IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Parentage of J.M.W.	)	NO. 64334-7-I
	)	
MICHAEL A. TIPPIE,	)	DIVISION ONE
	)	
Appellant,	)	
	)	
and	)	
	)	
MARY V. WILSON,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: October 25, 2010
	)	

Lau, J. — Mary Wilson is the adoptive mother of J.W. Shortly before J.W.'s adoption, Wilson began dating Michael Tippie. The couple eventually moved in together and later married. About six years after their relationship began, Tippie petitioned for divorce and to be named J.W.'s de facto parent. The trial court granted summary judgment in Wilson's favor, finding no material issues of fact on the consent element of the de facto parent doctrine. Because In re Parentage of M.F., 168 Wn.2d 528, 531, 228 P.3d 1270 (2010), precludes application of the de facto parent doctrine to the circumstances here, we affirm dismissal of Tippie's defacto parent petition.

FACTS

In 1998, Wilson commenced child adoption proceedings. She was approved in 1999 as a prospective adoptive mother for a child soon to be born in Guatemala. While the adoption process was ongoing, Wilson began dating Tippie. In November 1999—about six months into their relationship—Wilson and Tippie travelled to Guatemala together to pick up Wilson's adopted child, J.W. The parties dispute whether Wilson invited Tippie on the trip or whether Tippie invited himself. Tippie was present when Wilson first met J.W. He stayed in Guatemala for a short time and then returned to the United States. Wilson remained in Guatemala alone to complete the adoption process. On November 19, 1999, J.W. was permanently delivered to Wilson's care.

Wilson and Tippie continued dating but lived separately for about a year after the adoption. During this time, Wilson and Tippie saw each other once or twice a week. Wilson never asked Tippie to watch J.W., bathe her or change her diaper. In December 2000, Wilson and Tippie purchased a home together and moved in with J.W. and Tippie's two children from a prior marriage.[1] On December 11, 2000—the same day the house purchase closed—Wilson petitioned to adopt J.W. in King County Superior Court. Wilson did not offer to include Tippie as an adopting parent, and Tippie did not ask to be included. According to Wilson, the decision not to include

[1] Tippie shared parenting half time (alternate weeks) with his former wife.

Tippie "was not an oversight on my part, but reflected the fact that I did not see this adoption in any way as a joint endeavor with him." Nevertheless, J.W. referred to Tippie as "Daddy" from the time she began to speak, and the two would go out for weekend events without Wilson.

The parties eventually agreed to get married in July 2002. Shortly before the wedding, Tippie presented Wilson with a prenuptial agreement that included a provision that he would adopt J.W. "as soon as possible post-marriage." Wilson rejected the proposal but agreed to a provision that Tippie be allowed to adopt J.W. "upon [J.W.] turning nine years of age"—about six years later. Wilson and Tippie "recognize[ed] that not all of this section is legally binding on the court, but it represents our true, genuine, good faith wishes while in a mutual state of good will." The parties agreed,

> (a) We mutually believe and agree that it is in the best interest of children for them, at all times and under any circumstances, to continue to have a continual substantial loving relationship with both their mother and father. We believe that not to have a substantial involvement of both a mother and father in a child's life would be detrimental to healthy psychological and spiritual growth in the child, hence it is our honest and dedicated intention to hereby to foster such a cooperative relationship between the children and both parents at all times and at all costs. We recognize that while divorce between parents may terminate the marriage relationship for the parents, it does not ever diminish a mother's or father's parental relationship or responsibilities. Consequently, we stipulate the following:
>
> (1) After the parties marriage on 7/19/02, upon [J.W.] turning nine years of age, or when the Parties agree to do so, whichever comes first, Michael Tippie will adopt [J.W.]
>
> (2) In the event of dissolution of the marriage between Michael Tippie and Mary Wilson, Michael will obtain, at a minimum, custody of [J.W.] every other weekend and one day midweek as well as at least four weeks in the summer through Labor Day, Christmas Break excluding Christmas Day, Father's Day and Michael's birthday. In addition, every other year, Michael will have custody on [J.W.]'s Spring Break as well as Christmas Day, New Year's Day, Thanksgiving

and Halloween.

