

Washington Law Review

Volume 79 | Number 4

11-1-2004

Making Mommies: The Washington State Court of Appeals Exceeded Its Authority by Creating a Common Law Parentage Action in *In re Parentage of L.B.*

Thomas G. Robinson-O'Neill

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Family Law Commons](#)

Recommended Citation

Thomas G. Robinson-O'Neill, Notes and Comments, *Making Mommies: The Washington State Court of Appeals Exceeded Its Authority by Creating a Common Law Parentage Action in In re Parentage of L.B.*, 79 Wash. L. Rev. 1209 (2004).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol79/iss4/6>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

MAKING MOMMIES: THE WASHINGTON STATE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY CREATING A COMMON LAW PARENTAGE ACTION IN *IN RE PARENTAGE OF L.B.*

Thomas G. Robinson-O'Neill

Abstract: In *In re Parentage of L.B.*, Division I of the Washington State Court of Appeals created a new common law cause of action that allows a same-sex de facto parent to be declared a legal parent. In the alternative, the court held that a de facto parent has a cause of action under Washington's nonparental visitation statute. This Note argues that the court exceeded its authority in creating a common law cause of action because the Uniform Parentage Act and the statutory scheme preempt the common law. Further, this Note argues that the ability of a de facto parent to obtain a visitation order under the nonparental visitation statute adequately protects the best interests of the child. Therefore, the Washington State Supreme Court should reverse Division I's creation of a common law parentage action and affirm Division I's alternative holding.

Courts today must address an increasingly familiar family framework: a lesbian couple who has a child via artificial insemination.¹ In most cases, one of the women is the child's biological, and therefore legal, parent; courts recognize her as the child's parent, and the legal system protects her relationship with the child.² The other woman may be able to demonstrate that she is a "de facto parent"³ who acts in every way as

1. Numerous cases around the country have similar fact patterns. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002) (estimating that as many as ten million children live with same-sex parents in the United States). See generally Robin Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-Sex Relationship*, 80 A.L.R.5th 1 (2000).

2. See Jacobs, *supra* note 1, at 342 (citing generally Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769 (1999)).

3. For purposes of clarity, this Note will use the term "de facto parent" to describe a nonparent with a psychological relationship with a child equivalent to that of a biological parent. See *In re Marriage of Allen*, 28 Wash. App. 637, 648, 626 P.2d 16, 23 (1981). Case law from Washington and other jurisdictions addresses these people also as "psychological parents" and as those acting *in loco parentis*. See, e.g., *In re Dependency of J.H.*, 117 Wash. 2d 460, 469, 815 P.2d 1380, 1384 (1991) ("In certain limited circumstances our appellate courts have recognized the importance of psychological parents to the welfare of children."); *In re Custody of S.H.B.*, 118 Wash. App. 71, 79, 74 P.3d 674, 680 (2003) ("Nonparents—including adoptive parents, legal guardians, grandparents, and persons acting in an *in loco parentis* capacity—do not have the same constitutional rights of a parent, absent legislative action."). See generally Miller, *supra* note 1 (citing cases addressing de facto parents, psychological parents, and those acting *in loco parentis*). The various terms used by different jurisdictions refer to those who have a significant psychological relationship with children.

the child's parent but remains a legal stranger.⁴ However, if the women's relationship dissolves, the distinction between legal and de facto parents means that the law protects only the legal parent's relationship with the child.⁵

In Washington, until *In re Parentage of L.B.*,⁶ a de facto parent had limited legal recourse to maintain a relationship with the child.⁷ However, in *In re Parentage of L.B.*, Division I of the Washington State Court of Appeals created a common law parentage action that allows a nonbiological de facto parent standing to be declared a legal parent when he or she can show that (1) the nonbiological parent consented to the formation of a parent-like relationship; (2) the nonbiological parent lived in the same household with the child; (3) the nonbiological parent assumed the obligations of parenthood without expectation of financial compensation; and (4) the nonbiological parent had been in a parental role long enough to form a bonded psychological relationship with the child.⁸

This Note argues that Division I of the Washington State Court of Appeals (Division I) erred in recognizing a new common law parentage action. Although Washington courts have the authority to create common law, statutes and judicial caution limit this authority.⁹ Because the legislature intended the Uniform Parentage Act (UPA)¹⁰ to serve as the exclusive means to determine parentage and because there are other statutory remedies for de facto parents, Division I exceeded its authority in creating a common law cause of action.¹¹ Part I describes how, prior

The term de facto parent better describes the situation in which the person with the psychological relationship is not the legal parent.

4. See Jacobs, *supra* note 1, at 342 (noting that the de facto parent had "no legal parental role because of her lack of biological connection to the child").

5. See *id.* at 347 (noting that the law often fails to recognize a lesbian coparent's parental status).

6. 121 Wash. App. 460, 89 P.3d 271 (2004).

7. See, e.g., *id.* at 470–76, 89 P.3d at 276–79 (discussing statutory remedies for same-sex de facto parents); see also *infra* Part I.

8. *L.B.*, 121 Wash. App. at 487, 89 P.3d at 285.

9. See, e.g., *Sedlacek v. Hillis*, 145 Wash. 2d 379, 390, 36 P.3d 1014, 1019–20 (2001) (indicating that the court will not extend the common law tort of wrongful discharge absent a clear mandate of public policy); *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wash. 2d 219, 222, 517 P.2d 585, 587 (1974) (stating that common law is preempted by statute where statute is plain and unambiguous); *L.B.*, 121 Wash. App. at 476, 89 P.3d at 279 (announcing the test for creating common law).

10. The Uniform Parentage Act is codified in Washington at WASH. REV. CODE § 26.26 (2002).

11. *L.B.*, 121 Wash. App. at 487, 89 P.3d at 285.

to *In re Parentage of L.B.*, same-sex de facto parents could not be considered legal parents under the UPA. Part II addresses the remedies de facto parents had prior to Division I's decision. Part III describes judicial authority to create common law. Part IV presents the court's reasoning in *In re Parentage of L.B.* Part V argues that Division I exceeded its authority in creating a common law cause of action. This Note concludes that Division I should have held that de facto parents may obtain visitation orders under the nonparental visitation statute but should not be declared legal parents under the common law.

I. UNDER THE UPA, THE SAME-SEX PARTNER OF A BIOLOGICAL PARENT IS NOT A LEGAL PARENT

Courts do not typically consider the same-sex partner of a biological parent to be the child's legal parent.¹² At common law, legal parents were traditionally the biological mother and father.¹³ Before the advent of genetic testing, the difficulty of conclusively establishing biological relationships between fathers and children led to a common law presumption that spouses were the biological, and therefore the legal, parents.¹⁴ Because same-sex couples cannot marry in Washington,¹⁵ those who have children via artificial insemination do not fit neatly into this framework, as typically one of them is a biological parent and the other is not.¹⁶ The nonbiological or de facto parent may establish parentage by a statutory second parent adoption¹⁷ or an adjudication of parentage under the UPA.¹⁸

The same-sex partner of a biological parent may pursue a second parent adoption.¹⁹ Adoption proceedings are purely statutory²⁰ and allow

12. See Jacobs, *supra* note 1, at 343–44.

13. See *State ex rel. D.R.M. v. Wood*, 109 Wash. App. 182, 189, 34 P.3d 887, 891 (2001).

14. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989) (discussing common law presumption of legitimacy).

15. WASH. REV. CODE § 26.04.020(1) (2002) (“Marriages . . . are prohibited: . . . [w]hen the parties are persons other than a male and a female.”). Two separate Washington State Superior Courts recently declared this statute unconstitutional, but the decisions are stayed pending review by the Washington State Supreme Court. Tracy Johnson, *2nd Judge Rules Against State's Gay Marriage Ban*, SEATTLE POST-INTELLIGENCER, Sept. 8, 2004, at A1. If the decision is upheld, a lesbian married couple who conceives via artificial insemination will be covered by the UPA.

16. See Jacobs, *supra* note 1, at 342.

17. See WASH. REV. CODE § 26.33.140-.295; *D.R.M.*, 109 Wash. App. at 191, 34 P.3d at 892.

18. See WASH. REV. CODE § 26.26.

19. *D.R.M.*, 109 Wash. App. at 189, 34 P.3d at 891 (citing WASH. REV. CODE § 26.33). This Note focuses on post-dissolution remedies for a de facto parent, because in most of these situations a

a court to declare that a person not biologically related to the child is a legal parent.²¹ The adoption statute is silent on the subject of second parent adoptions,²² but the Washington State Supreme Court has held that the standing requirements for adoption are very broad.²³ Division I of the Washington State Court of Appeals has indicated that same-sex second parent adoptions are not prohibited under the adoption statutes.²⁴

Washington's UPA authorizes actions to establish parentage,²⁵ but it does not provide a de facto same-sex parent with standing.²⁶ The UPA is intended to govern all parentage actions in Washington²⁷ and gives courts the power to adjudicate parentage,²⁸ including parenting responsibilities.²⁹ The statute specifically allows for an adjudication of maternity,³⁰ and it indicates that the provisions allowing for an

legal parent is unlikely to consent to a second parent adoption.

20. See *In re Adoption of Parsons*, 76 Wash. 2d 437, 442, 457 P.2d 544, 546 (1969).

21. WASH. REV. CODE § 26.33.260; see *D.R.M.*, 109 Wash. App. at 189, 34 P.3d at 891.

22. See WASH. REV. CODE §§ 26.33.010–910.

23. See, e.g., *In re Adoption of B.T.*, 150 Wash. 2d 409, 417–19, 78 P.3d 634, 638–39 (2003) (holding that the standing doctrine is very broad and allowing grandparents to adopt after intervening in a dependency hearing, as long as requirements of WASH. REV. CODE § 26.23.140 are met).

24. See *D.R.M.*, 109 Wash. App. at 191, 34 P.3d at 892.

25. WASH. REV. CODE § 26.26.021 (“This chapter governs every determination of parentage in this state.”).

26. See *id.* §§ 26.26.021–913. The UPA recognizes seven categories of persons with standing: (1) the child; (2) the mother; (3) a man whose paternity is to be adjudicated; (4) the division of child support; (5) an authorized adoption agency; (6) a representative authorized by law to act for a deceased, incapacitated, or minor individual; or (7) an intended parent under a surrogate parentage contract. See *id.* § 26.26.505.

27. *Id.* § 26.26.021(1). This statute acknowledges that the UPA does not interfere with rights and duties under other Washington laws. *Id.* § 26.26.021(3). Presumably, this refers to the dependency, adoption, and marital dissolution statutes, which all provide for determinations of the scope of parental rights. See WASH. REV. CODE §§ 13.34.010–810 (2002) (dependency statute); WASH. REV. CODE §§ 26.09.002–914 (marital dissolution statute); *id.* §§ 26.33.010–910 (adoption statutes). While the UPA savings clause preserves the scope of parental authority under these statutes, it does not indicate that parentage may be determined by other means. *Id.* § 26.26.021(3). The standing provisions of the UPA, therefore, take into account other statutory methods of being declared parents. For example, the standing provisions of the UPA clearly denote that adoptive parents may be considered parents under the UPA. *Id.* § 26.26.101(1)(c), (2)(d). Therefore, this savings clause should not be read to preserve subsequently created common law action that creates legal parents rather than merely defining the scope of those rights.

28. See *id.* § 26.26.031.

29. *Id.* § 26.26.130(7) (providing for allocation of parenting responsibilities pursuant to WASH. REV. CODE § 26.09, the dissolution of marriage statute).

30. *Id.* § 26.26.101(1)(b) (stating that a mother-child relationship is established by an adjudication of maternity).

adjudication of paternity may also be used to determine a mother-child relationship.³¹

The UPA initially contained language that might have supported same-sex parentage actions.³² A former version of the statute allowed a man to establish parentage if, for example, he held the child out as his own or acknowledged paternity in writing.³³ Division I noted in dicta that these provisions might apply to a same-sex couple through the provision that allows paternity actions to be used to determine maternity.³⁴ However, in 2002, the legislature repealed this section of the UPA.³⁵

A nonbiological partner in a same-sex relationship cannot use the current UPA to adjudicate parenthood.³⁶ There is no provision in the UPA that provides for a determination of parentage on the basis of a person's significant relationship with a child.³⁷ In the case of artificial insemination, the UPA affords the spouse of the woman who conceived a presumption of fatherhood.³⁸ Because same-sex couples cannot marry in Washington and the UPA specifies that only a husband enjoys such a presumption, a lesbian *de facto* parent cannot rely on this provision.³⁹ Nor do the provisions concerning surrogate contracts⁴⁰ allow a lesbian *de facto* parent to be deemed an intended parent served by a "surrogate father" because the statute is gender specific.⁴¹

31. *Id.* § 26.26.051 ("[T]he provisions relating to determination of paternity may be applied to a determination of maternity.").

32. *See In re Parentage of L.B.*, 121 Wash. App. 460, 470–71, 89 P.3d 271, 276 (2004) (citing *State ex rel. D.R.M. v. Wood*, 109 Wash. App. 182, 189–91, 34 P.3d 887, 891–93 (2001)).

33. WASH. REV. CODE § 26.26.040(d)–(e) (2000), *repealed by* Uniform Parentage Act, ch. 302, § 711, 2002 Wash. Laws 1470.

34. *See L.B.*, 121 Wash. App. at 470–71, 89 P.3d at 276; *see also* WASH. REV. CODE § 26.26.051 (2002) (allowing paternity actions to be used to determine maternity).

35. Uniform Parentage Act, ch. 302, § 711, 2002 Wash. Laws 1470.

36. *L.B.*, 121 Wash. App. at 474–75, 89 P.3d at 278 (concluding that the current UPA does not provide a cause of action for a same-sex unmarried individual to pursue parentage).

37. *See* WASH. REV. CODE §§ 26.26.021–.913.

38. *Id.* § 26.26.710.

39. *See, e.g., L.B.*, 121 Wash. App. at 474, 89 P.3d at 278 (concluding that the current UPA does not provide a cause of action for a same-sex unmarried individual to pursue parentage).

40. WASH. REV. CODE §§ 26.26.210–.260.

41. *See L.B.*, 121 Wash. App. at 474, 89 P.3d at 278 (noting that the UPA's surrogacy provisions are gender specific).

II. PRIOR TO *IN RE PARENTAGE OF L.B.*, LEGAL PARENTS HAD RIGHTS SUPERIOR TO DE FACTO PARENTS

A de facto parent does not have the same rights⁴² that a legal parent has under the United States Constitution.⁴³ Under Washington law, de facto parents have limited rights,⁴⁴ but these statutory nonparental rights are circumscribed by the legal parents' constitutional rights.⁴⁵

A. *Legal Parents Have a Constitutional Right to Protect Their Relationships with Their Children, but that Right Is Not Absolute*

The U.S. Supreme Court has repeatedly reaffirmed that parents have a fundamental liberty interest in the care, custody, and control of their children.⁴⁶ Under the Fourteenth Amendment to the U.S. Constitution, a legal parent has a constitutional right to direct his or her child's upbringing.⁴⁷ These rights rest on a rebuttable presumption that a parent acts in the best interests of his or her child,⁴⁸ thus, for instance, a parent may restrict the child's contact with certain people because it is assumed

42. See *In re Custody of S.H.B.*, 118 Wash. App. 71, 80, 74 P.3d 674, 680 (2003).

43. *In re Custody of Smith*, 137 Wash. 2d 1, 13–15, 969 P.2d 21, 27–28 (1998), *aff'd on other grounds sub nom. Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion). However, these constitutionally protected rights are not absolute. See *id.* at 16–17, 969 P.2d at 28–29.

44. See *id.* at 20, 969 P.2d at 30.

45. See *In re Custody of Nunn*, 103 Wash. App. 871, 884, 14 P.2d 175, 182 (2001) (“Between a parent and a nonparent, therefore, a more stringent balancing test is required to justify awarding custody to the nonparent.”).

46. See, e.g., *Troxel*, 530 U.S. at 65 (plurality opinion) (noting “extensive precedent . . . that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923), for the proposition that it is a fundamental Due Process right to direct the education of one's children); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (describing the “fundamental liberty interest” of natural parents); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (noting parents have a right to raise their children); *Quillon v. Walcott*, 434 U.S. 246, 255 (1978) (“[T]he relationship between the parent and child is constitutionally protected . . . by the Due Process Clause of the Fourteenth Amendment.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (noting it is well-established that parents have a fundamental liberty interest in their children); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting the integrity of the family unit is protected under the Due Process Clause); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (indicating that a parent's right to control the education of a child derives from the Fourteenth Amendment).

47. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property without due process of law.”); *Meyer*, 262 U.S. at 399–400 (recognizing that “liberty” in the Fourteenth Amendment includes “establish[ing] a home and bring[ing] up children”).

