 20, 2009, Mr Fulton moved for adequate cause on his Third Party Custody claim, which was denied. Ex. 8; pg.2. However, incongrusly, the court commissioner who heard the matter granted adequate cause on the Mr. Fulton's *de facto* parent claim. Ex. 8; pg.2. The court commissioner entered a second and conflicting Parenting Plan for Mason, allowing Mr. Fulton to remain in the child's life on an alternating times and days every other weekend. CP 136; pg 6; sc.2; Ins 24-26.

C. Trial court held and Mr. Fulton is determined a *de facto* father to Mason under Common law.

A trial was held before the Honorable Judge Anita Farris to

determine whether Mr. Fulton had a right to claim *de facto* parent status and, if so, would it be in the best interests of this child to name him a *de facto* parent if he was found to be a party allowed to seek status as a *de facto* parent under *RCW 26.26*. CP 137

Mr. Miller and Ms. Cotton presented a Motion to Dismiss Mr. Fulton's claims prior to trial, based upon Judge McKeeman's prior rulings. CP 120. The trial court joined both the parenting actions under the *de facto* parent petition under Snohomish County case number 09-3-02834-8, as all the parties were the same. CP 124.

After Mr. Fulton presented his case, Mr. Miller and Ms Cotton renewed their motion to dismiss, under *CR 41(b)(3)*. CP 120. The trial court denied the motion. RP, June 16, 2011, p. 12; In 9. Mr. Miller's and Ms. Cotton's motion contended that the requirements of *In re L.B* necessitated the existence of "a triggering event", such as denial of visitation for the minor child, and the requirements of *In re M.F.* that a party seeking *de facto* parent status must modify any established Parenting Plan for the child that *de facto* status was being requested. CP 120; CP 122. Mr. Miller and Ms. Cotton specifically noted that application of the doctrines of *res judicata* and collater estoppel dictated a dismissal in view of Judge McKeeman's rulings of August 20, 2009. Ex. 29, pg. 1-6.

On June 16, 2011, the trial court denied Mr. Miller's and Ms. Cotton's motion for directed verdict. CP 120 During her oral ruling, the trial court stated: "I am finding, as a matter of law, that under the circumstances that are undisputed in this case, the issue of *de facto* parenting can be litigated, because we have a situation where the biological mother, without dispute, agreed to have Fulton be the father." RP; June 16, 2011, pg. 9; ln. 8-12. The trial court ruled that "the only fact that's of any relevance whatsoever in a UPA claim under two years of age is genetics. . . .When you have two men fighting, genetics wins. . . . It doesn't matter who parented; none of that other stuff matters." RP, June 16, 2011; pg. 4; ln. 8-9. The trial court further opined that "as to a claim that there is a statutory remedy, Respondents' counsels are correct, that if the statute supersedes the are or provides are remedy, it controls." RP, June 16, 2011; pg. 10; ln. 13-16. But the trial court went on further to say that

This statute filled a necessary function, to have a quick, speedy and clear way to determine who is your legal, biological father within a limited time frame. Determining that is important. It set up a scheme. In doing so, it did not say, Well if somebody doesn't meet biology, they can never bring a *de facto* parent claim.

RP, June 16, 2011; pg. 10 ; ln. 23-25; pg. 11; ln. 1-3.

After further testimony on the issues the trial court ruled on June 27, 2011 that the "triggering event" necessary to affirm Mr. Fulton's *de facto* parent claim was Mr. Miller and Ms. Cotton

filing the statutory Paternity Claim stating they would no longer agree to give Mr. Fulton visitation, despite the termination of all contact between Mr. Fulton and Mason under Judge McKeeman's Parenting Plan of August 20, 2009. RP, June 27, 2011, pg. 1, ln. 4-12. The trial court stated:

“the doctrine of de facto parent in L.B., was very clear, that it can only be applied in extremely narrow circumstances. Those circumstances are not ones where you're gay, they're not the ones where you're a wome . . . The circumstance that makes this unique, as clearly stated by the court outright, are those circumstances where the natural or legal parent has consented to someone acting as a parent to the child.