The parties married on July 19, 2002. In their subsequent dissolution action, the trial court found[2] that the prenuptial agreement was unenforceable.

On March 25, 2008, Tippie filed a petition to dissolve the marriage and requested de facto parentage status as to J.W. Tippie also filed a separate petition to establish his de facto parentage status. The court denied Tippie's motion to consolidate the de facto parentage petition with his dissolution action. The court also denied his motion to appoint a guardian ad litem, finding,

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

On May 20, 2009, Wilson filed a CR 12(b)(6) motion to dismiss Tippie's de facto parent petition. The court, with the parties' consent, considered the motion as a summary judgment motion. After oral argument, the court granted the motion. It found that Tippie failed to show material fact issues on the consent element of de facto parentage and dismissed his petition. After Tippie appealed and filed his opening brief in this court, the Supreme Court declined to extend the de facto parent doctrine to stepparents seeking parental rights to stepchildren of a former marriage in M.F., 168 Wn.2d at 531.

ANALYSIS

Applicability of De Facto Parent Doctrine to Stepparents

[2] No documentation of the dissolution appears in the record, but the parties do not dispute that the trial court found the prenuptial agreement unenforceable.

Wilson argues that regardless of whether issues of fact exist on the de facto parent doctrine elements, Tippie is precluded, as a matter of law, from relying on that doctrine by M.F. Tippie counters that M.F.'s reach is limited and is distinguishable on its facts. Although the trial court applied the de facto parent doctrine here and found no material issues of fact as to its elements, the Supreme Court's decision in M.F. controls the doctrine's application to this case. Accordingly, we address the application question first.

We review a motion for summary judgment de novo, construing all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992); Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 795, 64 P.3d 22 (2003). We may affirm summary judgment on any grounds supported by the record. Allstot v. Edwards, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

Our Supreme Court first recognized the de facto parent doctrine in In re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005). There, the court examined whether a biological mother's former lesbian partner, who was not biologically related to the child or an adoptive parent, had standing to petition for determination of co-parentage of the child born into their relationship. L.B., 155 Wn.2d at 683–84, 688–89. The two women were in a committed relationship when the child was born, the decision to add the child to the relationship was a joint decision, the women held themselves and the child out to the public as a family, and the women co-parented the child until

their relationship ended when the child was six. L.B., 155 Wn.2d at 683–84.

After their relationship ended, the biological mother terminated all contact between her former partner and the child. The former partner petitioned for establishment of parentage, asking that she be declared the child's legal parent under the Uniform Parentage Act (UPA), chapter 26.26 RCW, that she be declared a parent under equitable estoppel or recognized as a de facto parent, and that she be allowed statutory third party visitation rights. L.B., 155 Wn.2d at 685.

On review, relying on its equitable powers and recognizing the common law status of a de facto parent, our Supreme Court determined that the former partner had standing to petition for a determination of co-parentage if she could establish that she had a de facto parent relationship with the child. L.B., 155 Wn.2d at 683. The court created that remedy, recognizing that "while attempting to give structure and predictability to [parentage] determinations, neither the UPA nor corresponding statutes defining parental rights and responsibilities purport to preclude the operation of the common law when addressing situations left unanswered after conducting a strict statutory inquiry." L.B., 155 Wn.2d at 696. While the "UPA undeniably provides a statutory, and the most common, avenue by which courts adjudicate a person a parent in this state . . . it inevitably did not contemplate nor address every conceivable family constellation . . . ." L.B., 155 Wn.2d at 688 n.5. Thus, the de facto parent doctrine was necessary "to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy." L.B., 155 Wn.2d at 707. The court then set out the elements a party claiming de facto parentage status must

establish.

> "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature."

L.B., 155 Wn.2d at 708 (quoting In re Parentage of L.B., 121 Wn. App. 460, 487, 89 P.3d 271 (2004)). Further, the court noted, "[R]ecognition of a de facto parent is 'limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.'" L.B., 155 Wn.2d at 708 (quoting C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004)).