48. *Parham*, 442 U.S. at 602.

the parent acts in the child's best interest.⁴⁹ A court must defer to the decisions of a legal parent and may not override these decisions absent a compelling state interest.⁵⁰ Only a legal parent has these constitutionally protected rights; nonparents, even de facto parents, do not have constitutionally protected interests in their relationships with their children.⁵¹

Though a parent has constitutional rights, these rights are not absolute.⁵² The state's *parens patriae*⁵³ authority allows the state to intervene in family decisions to protect the welfare of its citizens.⁵⁴ When a fundamental liberty interest of a parent is involved, a state may intervene only where it has a compelling interest.⁵⁵ The U.S. Supreme Court has upheld a state's authority to impinge on a legal parent's autonomy, or even completely sever a parent's rights, where a child has been harmed or where there is a threat of harm to a child.⁵⁶

Under Washington's nonparental custody statute, the state's power to override a legal parent's wishes can be used to protect a de facto parent's

49. *Smith*, 137 Wash. 2d at 21, 969 P.2d at 31.

50. *See Troxel*, 530 U.S. at 68–69 (plurality opinion). What constitutes a compelling state interest is not settled. The Washington State Supreme Court has held that only prevention of harm to the child constitutes such a compelling state interest. *Smith*, 137 Wash. 2d at 18, 969 P.2d at 29. On appeal, the *Troxel* Court declined to reach this question. *See Troxel*, 530 U.S. at 73 (plurality opinion).

51. *Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004) (finding that de facto parents have a right to appear in dependency proceedings, but have no other right or weightier constitutional interest); *In re Custody of S.H.B.*, 118 Wash. App. 71, 80, 74 P.3d 674, 680 (2003) (holding that absent legislative action, nonparents, even those acting as *in loco parentis*, lack constitutional rights of parents).

52. *Smith*, 137 Wash. 2d at 16–17, 969 P.2d at 28–29.

53. Literally, *parens patriae* means “parent of the country.” BLACK’S LAW DICTIONARY 1137 (7th ed. 1999); *see also* Eric B. Martin, Comment, *Grandma Got Run Over by the Supreme Court: Suggestions for a Constitutional Nonparental Visitation Statute After Troxel v. Granville*, 76 WASH. L. REV. 571, 576 (2001) (discussing the *parens patriae* doctrine).

54. *Smith*, 137 Wash. 2d at 15–16, 969 P.2d at 28.

55. *Id.* (citing, *inter alia*, *Roe v. Wade*, 410 U.S. 113, 155 (1973)). The Washington State Supreme Court has gone further and held that the remedy must serve a state's compelling interest. *Id.* The U.S. Supreme Court, however, has not reached the question of whether the remedy must be narrowly tailored when it conflicts with a legal parent's constitutional rights. *See* Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783, 785–86 (2001) (arguing that the Court failed to agree on the proper standard of review).

56. *See Wisconsin v. Yoder*, 406 U.S. 205, 230–32 (1972). In its most recent case addressing the subject, however, the U.S. Supreme Court refused to consider whether a showing of harm was necessary where a case involved visitation by nonparents. *See Troxel v. Granville*, 530 U.S. 57, 73 (2000) (plurality opinion).

relationship with a child.⁵⁷ In order to receive custody under this statute, a petitioner must either show that the legal parent does not have physical custody or allege that neither legal parent is a suitable custodian.⁵⁸ A legal parent is not a suitable custodian when he or she causes actual detriment to the child.⁵⁹ To show actual detriment, a petitioner must do more than convince the court that it is not in the child's best interests to remain with the legal parent, but need not show parental unfitness.⁶⁰

The visitation provisions in Washington's nonparental custody statute are even broader than its custodial provisions.⁶¹ The statute allows "[a]ny person" to petition for visitation "at any time," as long as the visitation is in the best interests of the child.⁶² In 1998, the Washington State Supreme Court held that the statute was so broad as to be facially unconstitutional under the Due Process Clause of the U.S. Constitution because it infringed on fundamental rights of parents and did not serve a compelling state interest.⁶³ In *Troxel v. Granville*,⁶⁴ the U.S. Supreme Court affirmed the Washington State Supreme Court's decision, but held the statute unconstitutional only as applied because the trial court did not

57. WASH. REV. CODE §§ 26.10.010–913 (2002); see also *In re Custody of Stell*, 56 Wash. App. 356, 365, 783 P.2d 615, 620 (1989) (concluding that a de facto parent can be awarded custody under WASH. REV. CODE § 26.10 (1988)).

58. WASH. REV. CODE § 26.10.030(1). If the child is in the custody of a parent, the statute requires an allegation that neither legal parent is a suitable parent. *Id.* Division I has interpreted the statute to require that the petitioner prevail on this element if the child is in the custody of a parent and the petitioner wishes to gain custody. *In re Custody of S.H.B.*, 118 Wash. App. 71, 79, 74 P.3d 674, 679 (2003).

59. See, e.g., *In re Marriage of Allen*, 28 Wash. App. 637, 649, 626 P.2d 16, 23 (1981) ("In extraordinary circumstances, where placing the child with an otherwise fit parent would be detrimental to the child, the parent's right to custody is outweighed by the state's interest in the child's welfare.").

60. *Id.* ("There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the 'best interests of the child' test . . . [b]ut unfitness of the parent need not be shown."); see also *In re Custody of Shields*, 120 Wash. App. 108, 111, 84 P.3d 905, 906 (2004) (holding that the nonparental custody action requires a showing of parental unfitness or actual detriment); *In re Custody of R.R.B.*, 108 Wash. App. 602, 615–16, 31 P.3d 1212, 1219–20 (2001) (affirming an award of custody to the biological parent where the trial court found placement with the otherwise fit legal adoptive parents would be detrimental to the child); *Stell*, 56 Wash. App. at 365, 783 P.2d at 620 (affirming an award of custody to an aunt when placement with the father would cause actual detriment to the child).

61. See *Troxel*, 530 U.S. at 67 (plurality opinion) ("The Washington nonparental visitation statute is breathtakingly broad.").

62. WASH. REV. CODE § 26.10.160(3).

63. See *In re Custody of Smith*, 137 Wash. 2d 1, 19, 969 P.2d 21, 30 (1998), *aff'd on other grounds sub nom.* *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion).

64. 530 U.S. 57 (2000).

give deference to the legal parent's wishes.⁶⁵ Division I has subsequently held that the visitation provision remains valid as long as it complies with the limitations imposed by *Troxel*.⁶⁶ Because deference to a parent's wishes may be overcome where a child is harmed,⁶⁷ and Washington courts recognize that severing a de facto parent-child bond could cause harm,⁶⁸ a visitation order under the provisions of the nonparental visitation statute could comply with *Troxel*.⁶⁹

B. Prior to In re Parentage of L.B., Washington Courts Recognized the Importance of De Facto Parents in Limited Circumstances

Recognizing the importance of the psychological relationship between children and de facto parents, Washington courts have awarded visitation or custody to de facto parents in limited circumstances.⁷⁰ The

65. See *id.* at 69, 73, 75 (plurality opinion) (holding that the trial court violated Granville's parental rights by not giving special weight to her wishes). The U.S. Supreme Court did not reach the question of whether the Due Process Clause requires a showing of harm to satisfy the compelling state interest condition precedent to granting visitation. *Id.* at 73.

66. See *In re Parentage of L.B.*, 121 Wash. App. 460, 490, 89 P.3d 271, 286 (2004) ("[T]he third-party visitation statute is facially valid when construed in accord with the principles of *Troxel* . . ."). Whether this is a correct analysis of the effect of *Troxel* on the Washington State Supreme Court's holding in *Smith* is beyond the scope of this Note. At the very least, it remains an open question.

67. See *In re Custody of R.R.B.*, 108 Wash. App. 602, 616, 31 P.3d 1212, 1219–20 (2001); see also *Smith*, 137 Wash. 2d at 15–16, 969 P.2d at 28 ("[T]he state may step in and override a decision of a parent where the decision would harm the child.").

68. See, e.g., *Smith*, 137 Wash. 2d at 20, 969 P.2d at 30 (noting that where a significant relationship with a child is severed, there is potential for harm to the child).

69. See, e.g., *L.B.*, 121 Wash. App. at 490, 89 P.3d at 286 (holding that the third party visitation statute could be constitutionally applied in the case of a de facto lesbian parent); see also *In re Parentage of C.A.M.A.*, 120 Wash. App. 199, 214, 84 P.3d 1253, 1260 (2004) ("Finally, *Troxel* also required special factors which might justify the state's interference with a parent's fundamental right to make decisions. We conclude that one such factor is a longstanding de facto parental relationship between the petitioner and the child.").

70. See, e.g., *In re Dependency of J.H.*, 117 Wash. 2d 460, 469, 815 P.2d 1380, 1384 (1991) ("In certain limited circumstances our appellate courts have recognized the importance of psychological parents to the welfare of children."); *McDaniels v. Carlson*, 108 Wash. 2d 299, 313, 738 P.2d 254, 263 (1987) (remanding a dispute between a putative and natural father with the direction that both be given the opportunity to petition for reasonable visitation rights); *In re Custody of Shields*, 120 Wash. App. 108, 130–31, 84 P.3d 905, 916 (2004) (affirming custody award to stepmother after the death of the child's father because the child had been well-integrated into the family of the stepparent); *In re Dependency of Ramquist*, 52 Wash. App. 854, 862, 765 P.2d 30, 35 (1988) (affirming an award of custody to foster parents after the parent's rights were terminated because the child was psychologically bonded to the foster family); *In re Marriage of Allen*, 28 Wash. App. 637, 649, 626 P.2d 16, 23 (1981) (awarding custody to the stepmother upon determination that placement with the father would cause actual detriment to the child).

courts have recognized that harm to the child may occur when a significant relationship between the child and an adult is severed.⁷¹ In *In re Custody of Smith*,⁷² the Washington State Supreme Court noted that “[i]n certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child.”⁷³ Washington courts have recognized the importance of the stability of these relationships even when the adult involved is not a legal or natural parent.⁷⁴

Prior to *L.B.*, the rights of those de facto parents who could demonstrate such a significant relationship were typically limited to situations in which the rights of the legal parents did not conflict with those of the de facto parent.⁷⁵ For example, the Washington State Supreme Court held that an aunt and uncle who had commenced a nonparental custody action and been awarded temporary custody had a right to intervene in a concurrent dependency action to terminate the legal parents’ rights.⁷⁶ Thus, in a dependency action in which the legal parent’s rights are severed, a de facto parent could intervene and obtain custody.⁷⁷ Courts have awarded custody or visitation to nonparents with psychological bonds in the context of stepparent divorces and contested paternity actions.⁷⁸

71. See, e.g., *Smith*, 137 Wash. 2d at 20, 969 P.2d at 30 (recognizing potential for harm where a substantial relationship is severed); *J.H.*, 117 Wash. 2d at 469, 815 P.2d at 1384 (acknowledging the importance of relationships between children and nonparent caretakers); *McDaniels*, 108 Wash. 2d at 310–11, 738 P.2d at 261–62 (recognizing a bond between child and two putative fathers); *Allen*, 28 Wash. App. at 649, 626 P.2d at 23 (recognizing the bond between a child and stepmother).

72. 137 Wash. 2d 1, 969 P.2d 21 (1998), *aff’d on other grounds sub nom.* *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion).

73. *Id.* at 20, 969 P.2d at 30.

74. “Child development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent.” *McDaniels*, 108 Wash. 2d at 310, 738 P.2d at 261 (citing generally, *inter alia*, J. GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979)); see *Allen*, 28 Wash. App. at 648, 626 P.2d at 23 (“Where the reason for deferring to parental rights—the goal of preserving families—would be ill-served by maintaining parental custody, as where a child is integrated into the nonparent’s family, the de facto family relationship does not exist as to the natural parent and need not be supported.”).

75. See, e.g., *J.H.*, 117 Wash. 2d at 471, 815 P.2d at 1385 (reasoning that foster parents have a permissive right to intervene so long as their intervention does not conflict with the legal parent’s rights).

76. *In re Dependency of J.W.H.*, 147 Wash. 2d 687, 700, 57 P.3d 266, 272 (2002).

77. See, e.g., *In re Dependency of Ramquist*, 52 Wash. App. 854, 863, 765 P.2d 30, 35 (1988) (upholding termination of a natural parent’s relationship in favor of foster parents).

78. See *McDaniels v. Carlson*, 108 Wash. 2d 299, 313, 738 P.2d 254, 263 (1987) (holding that

C. *Prior to In Re Parentage of L.B., a De Facto Parent's Remedies Were Limited*

Although a court could award to a de facto parent either visitation or custody over the wishes of a legal parent, a de facto parent has fewer remedies and rights.⁷⁹ In *Smith v. Organization of Foster Families*,⁸⁰ the U.S. Supreme Court addressed foster parents' contention that the U.S. Constitution protected their psychological parent relationships with the children in their care.⁸¹ The Court assumed, without deciding, that a right to protect a substantial relationship with a child did exist and held that New York's procedural protections for foster parents were sufficient.⁸² The Court cautioned that constitutional rights for nonparents such as foster parents would necessarily be in tension with a legal parent's constitutional rights.⁸³ Therefore, the Court concluded that where a foster parent's wishes conflict with a legal parent's wishes, the rights of the foster parent "must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."⁸⁴

Though the U.S. Supreme Court has not explained when rights are substantially attenuated,⁸⁵ Washington courts make this determination by carefully balancing the rights of the child's nonparents, legal parents, and the state.⁸⁶ In *In re Custody of Nunn*,⁸⁷ Division I of the Court of

both a natural father and a putative father were entitled to petition for visitation regardless of the outcome of a paternity action); *Allen*, 28 Wash. App. at 644, 626 P.2d at 21 (interpreting the divorce statute to allow an award of custody to a stepparent); see also *In re Parentage of L.B.*, 121 Wash. App. 460, 478–81, 89 P.3d 271, 280–81 (2004) (citing cases in which courts awarded visitation or custody to nonparents).

79. *In re Custody of S.H.B.*, 118 Wash. App. 71, 80, 74 P.3d 674, 680 (2003) (holding that absent legislative action, nonparents, even those acting as *in loco parentis*, lack constitutional rights of a parent); *Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004) (finding that de facto parents have a right to appear in dependency proceedings, but have no other right or weightier interest of constitutional dimension).

80. 431 U.S. 816 (1977).

81. See *id.* at 846–47.

82. *Id.* at 847.

83. See *id.* at 846; accord *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion) ("The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, [it] can place a substantial burden on the traditional parent-child relationship.").

84. See *Org. of Foster Families*, 431 U.S. at 847.

85. See *Troxel*, 530 U.S. at 78 (Souter, J., concurring) ("Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child . . .").

86. See, e.g., *In re Custody of Smith*, 137 Wash. 2d 1, 19 n.4, 969 P.2d 21, 30 n.4 (1998)

Appeals reversed the trial court's award of custody to a paternal aunt over a fit biological mother after the death of the biological father.⁸⁸ The court reasoned that a stringent balancing test is required in a custody dispute between a legal parent and a nonparent to justify awarding custody to a nonparent.⁸⁹ Thus, the court held that in order to minimize state interference with a family unit, a nonparent must produce evidence of parental unfitness before a court can award custody to the nonparent.⁹⁰ Unless the nonparent can show the child is being or will be harmed, a nonparent has no standing to challenge a legal parent's rights.⁹¹

Even where a *de facto* parent's asserted rights did not conflict with a legal parent's,⁹² Washington courts have acknowledged that the nonparent had limited due process protection in comparison to the legal parent.⁹³ At common law, nonparents, even grandparents, had no legal right to petition for visitation or custody.⁹⁴ Similarly, a nonparent is not entitled to the same presumptions as a legal parent within the

(acknowledging that the court had applied a balancing analysis and affirming the result because the threshold showing of harm was met), *aff'd on other grounds sub nom. Troxel*, 530 U.S. 57 (plurality opinion); *id.* at 24, 969 P.2d at 32 (Talmadge, J., concurring in part, dissenting in part) (noting that the court must balance the interests of the child, legal parent, and state before awarding visitation); *In re Custody of Nunn*, 103 Wash. App. 871, 884, 14 P.3d 175, 182 (2001) (reasoning that a more stringent balancing test is required when determining whether to award custody or visitation to a parent or a nonparent); *In re Custody of Anderson*, 77 Wash. App. 261, 264, 890 P.2d 525, 526 (1995) (holding that in a custody dispute between parents and nonparents, the analysis must accommodate the natural parent's constitutional interests.); *In re Marriage of Allen*, 28 Wash. App. 637, 646, 626 P.2d 16, 22 (1981) (applying a balancing test among parental rights, state interests, and child's interests to determine when a nonparent may be awarded custody).

87. 103 Wash. App. 871, 14 P.3d 175 (2001).

88. *Id.* at 873–74, 14 P.3d at 177.

89. *See id.* at 884, 14 P.3d at 182. The strongest expression of this approach comes from *Smith*, in which the Washington State Supreme Court held that a petitioner must make a showing of harm to the child before the court can intervene to order visitation. *Smith*, 137 Wash. 2d at 20, 969 P.2d at 30.

90. *See Nunn*, 103 Wash. App. at 883, 14 P.3d at 181.

91. *See id.*

92. In Washington, a foster parent may not be involved, for example, where the state has instituted a dependency hearing to terminate a legal parent's rights. *In re Dependency of J.H.*, 117 Wash. 2d 460, 471–72, 815 P.2d 1380, 1385 (1991) (reasoning that foster parents have a permissive right to intervene as long as their intervention does not conflict with the legal parent's rights).