RP, June 27, 2011, pg. 2, ln. 14-22.

The trial court was questioned as to whether she had done a “made a strict statutory inquiry . . . as to the facts of this case and how they relate to the UPA,” to which the trial court answered “Yes.” RP, June 27, 2011, pg. 21, ln. 9-13.

The trial court ruled, “as a matter of law, I find that he [Mr. Fulton] has a right to make a de facto parenting claim.” RP, June 27, 2011, pg. 22, ln. 1-2. The trial court then went through the five-factor test for *de facto* parent status under *In re L.B.* and related case law and found that Mr. Miller had consented to the relationship by “his behaviors,” despite Meghan informing him he was not the dad. The trial court reasoned that since Mr. Miller did not count down the months and had available to him facts that were verifiable, his consent was based upon having been told by

mother that he may be the child's father, suggesting he may have been "duped" into waiting a year to act on his claims. . The trial court commented that Mr. and doing nothing for a year despite possibly "being duped," as the Court put it. RP, June 27, 2011, page 7, ln. 16-20.

The trial court went on further and stated: "I believe you can have a legal father or a biological father and a de facto father." RP, June 27, 2011, pg. 23, ln. 19-20.

On the basis of the testimony adduced at trial, the trial court granted Mr. Fulton's request for *de facto* parent status and proceeded to the second phase of the trial concerning the parenting plan.

After testimony on parenting and the best interests of the child the trial court granted Mr. Fulton visitation and full rights as a father to Mr. Miller and Ms. Cotton's son and entered a Final Parenting Plan, Child Support Order, Findings and Conclusions of Law and Decree of De Facto Parentage. CP 134; CP 135; CP 136; and CP 137.

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for a court's decision is abuse of discretion. *In re Marriage of Horner*, 114 Wn. App. 495, 501 n. 30, 58 P.3d 317 (2002), review granted, 149 Wn.2d 1027, 78 P.3d

656 (2003). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). See also *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Ricketts*, 111 Wn. App. 168, 171, 43 P.3d 1258 (2002). A court acts on untenable grounds if its factual findings are unsupported by the record; a court acts for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; and a court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996).

B. THE UNIFORM PARENTAGE ACT IS APPLICABLE TO ALL FACTS IN THIS MATTER

The UPA controls all actions regarding paternity in Washington State. *RCW 26.26.021(1)*. Parents are defined by the statute to those individuals who have established a parent-child relationship under *RCW 26.26.011*.

RCW 26.26.540 applicable at all times relevant to this cause of action requires that an action to adjudicate the parentage of a child having an acknowledged or adjudicated father must be commenced within two years of the acknowledgment or

adjudication and that any acknowledgment “may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man to the father of the child.” *RCW 26.26.600(1)*.

The UPA and its related statutes are clearly applicable to the facts of this case, as evidenced by Judge McKeeman’s dismissal of Mr. Fulton from the paternity action in August of 2009, based on the lack of a legal relationship between Mr. Fulton and Mason. Ex. 29. Under scheme adopted by the Washington Legislature, the paternity of Mason was determined and, therefore, Mr. Fulton was not entitled to any common law relief.

The trial court erred in deviating from the statutory scheme created by the Washington Legislature. The trial court’s deviation was based on a fundamental misunderstanding of the plain wording of the relevant statute and the trial court’s misplaced concerns for “equal protection”: “I don’t think they even thought about it; and if they did, they would not create a statutory scheme where, if a woman who parented, but is not biologically, can bring the cause, but you can’t with a man, that would defy equal protection.” *RP*, June 16, 2011, pg. 10, ln. 18-22. There is no equal protection test regarding the establishment of parental status in this state. The test for determining parental status is statutory law - not common law.