But in M.F., our Supreme Court declined to extend the de facto parent doctrine to the stepparent context. M.F.,168 Wn.2d at 535. Before M.F. was two, her natural parents divorced and her mother married John Corbin. When M.F. was seven, her mother and Corbin divorced, but Corbin continued to have regular contact with M.F. until she was 12. M.F., 168 Wn.2d at 529–30. After M.F. arrived at Corbin's house "bruised in intimate places, apparently from being 'tickled' by her mother's new boyfriend," Corbin petitioned to become M.F.'s de facto father. M.F., 168 Wn.2d at 536 (Chambers, J. dissenting).

The court held that because the "legislature has provided a statutory remedy for a stepparent seeking a custodial relationship with a stepchild by enabling stepparents to petition for custody," the de facto parentage doctrine did not extend to the stepparent context. M.F., 168 Wn.2d at 533. The court so held because it determined chapter

26.10 RCW, the child custody statute, constituted an adequate statutory remedy. M.F., 168 Wn.2d at 534–35. In describing its previous decision in L.B., the Supreme Court explained "the factors prompting us to recognize a remedy in L.B. are not present in this case, as no statutory gaps exist to fill." M.F., 168 Wn.2d at 532 (emphasis added). Rather, the court held, "An avenue already exists for a stepparent seeking a legal, custodial relationship with a child. The legislature has created and refined a statutory scheme by which a stepparent may obtain custody of a stepchild." M.F., 168 Wn.2d at 532. Because there was no statutory void, the court could not "apply an equitable remedy that infringes upon the rights and duties of M.F.'s existing parents." M.F., 168 Wn.2d at 532. The court concluded,

> [H]ere, the petitioner is a third-party to the two already existing parents, which places him in a very different position than the respondent in L.B. These differences, as well as the presence of a statutory remedy available to Corbin, support our conclusion that the de facto parentage doctrine should not extend to the circumstances in this case.

M.F., 168 Wn.2d at 534.

M.F. controls the resolution of this case. The M.F. court held that because the "legislature has provided a statutory remedy for a stepparent seeking a custodial relationship with a stepchild by enabling stepparents to petition for custody," the de facto parentage doctrine should not extend to the stepparent context. M.F., 168 Wn.2d at 533. The statutory remedy available in M.F.— nonparent custody pursuant to RCW 26.10.030—was equally available to Tippie. Accordingly, M.F. bars Tippie's action as a matter of law. And as Wilson argues, because J.W. has only one legal parent, stepparent adoption constitutes a viable statutory remedy as well. Indeed, adoption was more available to Tippie

than to the petitioner in M.F., as Tippie would not be required to seek the termination of a biological or legal father's parental rights. That Wilson did not consent to the adoption does not mean that the legislature has not provided a statutory remedy.

Tippie argues that M.F. is distinguishable because the court there emphasized that "the petitioner is a third-party to the two already existing parents, which places him in a very different position than the respondent in L.B.," while Tippie is a stepparent to an adopted child with only one legal parent. M.F., 168 Wn.2d at 534 (emphasis added). But Tippie is still an outside party to a parent-child relationship "with established parental rights and duties" as was the case with the petitioner in M.F., 168 Wn.2d at 532. And as Wilson notes, the Supreme Court has not applied a different analysis when examining the parental rights of single parents. See In re Custody of Shields, 157 Wn.2d 126, 136 P.3d 117 (2006) (applying heightened actual detriment standard to stepmother's third party custody action pursuant to RCW 26.10.030 where child had only one legal parent).

Wilson established her parental rights and duties acting alone. She decided to adopt a child in 1998—about a year before she met Tippie. While Tippie accompanied Wilson to Guatemala to pick up J.W., the two did not live together until a year later and did not marry until two years and eight months later. And the Guatemalan adoption decree entered in 1999 lists Wilson as J.W.'s only parent.[3] Similarly, the December 11,

[3] The adoption decree does not appear in the record, but Wilson submitted a declaration stating, "I am the mother of [J.W.] . . . adopted by me as a single mother by a Guatemalan Decree entered on October 25, 1999." Tippie does not contest this assertion.

2000 United States petition for adoption[4] includes a sole petitioner—Wilson. According to Wilson, the decision not to include Tippie "was not an oversight on my part, but reflected the fact that I did not see this adoption in any way as a joint endeavor with him." The record here shows no evidence that the decision to adopt J.W. was a joint decision, unlike the decision to have a child in L.B.