93. *See, e.g., In re Custody of S.H.B.*, 118 Wash. App. 71, 80, 74 P.3d 674, 680 (2003) (holding that, absent legislative action, nonparents—even those acting as parents—lack constitutional protections).

94. *See Martin*, *supra* note 53, at 579.

nonparental custody statute.⁹⁵ In practice, this means that a court can override the nonparent’s wishes without providing the same due process protections granted to a parent.⁹⁶ As a corollary, once a nonparent ceases to act as the child’s parent, the nonparent’s legal obligation to support the child ends.⁹⁷

Thus, before *In re Parentage of L.B.*, there was a significant difference between the rights of de facto and legal parents.⁹⁸ As a nonparent petitioning under the nonparent custody and visitation statute, a de facto parent could ask a court to intervene only when there is actual detriment to the child.⁹⁹ Even then, the due process rights of the nonparent with a court order were limited in comparison to those of a legal parent.¹⁰⁰

III. STATUTES AND JUDICIAL CAUTION LIMIT THE AUTHORITY OF WASHINGTON COURTS TO CREATE COMMON LAW

Washington courts have the authority to create common law, but this authority is limited.¹⁰¹ A court may not, for example, contravene statutes or statutory intent.¹⁰² Moreover, the Washington State Supreme Court has indicated that a court should be cautious in creating common law “absent prior legislative or judicial expression on the subject.”¹⁰³ In *In re*

95. See WASH. REV. CODE §§ 26.10.010–.913 (2002); *S.H.B.*, 118 Wash. App. at 80–82, 74 P.3d at 680–81 (“Nonparents—including adoptive parents, legal guardians, grandparents, and persons acting in an *in loco parentis* capacity—do not have the same constitutional rights of a parent, absent legislative action.”).

96. See, e.g., *Smith v. Org. of Foster Families*, 431 U.S. 816, 853 (1977) (noting that the “balance of due process interests must accordingly be different” between a foster parent and a natural parent).

97. See, e.g., *State ex rel. D.R.M. v. Wood*, 109 Wash. App. 182, 193, 34 P.3d 887, 893–94 (2001) (noting that when a stepparent’s custodial relationship ends, so does the support duty).

98. See, e.g., *S.H.B.*, 118 Wash. App. at 80, 74 P.3d at 680 (noting that nonparents do not have the same constitutional rights as parents).

99. See *supra* notes 58–60 and accompanying text.

100. *S.H.B.*, 118 Wash. App. at 80, 74 P.3d at 680.

101. See, e.g., *State v. Jackson*, 137 Wash. 2d 712, 724–25, 976 P.2d 1229, 1235 (1999) (refusing to read omission liability into an accomplice statute absent legislative intent).

102. See, e.g., *id.* (noting that the court may not rewrite unambiguous statutes to suit the court’s notion of public policy).

103. *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089 (1984) (citation omitted) (indicating that courts should be cautious in expanding the common law tort for wrongful discharge unless there is a prior judicially or legislatively recognized public policy favoring such expansion).

Parentage of L.B., Division I cited recent decisions to articulate that a court may create common law where there is a void in the statutes and a clear public policy mandate.¹⁰⁴

In Washington, courts have the authority and duty to alter the common law as justice requires.¹⁰⁵ The common law consists of court-made rules,¹⁰⁶ fashioned to adjust the law to deal with the “rich variety” of cases confronting the courts.¹⁰⁷ The court’s authority over the common law may extend to creating new judicial remedies.¹⁰⁸ In *Ueland v. Reynolds Metals Co.*,¹⁰⁹ for example, the Washington State Supreme Court, recognizing a child’s independent cause of action for loss of parental consortium, noted that to defer to the legislature would “abdicate [the court’s] responsibility to reform the common law to meet the evolving standards of justice.”¹¹⁰

A court’s authority over the common law is limited by statute.¹¹¹ The common law gives way to statutory authority when statute and common law conflict.¹¹² Courts are guided by statutory intent when they determine whether a statute abrogates the common law.¹¹³ The goal of statutory interpretation is to give effect to the intent and purpose of the legislature.¹¹⁴ The court may not substitute its own interpretation of public policy in place of the legislature’s.¹¹⁵ This prohibition includes

104. *In re Parentage of L.B.*, 121 Wash. App. 460, 476 n.2, 89 P.3d 271, 279 n.2 (2004).

105. *Lundgren v. Whitney’s, Inc.*, 94 Wash. 2d 91, 95, 614 P.2d 1272, 1275 (1980) (“Indeed, we have often discharged our duty to reassess the common law and alter it where justice requires.”).

106. *Spokane Methodist Homes, Inc. v. Dep’t of Labor & Indus.*, 81 Wash. 2d 283, 286, 501 P.2d 589, 591 (1972).

107. *Lundgren*, 94 Wash. 2d at 95, 614 P.2d at 1275 (quoting *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 676 (Cal. 1974)).

108. *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 136, 691 P.2d 190, 193 (1984) (“When justice requires, this court does not hesitate to expand the common law and recognize a cause of action.”).

109. 103 Wash. 2d 131, 691 P.2d 190 (1984).

110. *Id.* at 136, 691 P.2d at 193.

111. *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wash. 2d 219, 221, 517 P.2d 585, 587 (1973).

112. *Id.* at 222, 517 P.2d at 587.

113. *In re Custody of Smith*, 137 Wash. 2d 1, 8, 969 P.2d 21, 24–25 (1998) (“The purpose of statutory interpretation is to determine and give effect to legislative intent. Legislative intent is primarily determined from statutory language.” (citations omitted)), *aff’d on other grounds sub nom. Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion).

114. *Harmon v. Dep’t of Soc. & Health Servs.*, 134 Wash. 2d 523, 530, 951 P.2d 770, 773 (1998).

115. *See State v. Jackson*, 137 Wash. 2d 712, 725, 976 P.2d 1229, 1235 (1999) (refusing to read failure to meet common law duty of support to a child as a crime under accomplice liability statute).

“resist[ing] the temptation to rewrite an unambiguous statute to suit [the court’s] notions of what is good public policy”¹¹⁶

The court also may not adopt a common law cause of action that conflicts with an existing statutory scheme.¹¹⁷ Nor may the court create a cause of action where the legislature intends the statutory remedy to be exclusive.¹¹⁸ Thus, although the court may create common law in an area of law in which the legislature has acted,¹¹⁹ the court’s authority is strongest where the cause of action originated in the common law¹²⁰ or “in a field peculiarly nonstatutory”¹²¹ In a field of law in which the legislature has acted, the court may act only where there is a void in the statutes.¹²²

In *Philippides v. Bernard*,¹²³ the Washington State Supreme Court held that a court may not act on matters where the legislature has created a comprehensive set of statutes.¹²⁴ The court refused to acknowledge a common law cause of action for loss of consortium on behalf of the parents of an adult dependent.¹²⁵ A majority of eight justices held that because the legislature had created a comprehensive set of statutes governing who can recover in wrongful death actions, the court was precluded from acting.¹²⁶ Writing for the majority, Justice Faith Ireland observed that creating a common law remedy would directly conflict

116. *Id.*

117. *Philippides v. Bernard*, 151 Wash. 2d 376, 390, 88 P.3d 939, 946 (2004).

118. *Roberts v. Dudley*, 92 Wash. App. 652, 655, 966 P.2d 377, 378–79 (1998) (stating that the first step in determining whether to create a common law cause of action is to determine if the legislature intended to preempt the common law), *aff’d*, 140 Wash. 2d 58, 993 P.2d 901 (2000).

119. *Roth v. Bell*, 24 Wash. App. 92, 100, 600 P.2d 602, 607 (1979) (“The legislature may legislate in areas dealing with facets of tort law involving familial relationships, but such legislative action does not divest courts of their authority to alter rules of law which had their genesis in the courts under the common law.”).

120. *Stanard v. Bolin*, 88 Wash. 2d 614, 617, 565 P.2d 94, 96 (1977) (“Because the action has its origins in the common law and has not been acted upon by the legislature, it is proper for us to reexamine it and determine its continued viability in light of present-day society.”).

121. *Borst v. Borst*, 41 Wash. 2d 642, 657, 251 P.2d 149, 157 (1952) (quoting *Woods v. Lancet*, 102 N.E.2d 691, 694 (N.Y. 1951)).

122. *Roberts*, 92 Wash. App. at 655, 966 P.2d at 378–79 (determining that a court may use common law to fill such a void); *see also In re Parentage of L.B.*, 121 Wash. App. 460, 476 n.2, 89 P.3d 271, 279 n.2 (2004) (indicating that a common law remedy survives the enactment of a statutory remedy if the common law fills a void).

123. 151 Wash. 2d 376, 88 P.3d 939 (2004).

124. *Id.* at 390, 88 P.3d at 946 (holding that the court may not create a common law beneficiary for wrongful death and survival actions).

125. *Id.*

126. *Id.*

with existing statutes.¹²⁷

In addition to heeding the limitations imposed by statutes, a court should proceed cautiously when creating a common law cause of action.¹²⁸ In developing a new common law cause of action for the tort of wrongful discharge,¹²⁹ the Washington State Supreme Court warned that the court “should not create public policy but instead recognize only clearly existing public policy”¹³⁰ The court indicated that the legislature is the fundamental source of public policy and that courts should not act upon previously unrecognized public policy.¹³¹ However, the Washington State Supreme Court also indicated that in other circumstances¹³² it would extend common law if there was a “compelling necessity.”¹³³ Thus, Washington courts should proceed cautiously when creating a new common law cause of action.¹³⁴

IV. *IN RE PARENTAGE OF L.B.*, DIVISION I CREATED A COMMON LAW PARENTAGE ACTION

In *In re Parentage of L.B.*, Division I of the Washington State Court of Appeals addressed Sue Ellen Carvin’s petition to be declared a parent of L.B. under Washington’s UPA.¹³⁵ Prior to *L.B.*, there was a

127. *Id.*

128. *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089 (1984) (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) (“[C]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.” (emphasis in original))).

129. The court created this cause of action to ameliorate the common law rule of employment terminable at will in *Thompson*, 102 Wash. 2d at 232–33, 685 P.2d at 1089. The new cause of action allows a common law suit for wrongful discharge where there is a clear public policy against allowing the discharge. *Id.* The court adopted this exception to the common rule despite state legislative action against wrongful discharge. *Id.* at 226, 685 P.2d at 1086.

130. *Sedlacek v. Hillis*, 145 Wash. 2d 379, 390, 36 P.3d 1014, 1020 (2001).

131. *Id.* at 390, 36 P.3d at 1019.

132. *Erhardt v. Havens, Inc.*, 53 Wash. 2d 103, 106–107, 330 P.2d 1010, 1012 (1958) (declining to allow a child to maintain an independent cause of action for loss of consortium where the father conceded he had a statutory remedy). Although *Erhardt* was never overruled, the Washington State Supreme Court later adopted this cause of action in *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 136, 691 P.2d 190, 193 (1984).

133. *Erhardt*, 53 Wash. 2d at 106, 330 P.2d at 1012; see also *In re Parentage of L.B.*, 121 Wash. App. 460, 476 n.2, 89 P.3d 271, 279 n.2 (2004) (adopting the language from *Thompson* and *Sedlacek* to require a clear mandate of public policy before acting); *Roth v. Bell*, 24 Wash. App. 92, 100, 600 P.2d 602, 607 (1979) (interpreting *Erhardt* to require a compelling necessity before adopting a new cause of action).

134. See *Thompson*, 102 Wash. 2d at 232, 685 P.2d at 1089.

135. See *L.B.*, 121 Wash. App. at 465, 89 P.3d at 274.

significant difference between the rights of de facto and legal parents.¹³⁶ The court in *L.B.* held that Washington recognizes a common law parentage action and adopted a test previously articulated by the Wisconsin Supreme Court.¹³⁷ The court's decision, allowing de facto parents to be declared legal parents, gives de facto parents the constitutional protections that they did not previously have.¹³⁸ The court also held in the alternative that a lesbian nonbiological parent had a cause of action under the visitation provisions of the nonparental custody statute.¹³⁹

Sue Ellen Carvin and Page Britain, a lesbian couple, became romantically involved in 1989 and began cohabiting.¹⁴⁰ After five years, they decided Britain would have a child via artificial insemination, and they procured sperm from John Auset, a gay male friend.¹⁴¹ Carvin and Britain acted as the child's primary caretakers for the first six years of the child's life.¹⁴² Although the couple discussed adoption, Carvin did not adopt L.B.¹⁴³

In 2001, when L.B. was six, Britain decided to separate from Carvin.¹⁴⁴ Initially, the couple shared parenting of L.B., but shortly after the split Britain and Auset terminated Carvin's visitation with L.B.¹⁴⁵ Carvin then filed a petition to be declared L.B.'s legal parent.¹⁴⁶ The trial court found that L.B. had been harmed by the separation from Carvin, but held that Carvin had no cause of action under the UPA.¹⁴⁷ The trial

136. See, e.g., *In re Custody of S.H.B.*, 118 Wash. App. 71, 80, 74 P.3d 674, 680 (2003) (noting nonparents do not have the same constitutional rights as parents).

137. *L.B.*, 121 Wash. App. at 485, 487, 89 P.3d at 285.

138. *Id.* at 485, 487, 89 P.3d at 285 (holding that the common law cause of action would allow a court to award a de facto parent shared parentage). In other words, their rights are the same after they are declared de facto parents. *Id.*

139. *Id.* at 488, 89 P.3d at 285.

140. *Id.* at 465, 89 P.3d at 274.

141. *Id.* at 465–66, 89 P.3d at 274.

142. *Id.* at 467, 89 P.3d at 275.

143. *Id.* at 467, 89 P.3d at 274.

144. *Id.* at 467, 89 P.3d at 275.

145. *Id.* at 467–68, 89 P.3d at 275.

146. *Id.* at 468, 89 P.3d at 275. Shortly after Carvin filed her petition, Britain married Auset, and he signed a declaration of paternity. *Id.* Britain argued at the appellate court that Auset should be allowed to intervene in the proceeding. *Id.* at 490, 89 P.3d at 286. The court declined to reach the question of Auset's place in the proceeding, but remanded for the trial court to make an initial determination. *Id.* Therefore, this Note will not address Auset's standing.

147. *Id.* at 469, 89 P.3d at 276.

court also declined to create a common law parentage action and determined that the nonparental visitation statute did not apply because Carvin had not shown that Britain was an unfit parent.¹⁴⁸

On appeal, Division I reversed the trial court's decision and recognized a common law cause of action that allows de facto parents to adjudicate parentage.¹⁴⁹ The court held that Carvin did not have a cause of action under Washington's UPA.¹⁵⁰ Specifically, it held that although L.B. was conceived via artificial insemination, the artificial insemination provisions in the UPA applied only to married couples.¹⁵¹ Nor could Carvin rely on the surrogate parent standing provisions because the statute's definition of "surrogate parent" was gender specific.¹⁵² The court determined that the UPA was unambiguous and, because the UPA did not cover Carvin's situation, she had no cause of action.¹⁵³

Nonetheless, the court reasoned that "our Legislature cannot have intended to leave parties to such parentage arrangements and the children born of such arrangements without any remedy whatsoever."¹⁵⁴ The court then held that courts may create a common law remedy when the remedy "fills a void in the law for redress of an act or omission that contravenes a clear mandate of public policy."¹⁵⁵ Under this test, the court reasoned that Washington's prior judicial recognition of de facto parentage provided the public policy mandate necessary to justify creating a common law cause of action.¹⁵⁶

To determine the parameters of the common law doctrine, the court turned to other jurisdictions that have recognized a common law cause

148. *Id.*

149. *Id.* at 487, 89 P.3d at 285.

150. *Id.* at 474–75, 89 P.3d at 278. The 2002 amendment to the UPA repealed WASH. REV. CODE § 26.26.040 (2000), which Division I of the Court of Appeals indicated might cover a same-sex partner of a biological parent who signed a declaration of paternity. *Id.* (construing *State ex rel. D.R.M. v. Wood*, 109 Wash. App. 182, 189–91, 34 P.3d 887, 891–93 (2001)).

151. *Id.* at 474, 89 P.3d at 278.

152. *Id.* at 473–74, 89 P.3d at 278; *see also* WASH. REV. CODE § 26.26.210(3)–210(4) (2002) (specifying that a surrogate is a female who gestates a child and that a surrogate contract means a contract in which a female gestates a child and relinquishes parental rights).

153. *L.B.*, 121 Wash. App. at 474–75, 89 P.3d at 278.

154. *Id.* at 475–76, 89 P.3d at 279.

155. *Id.* at 476 n.2, 89 P.3d at 279 n.2.

156. *Id.* The court also cited Washington's Equal Rights Amendment as a source of public policy. *Id.* The court, however, did not address that issue in depth, *id.* at 476, 89 P.3d at 278–79, and it is beyond the scope of this Note.

of action for de facto parents such as Carvin.¹⁵⁷ Specifically, the court followed the test delineated by the Wisconsin State Supreme Court in *In re Custody of H.S.H.-K.*¹⁵⁸ Division I held that Carvin must show on remand that (1) Britain consented to and fostered the parent-like relationship; (2) Carvin and L.B. lived together in the same household; (3) Carvin assumed the obligations of parenthood without expectation of financial compensation; and (4) Carvin had been in the parental role long enough to establish a dependent, bonded parental relationship.¹⁵⁹

Division I's formulation, however, exceeded that of the Wisconsin court by extending the doctrine to full parentage rather than merely visitation.¹⁶⁰ The Wisconsin court articulated a doctrine that allows a same-sex de facto parent standing to bring a visitation petition,¹⁶¹ but dismissed the custody action on the grounds that proving the existence of a parent-like relationship was insufficient to justify custody.¹⁶² Similarly, other jurisdictions that have adopted equitable parent doctrines have stopped short of allowing a de facto parent to be adjudged a legal parent.¹⁶³

In the alternative, the *L.B.* court held that a de facto parent had standing to petition the court for visitation under the Washington nonparental custody statute.¹⁶⁴ The court adopted the actual detriment test for supporting an award of visitation.¹⁶⁵ The court further implied that a de facto parent would likely meet this actual detriment standard by showing that the legal parent's decision to stop visitation might harm the child.¹⁶⁶ On this independent ground, the court indicated that Carvin may

157. *Id.* at 481–85, 89 P.3d at 282–83.

158. 533 N.W.2d 419 (Wis. 1995); *L.B.*, 121 Wash. App. at 487, 89 P.3d at 285.

159. *L.B.*, 121 Wash. App. at 487, 89 P.3d at 285.

160. *See id.*

161. *H.S.H.-K.*, 533 N.W.2d at 436 (discussing Wisconsin's statutory basis for denying legal parents custody). The court also noted that the custody statutes in Wisconsin were intended to be the exclusive means of determining parentage. *See id.* at 431.

162. *Id.* at 420 (“We affirm that part of the order dismissing the petition for custody . . .”).

163. *See T.B. v. L.R.M.*, 786 A.2d 913, 920 (Pa. 2001) (affirming an award of partial custody and visitation); *cf. V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2001) (“Once a third party has been determined to be a psychological parent . . . he or she stands in parity with the legal parent.”). Despite this quote, the court did not award custody rights to the third party, only visitation rights. *Id.* (holding that visitation is the presumptive rule); *see also Jacobs, supra* note 1, at 366–69 (discussing the ways in which equitable doctrines in Wisconsin, New Jersey, and Massachusetts do not give full parental protections).

164. *L.B.*, 121 Wash. App. at 488–90, 89 P.3d at 285–86.

165. *Id.* at 489, 89 P.3d at 286.

be entitled to visitation rights.¹⁶⁷

V. DIVISION I EXCEEDED ITS AUTHORITY IN CREATING A COMMON LAW DE FACTO PARENTAGE ACTION

Division I of the Washington State Court of Appeals exceeded its authority when it created a common law parentage action for de facto parents. The Washington State Legislature intended Washington's UPA to be the exclusive means of establishing paternity.¹⁶⁸ Moreover, when the UPA is read in combination with the nonparental custody statute, the statutory scheme effectively preempts common law parentage actions.¹⁶⁹ Even if the UPA and nonparental visitation statute were not exclusive, Division I's own test for when courts can create a common law cause of action requires a clear mandate of public policy.¹⁷⁰ The nonparental custody statute, which allows a de facto parent to petition for visitation, adequately prevents harm to the child while protecting the legal parent's constitutional rights.¹⁷¹ Given the complex constitutional issues involved, the court should not have created a common law parentage action.

A. *Division I Exceeded Its Authority in Creating a Common Law Cause of Action Because the UPA Is Intended to Be the Exclusive Means of Determining Parentage*

Because the UPA was intended to be the exclusive means of determining parentage,¹⁷² a court may not create a common law parentage action. Washington courts do not hesitate to create common

166. See *id.* at 489, 89 P.3d at 285–86 (“Under Washington case law . . . Carvin does not need to prove that Britain is unfit in the classical sense, but only that it is detrimental to the child to sever the very parent-child relationship that Britain first consented to and fostered.”).

167. *Id.*

168. See WASH. REV. CODE § 26.26.021 (2002).

169. See, e.g., *Philippides v. Bernard*, 151 Wash. 2d 376, 390, 88 P.3d 939, 946 (2004) (explaining that a comprehensive statutory scheme leaves no room for a court to create common law).

170. See *L.B.*, 121 Wash. App. at 476 n.2, 89 P.3d at 279 n.2.

171. *Id.* at 490, 89 P.3d at 286 (concluding that when properly applied, the nonparental custody statute recognizes the presumption that a fit parent will act in the best interests of the child and its remedy is narrowly tailored); see also *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 436 (Wis. 1995) (explaining that de facto parent visitation protects parental constitutional rights and the child's best interest).

172. See WASH. REV. CODE § 26.26.021.

law where it is in the interest of justice.¹⁷³ The common law authority of the courts is, however, limited both by statute¹⁷⁴ and by the judicial canon of caution.¹⁷⁵ Division I recognized this in *In re Parentage of L.B.* by noting that it could create a common law cause of action only where there was a statutory void and a clear mandate of public policy.¹⁷⁶ The court's opinion, however, fails its own test.

The UPA does not grant standing to same-sex couples to adjudicate parentage.¹⁷⁷ The current version of the statute, as Division I held, "clearly does not" allow same-sex couples to pursue parentage under the UPA.¹⁷⁸ The court further noted that the standing provisions of the UPA were unambiguous and that a same-sex partner like Carvin did not fit any of the unambiguous categories granted standing.¹⁷⁹ Thus, the plain language of the statute does not allow same-sex de facto parents to be declared legal parents.

Moreover, the UPA is intended to be the exclusive method for determining parentage.¹⁸⁰ The statute expressly states: "This chapter governs every determination of parentage in this state."¹⁸¹ The court acknowledged this plain language,¹⁸² but concluded that because the legislature intentionally excluded same-sex couples who have children via artificial insemination, the legislature intended for the omission to be remedied by the courts.¹⁸³ This interpretation is inconsistent with the statute's unambiguous language stating that the UPA governs every parentage determination in Washington.¹⁸⁴ The very existence of a common law parentage action directly contradicts the statute, and because a court should not "rewrite an unambiguous statute to suit [the court's] notions of what is good public policy . . .,"¹⁸⁵ Division I exceeded its authority in creating a common law parentage action,

173. See *supra* notes 105–110 and accompanying text.

174. See *supra* notes 111–118 and accompanying text.

175. See *supra* notes 128–133 and accompanying text.

176. *In re Parentage of L.B.*, 121 Wash. App. 460, 476 n.2, 89 P.3d 271, 279 n.2 (2004).

177. See *supra* notes 36–41 and accompanying text.

178. *L.B.*, 121 Wash. App. at 474–75, 89 P.3d at 278.

179. *Id.* at 472, 89 P.3d at 278.

180. See WASH. REV. CODE § 26.26.021 (2002) (defining the scope of UPA).

181. *Id.* § 26.26.021(1).

182. *L.B.*, 121 Wash. App. at 476 n.2, 89 P.3d at 279 n.2.

183. *Id.* at 475–76, 89 P.3d at 279.

184. See WASH. REV. CODE § 26.26.021.

185. *State v. Jackson*, 137 Wash. 2d 712, 725, 976 P.2d 1229, 1235 (1999).

regardless of its public policy rationale.

Additionally, despite Division I's conclusion that the legislature "cannot have intended" to leave same-sex couples without remedy,¹⁸⁶ the omission of same-sex couples from the UPA should be interpreted to mean the legislature intended to exclude same-sex couples.¹⁸⁷ The legislature amended the UPA in 2002 and repealed the clause that may have applied to same-sex couples.¹⁸⁸ The decision to repeal those provisions should be read as intentional exclusion of same-sex couples from the UPA.

B. The Statutory Scheme Preempts Division I's Creation of a Common Law Parentage Action

Division I's conclusion that the legislature intended the courts to fill the void in the UPA with common law¹⁸⁹ is further undermined because de facto parents have remedies under Washington's adoption¹⁹⁰ and nonparental custody statutes.¹⁹¹ The court's own alternative holding that Carvin had a statutory remedy under the nonparental custody statute¹⁹² means that there is no statutory void to fill. A de facto parent can, for example, pursue a second parent adoption.¹⁹³ Because an adoptive parent is a legal parent¹⁹⁴ and there is no prohibition against same-sex adoptions,¹⁹⁵ the adoption statute can provide a same-sex de facto parent with full constitutional protections.¹⁹⁶

186. *L.B.*, 121 Wash. App. at 475–76, 89 P.3d at 279.

187. *See Jackson*, 137 Wash. 2d at 724–25, 976 P.2d at 1235 (admonishing the court to resist rewriting an unambiguous statute to suit the court's public policy rationale); *see also L.B.*, 121 Wash. App. at 473, 89 P.3d at 278 (noting that a lesbian nonbiological parent does not fit into any of the unambiguous categories for standing).

188. *L.B.*, 121 Wash. App. at 470–71, 89 P.3d at 276–78 (citing *State ex rel. D.R.M. v. Wood*, 109 Wash. App. 182, 189–91, 34 P.3d 887, 891–93 (2001)); *see supra* notes 32–35 and accompanying text.

189. *L.B.*, 121 Wash. App. at 476, 89 P.3d at 279.

190. *See supra* notes 17–22 and accompanying text.

191. *See supra* notes 59–71 and accompanying text. A de facto parent also has recourse under the dependency statutes. *See In re Dependency of Ramquist*, 52 Wash. App. 854, 862, 765 P.2d 30, 35 (1988).

192. *L.B.*, 121 Wash. App. at 488, 89 P.3d at 285.

193. *See State ex rel. D.R.M. v. Wood*, 109 Wash. App. 182, 191, 34 P.3d 887, 892 (2001).

194. WASH. REV. CODE § 26.33.260 (2002); *see D.R.M.*, 109 Wash. App. at 189, 34 P.3d at 891.

195. *See D.R.M.*, 109 Wash. App. at 191, 34 P.3d at 892.

196. *See* WASH. REV. CODE § 26.33.260; *D.R.M.*, 109 Wash. App. at 189, 191, 34 P.3d at 891–92.

Even after the dissolution of a same-sex relationship, Washington's statutory scheme provides a remedy for a same-sex de facto parent via the nonparental statute.¹⁹⁷ If the de facto parent can demonstrate that the child will suffer actual detriment, she can be awarded visitation or custody.¹⁹⁸ Because Washington courts already recognize that severing a significant relationship, such as a de facto parent-child relationship, may cause children harm, a de facto parent could demonstrate this actual detriment.¹⁹⁹ Division I acknowledged this in *In re Parentage of L.B.* by holding that a de facto parent had standing to petition for visitation under the nonparental statute.²⁰⁰

Thus, the statutory scheme preempts a common law remedy. A court cannot act in a field in which a comprehensive set of statutes exists.²⁰¹ In *Philippides*, the court refused to extend the common law to allow parents to recover for loss of consortium caused by the death of an adult child.²⁰² The court reasoned that the legislature had created a comprehensive wrongful death statute that defined statutory beneficiaries.²⁰³ To add parents of adult children to those beneficiaries would alter the legislative directive and exceed judicial authority.²⁰⁴ Similarly, with the UPA the legislature has created a comprehensive parentage statute and specified whom the statute covers.²⁰⁵ As in *Philippides*, creating a common law parentage action exceeds the court's authority to modify legislative policy decisions.

197. See WASH. REV. CODE §§ 26.10.010–913; see also *In re Custody of Stell*, 56 Wash. App. 356, 365, 783 P.2d 615, 620 (1989) (finding that a de facto parent can be awarded custody under WASH. REV. CODE § 26.10).

198. See *In re Custody of Smith*, 137 Wash. 2d 1, 20, 969 P.2d 21, 30 (1998) (recognizing potential for harm where a substantial relationship is severed), *aff'd on other grounds sub nom. Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion); *In re Dependency of J.H.*, 117 Wash. 2d 460, 469, 815 P.2d 1380, 1384 (1991) (noting that Washington courts have recognized the importance of the bond between nonparent caretakers and children); *McDaniels v. Carlson*, 108 Wash. 2d 299, 310–11, 738 P.2d 254, 261–62 (1987) (recognizing a bond between child and two putative fathers); *In re Marriage of Allen*, 28 Wash. App. 637, 649, 626 P.2d 16, 23 (1981) (recognizing the bond between a child and stepmother).

199. *Smith*, 137 Wash. 2d at 20, 969 P.2d at 30.

200. *In re Parentage of L.B.*, 121 Wash. App. 460, 488–90, 89 P.3d 271, 285–86 (2004).

201. See *Philippides v. Bernard*, 151 Wash. 2d 376, 390, 88 P.3d 939, 946 (2004).

202. *Id.*

203. *Id.*

204. *Id.*

205. WASH. REV. CODE § 26.26.505 (2002) (listing seven categories of parties who have standing under the UPA).

C. *Lesbian De Facto Parents Have Appropriate Statutory Remedies and Division I Cannot Override the Legislature's Policy Decision*

Given the remedies available under the nonparental custody and visitation statute, the public policy arguments advanced by Division I are insufficient to justify a new cause of action. To justify such an action, the court would need a "clear mandate of public policy."²⁰⁶ The difficulties in balancing the rights of legal parents, de facto parents, and children, however, obfuscate the public policy of creating a new parentage action.²⁰⁷ The actual detriment standard used by Washington courts to address petitions under the nonparental custody and visitation statute represents a careful balance between the rights of involved parties.²⁰⁸ As long as visitation orders are sufficient to remedy the identified risk of harm to the child, a court should not create an entirely new cause of action simply because the court believes it is better policy.

Because the court identified the prevention of harm to children as the relevant public policy,²⁰⁹ the court should have interpreted the nonparental custody and visitation statute as an adequate remedy for those parties, including same-sex couples, excluded from the UPA and marriage statutes. Using a visitation order to protect the de facto parental relationship is consistent with the Wisconsin court's approach in *H.S.H.-K.*, the case on which Division I modeled its test.²¹⁰ The Wisconsin court limited its de facto doctrine to visitation and deemed visitation sufficient to protect the child's best interests, as well as parental autonomy and

206. *In re Parentage of L.B.*, 121 Wash. App. 460, 476 n.2, 89 P.3d 271, 279 n.2 (2004).

207. *See In re Custody of Smith*, 137 Wash. 2d 1, 24, 969 P.2d 21, 32 (1998) (Talmadge, J., concurring in part, dissenting in part) (noting that the court must balance the interests of the child, legal parent, and state before awarding visitation), *aff'd on other grounds sub nom. Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion); *In re Custody of Nunn*, 103 Wash. App. 871, 884, 14 P.3d 175, 182 (2001) (reasoning that between a parent and a nonparent a more stringent balancing test is required); *In re Custody of Anderson*, 77 Wash. App. 261, 264, 890 P.2d 525, 526–27 (1995) (holding that in a custody dispute between parents and nonparents, the analysis must accommodate the natural parent's constitutional interests); *In re Marriage of Allen*, 28 Wash. App. 637, 646, 626 P.2d 16, 22 (1981) (balancing parental rights, state interests, and child's interests to determine when a nonparent may be awarded custody).

208. *Allen*, 28 Wash. App. at 649, 626 P.2d at 23.

209. *L.B.*, 121 Wash. App. at 481, 89 P.3d at 282; *see also In re Custody of R.R.B.*, 108 Wash. App. 602, 616, 31 P.3d 1212, 1219 (2001) ("[I]n a nonparental custody proceeding, the child's safety, welfare, growth or development is always at issue; otherwise, there is no basis for awarding custody to a nonparent."); *Smith*, 137 Wash. 2d at 15–16, 969 P.2d at 28 ("[T]he state may step in and override a decision of a parent where the decision would harm the child.").

210. *See L.B.*, 121 Wash. App. at 487, 89 P.3d at 285.

constitutional rights.²¹¹ As the court noted in *In re Parentage of L.B.*, a custody or visitation order under the existing nonparental statute allows a de facto parent to maintain a relationship with the child as long as the de facto parent can demonstrate that severing contact will cause detriment to the child.²¹² This approach carefully balances the legal parent's rights with the child's interests in maintaining a de facto parent relationship.²¹³

VI. CONCLUSION

Division I of the Washington State Court of Appeals exceeded its authority in creating a common law parentage cause of action. Thus, the Washington State Supreme Court should reverse the Division I's decision in *In re Parentage of L.B.* The UPA's exclusivity clause preempts a court from creating a common law parentage cause of action. Even if the UPA were not the exclusive means of determining parentage, the UPA, adoption, and nonparental custody statutes create a statutory framework that preempts common law remedies. This does not, however, invalidate Division I's concern with protecting the best interests of the child. The court should defer to the legislature's policy decision to address this situation outside the context of the UPA. Thus, the Washington State Supreme Court should affirm Division I's alternative holding that same-sex de facto parents have a remedy under the nonparental custody statute.

211. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 436 (Wis. 1995).

212. *L.B.*, 121 Wash. App. at 489–90, 89 P.3d at 286.

213. See *supra* notes 85–91 and accompanying text.