[Under] the provisions of the Uniform Parentage Act, [a] court must read the statute in a manner consistent with its purpose and the intent of the legislature. *In re Parentage of Calcaterra*, 114 Wn. App. 127, 56 P.3d 1003 (2002) citing *Gonzales v. Cowen*, 76 Wn. App. 277, 281, 884 P.2d 19 (1994). A statute's language must be "susceptible to more than one reasonable interpretation" before it will be considered ambiguous. *In re Parentage of L.B.*, 121 Wn. App. 460, 473, 89 P.3d 271 (2004), citing *Harmon v. D.S.H.S.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998). Only when a statute is determined to be ambiguous can the court look to the rules of statutory interpretation in order to ascertain and give effect to the intent and purpose of the Legislature. *In re L.B.*, 121 Wn. App. at 473; *Harmon*, 134 Wn.2d at 530, 951 P.2d 770, citing *State v. Bash*, 130 Wn.2d 594, 601-02, 925 P.2d 978 (1996); *State v. Hennings*, 129 Wn.2d 512, 522, 919 P.2d 580 (1996). Unambiguous statutes are not open to judicial interpretation. *Harmon v. D.S.H.S.*, 134 Wash. 2d 523, 530, 951 P.2d 770 (1998).

RCW 26.26.540 has been upheld in cases with similar facts concerning timely filing a paternity claim. Despite the statute being unambiguous to the facts of this case the trial court erroneously found that the statute defied equal protection when it determined it's only application to this case was biology and the person who was part of the original nucleus of the child be able to

continue his parental relationship under common law claim. The basis upon which the trial court relied to establish a basis for Mr. Fulton's common law claim, disregarded the statutory law altogether and has now made the statute moot.

"If the language of the statute is clear and unequivocal, the court must apply the language as written." *State v. Olson*, 148 Wn. App. 238, 243, 198 P.3d 1061 (2009). The court must also combine all related provisions together so as to "achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes." *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000); *State v. Tejada*, 93 Wn. App. 907, 911, 971 P.2d 79 (1999). When interpreting a statute this Court must do so in a way that best advances the legislature's intent and avoiding a strained or unrealistic interpretation. *Id.* Here the trial court entered orders that defy the statute and changed the Parenting Plan that was entered by Judge McKeeman in August of 2009, which was based on the best interests of the child.

RCW 26.26 is very clear on what a court is to do when a biological father asserts his rights over that of an acknowledged father. Common law was never intended to be a remedy in this matter as *RCW 26.26* determines paternity in this state when there are two competing males and the trial court erred in granting Mr.

Fulton *de facto* parent status despite the clear statutory scheme that permitted adjudication without resort to common law remedies.

First a common law remedy must be “consistent with Washington statutory law, [and only then can a] Washington court adopt and reform the common law. *In re L.B.*, 155 Wn.2d 679, 688-689, 122 P.3d 161 (2005). In order to resort to common law remedies, a court can only implement common law under *RCW 4.04.010* if there:

“in the absence of governing statutory provisions, the courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law.”

RCW 4.04.010; *In re L.B.*, 155 Wn.2d at 688-689 citing *Bernot v. Morrison*, 81 Wash. 538, 544, 143 P. 104 (1914) (citing *Sayward v. Carlson*, 1 Wash. 29, 23 P. 830 (1890)).

De facto parentage claims were created by the Supreme Court only as a remedy 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.*, 155 Wn.2d 679, 707, 122 P.3d 161 (2005). When the trial court concluded that a common law remedy was available, it circumvented “reason and common sense” despite *RCW 26.26* being clearly applicable to the situation. Only in the absence of applicable statutes is a court called upon to “administer justice according to the promptings of reason and common sense” *In re L.B.*, 155 Wn.2d 679 at 689

(quoting *Bernot v. Morrison*, 81 Wash. 538, 544, 143 P. 104 (1914)).

Since common law cannot supercede a clear and unambiguous statute, the rulings in this matter by the trial court are void and this matter should be remanded back to the trial court for compliance with the statutory mandate set forth in *RCW 26.26.540*.

There are no gaps in the UPA with regard to this factual situation. The UPA is the only device by which a court of law can determine the paternity of two competing males asserting parternity of one child, because it is specifically address in *RCW 26.26.600(1)*. The UPA prevents Mr. Fulton from even being allowed to seek any *de facto* parentage claim.

When a man acknowledges paternity and signs the acknowledgment of paternity, it is presumed that he intends to be an active participant in the child's life or a "part of the original nuclear family." When the legislature enacted the UPA in 2002 and directed that the acknowledge father be dismissed if a biological father makes a claim within the statutory time period, it presumed that the relationship between the child and the former acknowledged father would be severed. It is common sense to sever the relationship as early as possible in young child's life as to cause the least amount of disruption or trauma just, as Judge McKeeman stated in his ruling on August 13, 2009. Ex. 25; pg 1-

4. Acceptance and adjudication of Mr. Fulton's *de facto* parentage claim made after his dismissal from the paternity action completely disregards and undermines the legislative intent to quickly resolve paternity matters and stabilize the child's life.

The facts of this case are distinguishable from any of *de facto* parentage cases that have been reviewed in Washington Courts recently.

In *In re L.B., supra.*, there were two lesbian women in a long-term relationship to which a child was born into that relationship through artificial insemination with a male friend. The couple held the child out for over six years as the child to both women and they did not have a UPA claim. Here, we had a UPA claim that was properly filed, served and adjudicated by Judge McKeeman. Exs. 28, 29, 30 and 31. Determination of paternity was made pertaining to Mason according to the all of the statutory rules and procedures. The Court of Appeals upheld Judge McKeeman's dismissal of Mr. Fulton from the paternity action. Ex. 33. Mr. Fulton's common law claim for *de facto* parentage should never have been allowed to go forward.

The Court rulings that *In re JAB*, 146 Wn. App. 417, 1981 P.3d 71 (2008) and *In re M.F.*, 141 Wn. App. 558, 170 P.3d 601 (2007) are not applicable to this case because they established a *de facto* parentage for a non-parent and a step-parent. Again the facts

and applicable statutes are distinguishable from the factual situation in this matter.

In *In re M.F., supra.*, the case revolved around establishing a *de facto* parentage claim after final orders in a dissolution were entered five years prior which excluded the step-child. The Appellate Court overturned the lower court's decision that the step-parent was a *de facto* parent even though he had met all the factors because he had a statutory remedy available to him under the original dissolution case. *In re M.F., supra.* The factors did not matter as the child had two fit parents and it had to do with no statutory claim not the parents.

In *In re J.A.B., supra.*, the factual situation is so different from the facts of the current dispute that it should not be considered. The child was seven when the issue of paternity came about and the mother was unstable and there was not an adjudication of paternity. The Court ruled that despite a statutory remedy under *RCW 26.10*, there was a compelling interest to use the common law *de facto* parentage remedy because a third party custody claim would only confer temporary rights on a party who has been the primary parent for over seven years. Here the case was filed properly under statutory law. There are two fit legal parents in this matter and this no other relief was necessary nor called for under statutory.

While the trial court focused its attention on Mr. Fulton's claims, the trial court completely ignored and disregarded the biological parent's constitutionally protected rights as Mason's mother and father. A fit parent has a fundamental right to the care, custody, and control of a child without intervention by others, including the courts. *Troxell v. Granville* 530 U.S. 57, 60, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The State may interfere with the natural parents constitutional rights only if (1) the parent is unfit or (2) the child's growth and development would be detrimentally affected by placement with an otherwise fit parent. *In re Marriage of Allen*, 28 Wn. App. 637, 647, 626 P.2d 16 (1981). Such is the case here. Mr. Miller and Ms. Cotton are fit parents and, as such, have a constitutionally protected right to continue to parent their child without state interference or the interference of others. The trial court defied statutory and case law when it created a second dad, which violated Mr. Miller's and Ms. Cotton's constitutionally protected rights and threaten the best interest of the child the trial court asserted it was trying to benefit. The trial court's decision should not stand.

Even the trial court's consideration of the "best interests of the child" was misplaced. "The 'best interests' test is only proper when determining custody between parents, but as "between a parent and a nonparent, application of a more stringent balancing

test is required to justify awarding custody to the nonparent. Great deference is accorded to parental rights, based upon constitutionally protected rights to privacy and the goal of protecting the family entity." *In Re the Custody of R.R.B.*, 108 Wn. App. 602, 31 P.3d 1212 (2001), citing *Allen*, 28 Wn. App. at 645-46 (emphasis added). Mr. Fulton was a non-parent to this child as of August 20, 2009. Just because Mr. Fulton had a relationship with Mason during the first few months of his life does not matter, as the mere existence of a relationship is not the basis upon which to determine when a person can use a common law claim, especially one of *de facto* parentage.

Here, the trial court applied the "best interests of the child" test without taking into account that the best interests of this child were already determined when Mr. Fulton was dismissed from the paternity action by Judge McKeeman.

Mr. Fulton should never have been allowed to proceed with his claim of *de facto* parentage past Appellant's *CR 41(b)(3)* motion because *RCW 26.26* is clear as to its application in this case, as noted in the Unpublished Opinion of this Court of July 6, 2010, when Fulton was statutorily excluded as being this child's father.

There is nothing extraordinary in this matter that would allow the trial court to hear Mr. Fulton's Petition for *de facto*

parentage as the facts are VERY distinguishable from the *de facto* parentage cases reviewed in Washington Courts.

Indeed, where statutory remedies are available, the common law *de facto* parentage doctrine cannot be employed. *In re M.F., supra.*, at pages 532-33. Our Supreme Court has determined that such remedies constitute suitable alternatives to *de facto* parent status in the stepparent context, where the child already has two legal parents. *Id.* In this matter, Mason has two fit parents and any designation of another parent will interfere with their constitutionally protected parental rights.

Modifications under *In re M.F.* require that even if the party seeking *de facto* parent status can qualify or meet the five-part test under *In re L.B.*, that party must still meet the adequate cause threshold to modify any existing parenting plan in place concerning the child whom they are seeking *de facto* parent status. The statutory procedures for establishing adequate cause and requesting modification of an existing parenting plan are set out in *RCW 26.09*. The party petitioning for modification must submit an affidavit supporting the requested modification, and the non-moving party may file opposing affidavits. *RCW 26.09.270*. No modification of Judge McKeeman's Parenting Plan of August 20, 2009 was ever brought by Mr. Fulton, despite a motion and memorandum of law raising the issue in this matter. Ex. 26.

There is no doubt Mr. Fulton satisfied the five-part test for *de facto* parentage under *In re L.B* during the first year of Mason's life because he signed an affidavit of paternity. Almost every man that signs such an affidavit will satisfy the five-part factor test when the parent stays involved with the child for any time. However, this is a circumstance that was contemplated when the UPA was implemented in 2002 with a two year window of opportunity for the biological parent to challenge such affidavits of paternity. Here, Mr. Miller sought to establish his paternity, despite Mr. Fulton's acknowledgement of paternity, within the statutory two-year time limit. Mr. Miller was awarded paternity and custody of Mason and a Parenting Plan was adopted by Judge McKeeman that ultimately removed Mr. Fulton from Mason's life in February 2010. This Court should not permit the trial court of overturn Judge McKeeman's Orders and undermine the clear statutory scheme set forth in *RCW 26.26* to engage in what can best be described as "social engineering."