Tippie also maintains that in M.F., "the very issue that brought [the stepfather] into court was more akin to a proceeding for non parental custody [action] under RCW 26.10" and "[w]here a petitioner is not seeking a custodial relationship, but rather a parental relationship, the de facto doctrine should apply . . . ." Reply Br. of Appellant at 12–13. But while the evidence of abuse in M.F. likely could have supported nonparental custody, the petitioner there clearly "petitioned to be named M.F.'s de facto parent" just as Tippie has here. M.F., 168 Wn.2d at 530. And "[o]ne who meets the rigorous test that defines a de facto parent stands in legal parity to an otherwise legal parent . . . ." In re Parentage of J.A.B., 146 Wn. App. 417, 426, 191 P.3d 71 (2008). Tippie's argument is not persuasive.

Finally, Tippie argues that the "'original intent and agreement of the parties is extremely important to determining when the de facto parent doctrine applies" and that the parties' prenuptial agreement evinces an intention to create a "permanent parenting relationship" between Tippie and J.W. Reply Br. of Appellant at 16. Tippie bases this argument on a single phrase in M.F.

"We created this remedy to 'fill the interstices that our current legislative

[4] The adoption was finalized on February 28, 2001, but does not appear in the record.

> enactment fails to cover in a manner consistent with our laws and stated legislative policy.' L.B. 155 Wn.2d at 707. We concluded that a common law remedy is available when, in the absence of applicable statutes, the court is called upon to '"administer justice according to the promptings of reason and common sense. . . ."' L.B. 155 Wn.2d at 689 (quoting Bernot v. Morrison, 81 Wash. 538, 544, 143 P.I04 (1914)). Taking into account the original intent and agreement of the parties and the lack of a statutory remedy, we fashioned a remedy to fulfill the parties' agreement. But the factors prompting us to recognize a remedy in L.B. are not present in this case, as no statutory gaps exist to fill."

Reply Br. of Appellant at 10–11 (quoting M.F., 168 Wn.2d at 535) (emphasis in brief). From this, Tippie argues that the M.F. court relied on the lack of any "document or asserted agreement that would demonstrate that the parties' intent was for [the stepfather] to replace either of M.F.'s existing parents." Reply Br. of Appellant at 11. Because the prenuptial agreement here allegedly establishes Wilson and Tippie's intent to establish a parental relationship between Tippie and J.W., Tippie maintains the de facto parent doctrine should still apply. But there is little support for this claim in M.F. Even if the phrase in M.F. relied on by Tippie demonstrates that our Supreme Court took "into account" the parties' intent in L.B., that intent was not the basis of the court's decision. Rather, the court emphasized that it "created [the de facto parent] remedy to 'fill the interstices that our current legislative enactment fails to cover . . . .'" M.F., 168 Wn.2d at 535 (quoting L.B., 155 Wn.2d at 707). The prenuptial agreement and the meaning Tippie imputes to it are not enough to justify an equitable remedy where a statutory one—expressly approved in M.F.—exists.

Because we conclude that the de facto parent doctrine is inapplicable under the facts of this case, we do not address Tippie's remaining contention that material fact

issues exist as to the elements of that doctrine.[5]

Attorney Fees

Wilson also argues that the court should award attorney fees under RAP 18.1[6] and 18.9. Under RAP 18.9, this court may order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." "'An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.'" Kinney v. Cook, 150 Wn. App. 187, 195, 208 P.3d 1 (2009) (quoting Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007)). All doubts as to whether an appeal is frivolous are resolved in favor of the appellant. Kinney, 150 Wn. App. at 195. While M.F. does bar Tippie's action, we conclude that this is an evolving area of the law and Tippie has raised some debatable grounds on which to distinguish that case. His appeal is not frivolous under RAP 18.9, and an award of fees or other sanctions is not warranted.

For the reasons discussed above, we affirm dismissal of Tippie's defacto parent petition.

[5] Tippie also argues that the trial court abused its discretion in denying his motion to appoint a guardian ad litem. But Tippie has provided no controlling authority establishing that a guardian ad litem is appropriate in a de facto parent case, and we therefore find no error.

[6] RAP 18.1 describes the mechanics for requesting a fee award on appeal but does not provide an independent basis for such an award.

WE CONCUR: