

No. 90072-8

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**In re the Custody of M.W.**

**GREG MINIUM and LINDA MINIUM,  
Petitioners,**

**and**

**PATTI SHMILENKO,  
Respondent.**

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**JOHN SHMILENKO,  
Respondent,**

**PATTI SHMILENKO,  
Respondent,**

**and**

**GREG and LINDA MIMIUM,  
Petitioners,**

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**BRIEF OF *AMICUS CURIAE* LEGAL VOICE**

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## I. INTRODUCTION

The trial court erred by holding that John Shmilenko had shown adequate cause to proceed with a *de facto* parentage petition to establish himself as a legal parent for M.W., the child at the center of this case. There appears to be little question that Mr. Shmilenko is a loving and caring grandparent to M.W. and is an important person in the child's life. However, there should also be little question that Mr. Shmilenko cannot satisfy the requirements for *de facto* parentage under Washington law.

*Amicus* does not intend to minimize the importance of Mr. Shmilenko's role in M.W.'s life. However, availability of the common law remedy of *de facto* parentage is limited to people who have functioned in every respect as a child's parent and who can satisfy the stringent multi-factor test established by this Court in its decision in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005). Mr. Shmilenko cannot meet this test under any reasonable interpretation of the law. Indeed, if Mr. Shmilenko were to succeed in a *de facto* parentage claim, it would result in his being M.W.'s *only* legal parent under Washington law. This result would give Mr. Shmilenko constitutional and legal rights to M.W. superior to those of all other parties, including Greg and Linda Minium and Patti Shmilenko.

Under the facts here, Mr. Shmilenko cannot obtain status as a *de*

*facto* parent – a remedy it appears he only pursued at the well-intentioned but mistaken suggestion of the trial court, and one which he frankly acknowledged was a “rough fit” for the facts of this case. To the extent the Court must reach the merits of the trial court’s order granting adequate cause for *de facto* parentage, it should be reversed.

## II. IDENTITY AND INTEREST OF AMICI

The identity and interest of *amicus curiae* is set forth in the Motion for Leave to File an *Amicus Curiae* Brief.

## III. STATEMENT OF THE CASE

*Amicus* bases its statement of the case largely on the summary set forth in Commissioner Pierce’s ruling granting discretionary review and on the materials contained in the Appendix to Motion for Discretionary Review submitted by Petitioners Linda and Greg Minium.<sup>1</sup>

M.W.’s biological mother and father were killed by a drunk driver in August 2008, shortly before M.W.’s first birthday. CR 1. In September 2008, his maternal grandparents, Linda and Greg Minium, filed a non-parental custody petition pursuant to RCW 26.10 seeking custody of M.W. *Id.* The petition stated that the Miniums understood that “the paternal grandmother and the step-grandfather, John and Patti Shmilenko, would like to have court-ordered visitation” with the child. *Id.* Notwithstanding

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<sup>1</sup> *Amicus* cites to the Commissioner’s Ruling as “CR” and to the Appendix to Motion for Discretionary Review as “DR.”

this understanding, the Miniums' non-parental custody petition only named Patti Shmilenko as a respondent (DR 197), and John Shmilenko was never made a party to the action.

In 2010, the parties entered Agreed Orders that provided the Miniums would be M.W.'s non-parental custodians, with Patti Shmilenko having visitation rights. CR 2. John Shmilenko was not included in the Agreed Orders. DR 173-94. The Agreed Orders also provided that the child's residential schedule could be revisited after M.W.'s fifth birthday, without the need for a showing of adequate cause to modify the residential schedule. CR 2.

In 2013, Patti Shmilenko moved to modify the residential schedule and John Shmilenko moved to join the 2008 non-parental custody action as a party. *Id.* The trial court denied Mr. Shmilenko's request, but indicated he could file a separate a non-parental custody action and/or a petition for *de facto* parentage, which the court would consolidate with the 2008 non-parental custody action. *Id.* Mr. Shmilenko filed a non-parental custody petition, which he later amended to present a claim for *de facto* parentage. *Id.* at 3. The Miniums opposed his petitions, arguing that he could not seek visitation under the non-parental custody statute and that he could not satisfy the requirements for *de facto* parentage. *Id.* at 2-3.

The trial court agreed with the Miniums that Mr. Shmilenko could not seek visitation rights under the non-parental custody statute. *Id.* at 2-3. However, the trial court held that Mr. Shmilenko had shown adequate cause to proceed with a *de facto* parentage petition. *Id.* at 3.

In considering the issue of *de facto* parentage, the trial court indicated:

I think probably where we got in trouble, if you will, in this case was in 2010. We had a child with no parents. There is no guardian for that child. What we have is a Court Order that establishes custody in two people and visitation in a third party. Nobody has any *de jure* rights to that child under any traditional form of authority, guardianship or anything else. At most what we've got is a situation where there are three people who are considered *de facto* parents. That was made *de jure* by virtue of an Agreed Order that got signed, and I don't think anybody at the time was – whether Counsel or the Judge who signed the Order was thinking of this situation at the time. If we were, maybe it should've been done strictly by way of a guardianship, or something like that; but, I wouldn't expect anybody to kind of come up with these permutations at this point.

So, what we've got is three people who are, by virtue of that document, *de facto* parents. That's the only rational way I can analyze it, because they don't fit under anything else. We have a fourth person who is claiming, under the parameters established by that Order, that same kind of *de facto* parent relationship . . . .

DR 30. The trial court then indicated the question was “have we got adequate cause established” and stated “[h]ere, the standard would be adequate cause as a *de facto* parent, just like everybody else.” DR 32.

The trial court then reviewed the multi-factor test for *de facto* parentage



and found adequate cause for Mr. Shmilenko to proceed with his *de facto* parentage petition. DR 34.

In reaching this decision, the trial court acknowledged that “[w]e are swimming well away from any established channel markers, legally” and indicated the court would certify the matter for interlocutory appellate review. DR 33. The Miniums sought discretionary review of the *de facto* parentage ruling in this Court. CR 3. Commissioner Pierce granted the motion for discretionary review, and this Court subsequently accepted direct review of the case from the trial court.

In her ruling granting discretionary review, Commissioner Pierce raised additional questions as to whether the trial court properly determined that Mr. Shmilenko could not pursue visitation with M.W. under RCW 26.10, the non-parental custody statute. *Id.* Commissioner Pierce indicated:

While petitioners [the Miniums] assert and the trial court concluded that there is no statutory basis for the trial court to order visitation, this assertion may be too sweeping. In context, this statement summarizes this court’s rulings that RCW 26.10.160(3) and RCW 26.09.240 are facially unconstitutional because each of these statutes allows court ordered visitation over the objections of a fit parent. *See In re Parentage of L.B.*, 155 Wn.2d 679, 714, 122 P.3d 161 (2005). But one question on review will be whether this statement applies to visitation allowed as part of a custody order under RCW 26.10.030, which necessarily relies on a finding that the child is not in the custody of its parents or that neither of the parents is a suitable custodian. RCW 26.10.030 permits the intervention of “other interested parties,” and RCW

26.10.040(1)(a) provides that “[i]n entering an order under this chapter, the court shall consider, approve, or make provisions for” child custody, visitation, and child support. The question of whether these statutory provisions read together provide a statutory basis for court ordered visitation in these circumstances may affect the consideration of the issue the motion for discretionary review presents: “Can a trial court use the *de facto* parentage common law cause of action as an avenue to grant visitation to the third party whose relationship with the child is ‘grandparent-like’ because there is no statute authorizing visitation?” Briefs more fully addressing the threshold determination of whether there is a lack of a statutory remedy as well as how the multifactor test for establishing *de facto* parentage applies in these circumstances will better inform the decision of whether the case needed to be decided in the first instance by this court.

*Id.* at 4-5.

#### IV. ARGUMENT

##### A. The Trial Court Erred By Viewing the Agreed Non-Parental Custody Orders Entered in 2010 as Establishing Three *De Facto* Parents for M.W.

At the hearing on Mr. Shmilenko’s *de facto* parentage petition, the trial court indicated that it regarded the 2010 Agreed Orders presented by Linda and Greg Minium and Patti Shmilenko as establishing all three persons as M.W.’s *de facto* parents. *See* DR at 32 (“[W]hat we’ve got is three people who are, by virtue of that document, *de facto* parents.”). The trial court was mistaken on that point, and it appears that this fundamental misunderstanding in turn led to the trial court’s misapplication of the *de facto* parentage doctrine in evaluating Mr. Shmilenko’s petition.

The 2010 Agreed Orders did not establish that *any* person was

M.W.'s *de facto* parent. Instead, the Agreed Orders established that the Miniums would be M.W.'s non-parental custodians and that Patti Shmilenko would have visitation rights with the child, with the parties reserving the right to seek modification of the residential schedule without a showing of adequate cause after M.W. turned five. The Agreed Orders did not include language suggesting the parties had agreed that anyone was a *de facto* parent for M.W., but instead explicitly stated that the Miniums would be M.W.'s "nonparental custodian."<sup>2</sup> DR 185.

A non-parental custody order entered pursuant to RCW 26.10 does not make the non-parental custodian the child's legal parent under Washington law. See *In re Parentage of J.A.B.*, 146 Wn. App. 417, 426, 191 P.3d 71 (2008). Unlike an adjudicated *de facto* parent, who has "a fundamental liberty interest in the care, custody, and control of his or her child," a nonparental custodian has "only a temporary and uncertain right to custody of the child for the present time because the child has no suitable legal parent." *Id.* An order entered pursuant to RCW 26.10 does not make a non-parental custodian a child's *de facto* parent. Unlike a non-parental custodian, a *de facto* parent "stands in legal parity with an

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<sup>2</sup> The Agreed Orders also provided that the Miniums "will provide notice to Patti Shmilenko if they intend to adopt [M.W.]." DR 190. This provision further underscores that the Agreed Orders did not vest legal parental status on any party, as an adoption proceeding by the Miniums would be unnecessary if the Agreed Orders had established them as M.W.'s legal parents under the *de facto* parentage doctrine.

otherwise legal parent, whether biological, adoptive, or otherwise.” *L.B.*, 155 Wn.2d at 708. The concepts of non-parental custody under RCW 26.10 and the common law doctrine of *de facto* parentage are quite distinct, and importantly so.

The trial court’s confusion on this point is more readily understandable in light of the Agreed Orders entered by the parties in 2010, as well as the arguments presented to the court by the Miniums. The Miniums argued to the trial court that a person who is not a parent cannot obtain visitation with a child pursuant to a non-parental custody order entered under RCW 26.10. *See* DR at 125 (Miniums’ counsel argued “we’re here under 26.10, and I would submit that under the case law there is no legislative authority for [Mr. Shmilenko] to pursue nonparental visitation.”); *see also* Pet. Reply Br. at 2-3. However, the Miniums had agreed to orders in 2010 that did precisely that. The Agreed Orders explicitly established visitation rights in a non-parental custody proceeding under RCW 26.10 for Patti Shmilenko, a non-parent. DR 184-92.

Under these circumstances, the trial court mistakenly regarded the Agreed Orders as establishing that the Miniums and Patti Shmilenko were all M.W.’s *de facto* parents under Washington law. Plainly displaying this mistaken understanding, the trial court remarked that viewing the Agreed

Orders as creating three *de facto* parents for M.W. was “[t]he only rational way I can analyze it, because they don’t fit under anything else.” DR 30.

This misunderstanding in turn led the trial court to incorrectly consider Mr. Shmilenko as being “a fourth person who is claiming, under the parameters established by that Order, that same kind of *de facto* parent relationship.” *Id.* The trial court’s remarks aside, the fact remains that a non-parental custody order is quite different under Washington law from a *de facto* parentage order, and no *de facto* parentage order had been entered as to M.W. The trial court was incorrect in its view that the 2010 Agreed Orders established the Miniums and Patti Shmilenko as M.W.’s *de facto* parents.

**B. Mr. Shmilenko Does Not Meet the Multi-Factor Test for *De Facto* Parentage Under Washington Law**

There should be little question that Mr. Shmilenko cannot meet the stringent multi-factor test to establish *de facto* parentage under Washington law, as set forth in this Court’s decision in *In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005). To avoid repetition of the parties’ arguments, *amicus* focuses briefly on only two of those required factors.

First, as this Court has noted, “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." *Id.* at 712. This status "can be achieved only through the active encouragement 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." *Id.* Here, there was no showing that M.W.'s mother or father had taken these steps to consent to or foster a parent-child relationship between M.W. and Mr. Shmilenko.

In addition, a person seeking *de facto* parent status must prove that he or she has "been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature." *Id.* at 708. While there is certainly evidence that Mr. Shmilenko is an important person in M.W.'s life and has been a loving and caring grandparent, there plainly appears to be insufficient grounds to find that the relationship is "parental in nature" or that M.W. regards him as a parent.

This Court has appropriately applied the multi-factor *de facto* parentage test stringently. While this Court has also appropriately affirmed that the *de facto* parentage doctrine is a flexible equitable tool, the Court has never suggested that any of the multiple required factors to establish *de facto* parentage under the *L.B.* decision may be dispensed with. Nor should it do so here.

In addition, as the Miniums suggest, if Mr. Shmilenko were to establish *de facto* parentage status, he would become M.W.'s *only* legal parent under Washington law. Such a ruling would give Mr. Shmilenko constitutional rights as a parent with respect to M.W. that would be superior to those of the Miniums or Patti Shmilenko. As a legal parent, he would have a “‘fundamental liberty interest’ in the ‘care, custody, and control’” of M.W. under the U.S. Constitution, a status which the Miniums and Ms. Shmilenko have not obtained by virtue of their rights under the existing non-parental custody orders. *L.B.*, 155 Wn.2d at 710 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Here again, the trial court’s mistaken view that the Miniums and Patti Shmilenko had been established as *de facto* parents of M.W. by virtue of the Agreed Orders appears to have misled the trial court to believe it was appropriate to permit Mr. Shmilenko to seek *de facto* parent status.

**C. The *De Facto* Parentage Doctrine Remains Necessary to Preserve Parent-Child Relationships For Petitioners Who Can Satisfy Its Stringent Requirements**

In 2013, this Court affirmed that the *de facto* parentage doctrine “remains a viable equitable doctrine under Washington law.” *In re Custody of B.M.H.*, 179 Wn.2d 223, 241, 315 P.3d 470 (2013); *see also In re Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013). The Court also made clear that application of the *de facto* parentage doctrine should

be free of “arbitrary categorical distinctions” that “would preclude many legitimate parent-child relationships from being recognized,” demonstrating the Court’s recognition of the doctrine’s importance in preserving fundamental parent-child relationships. *B.M.H.*, 179 Wn.2d at 243.

The Miniums criticize the *de facto* parentage doctrine, asserting that the Court “should learn from its experience with *de facto* parentage” and suggesting that the Court has created a “poorly defined common law ‘equitable’ basis to grant rights to third parties over children with whom they could not otherwise form a legal relationship under RCW ch. 26.10.” Reply at 10. This sharp criticism of the *de facto* parentage doctrine is unwarranted, and ignores the importance of the doctrine in preserving parent-child relationships in circumstances where a person has acted in all respects as a child’s parent, with the consent and encouragement of the child’s legal parent.

While *amicus* agrees that the doctrine was not properly applied by the trial court in this case, the trial court’s ruling is hardly evidence that the doctrine is “poorly defined” or that this Court ought to “learn from its experience” with the *de facto* parentage doctrine. It is apparent from the record that the trial court recognized that its application of the doctrine was not on firm legal ground, noting it was “swimming well away from



any established channel markers, legally” and certifying the decision for interlocutory review. It is also clear that the trial court’s decision flowed from its misperception that the Miniums and Ms. Shmilenko had already been established as M.W.’s *de facto* parents by virtue of the agreed non-parental custody orders entered in the case in 2010. This confusion appears to have arisen from the parties’ agreement to a court order that gave custodial rights to two parties and visitation rights to another party – an order that specifically included court-ordered visitation rights the Miniums have since argued should be unavailable to non-parents like Mr. Shmilenko under RCW 26.10.

The trial court’s confusion was understandable in light of the unusual facts of this case. The trial court’s misapplication of the *de facto* parent doctrine in this case should not be a basis to criticize the doctrine or to erode it in any way.<sup>3</sup>

**D. *Amicus* Takes No Position On Whether Visitation Should Be Available to Mr. Shmilenko Under RCW 26.10 or Under the Broad Equitable Authority of Courts in Family Law Cases**

Commissioner Pierce raised the question of whether the trial court correctly found that Mr. Shmilenko could not pursue visitation with M.W. pursuant to RCW 26.10.030 and .040. *Amicus* agrees that clarity on that

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<sup>3</sup> It also should be noted that the Legislature has taken no action in response to the Court’s *de facto* parentage rulings in *B.M.H. or A.F.J.* In contrast, the Legislature has often acted swiftly to address decisions by this Court. *See, e.g.,* Laws of 2015, ch. 38 (addressing Court’s decision in *State v. Veliz*, 176 Wn.2d 849, 298 P.3d 75 (2013)).

question would be helpful and could potentially be dispositive in this case. However, *amicus* as an organization has not taken a position on that question.

*Amicus* would simply note that there appears to be no constitutional barrier to allowing a third party to seek visitation with a child in cases where, as here, a child has no legal parents. The decisions cited by the parties in *Smith*, *Troxel*, and *C.A.M.A.* all concerned the strict constitutional scrutiny that must be applied to third-party visitation over the objections of a fit parent. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2052 (2000); *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998); *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005). As such, *amicus* believes that Commissioner Pierce is correct in raising the question of whether there remains a statutory basis under RCW 26.10.030 and .040 for a third party to seek visitation with a child in situations where, as here, the child has no legal parents.

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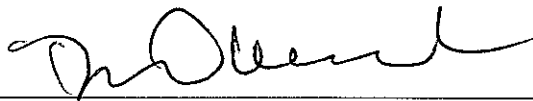
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V. CONCLUSION

To the extent it is necessary to reach the question, the Court should find that the trial court in this case did not properly apply the *de facto* parentage doctrine with respect to Mr. Shmilenko.

Respectfully submitted, this 8<sup>th</sup> day of May, 2015.

By: \_\_\_\_\_



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