In *In re A.F.J.*, No. 63919-6-1, slip op. at 12 (Div. I. May 16, 2011), this Court noted that Washington Court rulings in all of the *de facto* claims "indicate that each determination of *de facto* parentage should be made based on the particular facts of each case, rather than by applying sweeping, categorical rules. As an equitable remedy, such a question is properly left to a case-specific

inquiry.” *In re A.F.J.* The facts specific to this matter, when viewed statutorily, are exactly the facts specific to applying UPA and *RCW 26.26*. There is nothing special or unique about two men being named as a potential father by a pregnant woman. There is nothing special or unique about an acknowledged father being dismissed out of a case under the factors set out in the UPA and *RCW 26.26*. There is nothing “special” or unique about a former acknowledge father having a relationship with the child prior to a challenge to his paternity. This type of matter has been contemplated by the legislature when it adopted the scheme embodied in *RCW 26.26*. The competition between two competing potential dads is exactly why *RCW 26.26.540* was written, so the trial court should not considered Mr. Fulton’s common law claim and should have dismiss the matter pursuant to *CR 41(b)(3)*, as a matter of law.

On the basis of the foregoing, the trial court erred when it looked past the statute and stated:

“... I conclude, if the facts are as proved, that the mere fact that you have a biological father and a biological mother and a child under two does not wipe out the chance to raise a de facto parenting under this unique circumstance where the third party, Mr. Fulton – who is really the first party, or maybe the second—was the original family nucleus.

RP, June 16, 2011, page 9, ln.16-22.

Finally, the UPA provided Mr. Fulton all the relief he was entitled to without resorting to “common law” remedies. The

Washington Court of Appeals in 2005 ruled that the UPA is completely applicable to circumstances involving two competing paternal interests with one mother. In *Hampson v. Snell*, 8 Wn. App. 408, 115 P.3d 405 (2005), the Court ruled the moving biological father need not seek a common law action claim because the UPA dealt specifically with the factual situation related to the matter. The case revolved around two paternal interests, one mother, and the time allowed to seek a paternity determination within the framework of the UPA. The Court ruled the trial court did not err when it “dismiss[ed] his petition without ruling on his common law claim: [w]e need not reach this argument, as *Hampson* has a viable claim under the UPA.” *Hampson v. Snell*, *supra*. at 416. Clearly, the common law claim of *de facto* parentage is not available to Mr. Fulton as the UPA is unambiguous as to the manner in which courts in Washington State must deal with two competing paternal interests outside the context of gay or lesbian relationships.

The trial court has essentially created an unnecessary third parent. Given that the only mechanism for determining a parent/father is the UPA, the trial court’s ruling that Mr. Fulton is another parent to this child contrivens the laws of the State of Washington. “Parent” is defined as “an individual who has established a parent-child relationship” under *RCW 26.26.10*; *RCW*

26.26.011(12). Parent-child relationships are defined as either “mother-child” or “father-child” relationships. *RCW 26.26.101*. By excluding a man as the father of a child, the man is excluded for all purposes as the child’s parent because he has neither a “father-child” nor a “mother-child” relationship pursuant to *RCW 26.26.101*.

In fact, the UPA unambiguously defines a 'parent' as 'an individual who has established a parent-child relationship under *RCW 26.26.101* and the father-child relationship is established between a child and a man under *RCW 26.26.101(b)* by the “man's having signed an acknowledgment of paternity under *RCW 26.26.300* through *26.26.375*, unless the acknowledgment has been rescinded or successfully challenged” so there is recognition of the relationship. *RCW 26.26.101* (Emphasis added). In this case Mr. Miller successfully challenged Mr. Fulton’s parental relationship. Because the relationship established between the original acknowledged parent is addressed within the statute, any *de facto* status cannot be awarded and therefore a Parenting Plan allowing for parent/child visitation is an illegal and void.

As matters stand now, the biological parents must share visitation with a party who’s parental status has been avoided, which interferes with the constitutional protected rights of these two parents to parent their child autonomously and threatens the

child's best interests.

All courts "must resist the temptation to rewrite an unambiguous statute to suit its notions of public policy and to recognize that "the drafting of a statute is a legislative, not a judicial, function" *In re L.B., supra.* (citing (*State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)) (quoting *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987)). But, that is exactly what the trial court did when it ignored statutory law and created a legal parental relationship with a third-party Mr. Fulton.

VI. 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 biological 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.

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 19 th day of January 2012.



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