

No. 52151-9-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In Re The Parentage of L.B., Child,

Sue Ellen Carvin, *Appellant*,

v.

Page Britain, *Respondent*

AMICUS CURIAE BRIEF

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I. Identity and Interest of *Amicus*

Amicus Curiae, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress the systemic problems confronting children and thus to improve their lives and experiences.

The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families and the direct legal representation of children and their interests in the local court systems. Through its production of scholarship in support of legal reform and the work of children's rights advocates, and through its representation of individual clients, the Justice for Children Project strives to advance the cause of children's rights throughout the country.

The Project is grateful for the assistance provided by many law students in the preparation of this brief. The Project acknowledges in particular the assistance of students Melissa Callais, Kelly Curtis, Erin Davies, Kristen Duff, Lindsey Lathwell, Keith Little, and Kim Rigby.

The Justice for Children Project has undertaken the role of *Amicus Curiae* in this litigation as part of its overall mission to secure a legal reform on behalf of the child who was unrepresented in this contested

parentage and custody matter. The Justice for Children Project has no relationship to any of the individuals involved in this litigation.

II. Statement of the Case

Page Britain and Sue Ellen “Mian” Carvin began their relationship in June 1989, and started living together in September 1989. CP 181. In 1994, they began a family by having a child together. CP 75. Page and Mian defined their family as Page, Mian, and the new baby, L.B. CP 104.

While Page was pregnant, Page and Mian both attended parenting classes and went to Page’s prenatal care appointments. CP 78. When selecting L.B.’s middle name, they chose two separate names to honor both Page’s and Mian’s families. CP 78-79. While raising L.B., both women worked and L.B. attended daycare and then preschool. As L.B. got older, Page started working more, and Mian became the primary caregiver for L.B. CP 35, 61, 81, 162.

Page decided to leave Mian when L.B. was almost six years old. CP 83-84. As time passed, Page restricted visitation between L.B. and Mian until L.B. could no longer see Mian at all. CP 84, 88-91. Upon being denied visitation with Mian, L.B. had trouble sleeping and had vomiting episodes. CP 260-61. L.B.’s therapist recognized that L.B. “has experienced sadness at times since February 2001. . . and that she does miss [Mian].” (Declaration by Linda Anderson).

L.B. developed an intimate parent-child relationship with both Page and Mian. Over the course of six and a half years, L.B. was jointly raised by the two women. As the record reflects, the trial court failed to appoint either a guardian ad litem (“GAL”) or an attorney to L.B. for any of the proceedings in the Superior Court.

III. Argument

It is well settled that children have constitutional rights; those rights do not mature and come into being only when one attains the age of majority. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976). L.B.’s rights to be heard and represented in the custody and visitation proceeding are established under the Substantive and Procedural Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 3 of the Washington Constitution and the Association Clause of the First Amendment to the U.S. Constitution and Article 1, Section 4 of the Washington Constitution, as well as the Uniform Parentage Act.

A. L.B. has a fundamental right to maintain and pursue a parent-child relationship under the Substantive Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Substantive due process mandates that the state provide an adequate reason for any deprivation of life, liberty, or property. U.S. Const. Amend. XIV. The amount of substantive due process that must be

afforded depends on whether the right infringed is fundamental. *See generally Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). It is well established that “freedom of choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). In *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977), the Court found that familial rights are not limited to parents; these rights extend to the whole family, including children. Because the right to maintain familial relationships is a fundamental right, substantive due process will be satisfied only if the state can show a compelling governmental purpose for infringing on that right. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

The Supreme Court has not limited the definition of family to a nuclear, biological family. *Moore*, 431 U.S. at 504. The importance of family “stems from the emotional attachments that derive from the intimacy of daily association.” *Smith v. Organization of Foster Families for Equuity. and Reform*, 431 U.S. 816, 844, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977). In *Smith*, the Court held that “no one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood

relationship.” *Id.* The Court has recognized that this non-biological familial bond can be created as a result of living in an intimate, family-like situation.

Unlike the foster parent-foster child relationship in *Smith*, which the Court found not to warrant constitutional protection, L.B. shares a relationship with Mian most akin to a biological parent-child relationship. The foster parent relationship in *Smith* was temporary, while Mian’s relationship with L.B. is permanent. The Superior Court determined that “there is really no comparison of the grandparent relationship with the child in *Troxel* compared to the Petitioner’s relationship to the child in this case.” (Findings of Fact, ¶ 2.8). Thus, L.B. has a constitutional right to pursue a relationship with Mian if she so chooses; she has formed a constitutionally protected familial relationship, which stems from the emotional attachments that resulted from their regular, intimate contacts.

B. The Washington Constitution affords substantive due process protection to L.B.

Identical in language to its federal counterpart, Article 1, Section 3 of the Washington Constitution affords protections analogous to those provided by the Fourteenth Amendment’s Due Process Clause. *State v. Manussier*, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996).

Like the federal courts, Washington has acknowledged the important nature of a child's relationship with those other than her natural parents. The Supreme Court of Washington has recognized that being a parent is not always a matter of biology since children become psychologically attached to the adults who take care of their physical and emotional needs on a day-to-day basis. *In re Dependency of J.H.*, 117 Wn.2d 460, 468, 815 P.2d 1380 (1991). The role of a psychological parent is thus based on daily interaction, companionship, and shared experiences and can be fulfilled by a biological parent, an adoptive parent, or any other caring adult. *Id.* at 468-69. The Washington Supreme Court has further noted that "it would be ironic to find issues of parent-child ties are of constitutional dimension when the parents' rights are involved but not when the child's are at stake." *State v. Santos*, 104 Wn.2d 142, 143, 702 P.2d 1179 (1985). *J.H.* and *Santos* make clear that a child enjoys the fundamental right to pursue and maintain a familial relationship.

The child's interest in maintaining a relationship with a person who raised her since birth undeniably warrants deference and, absent a compelling, countervailing state interest, protection. Page's desire to remove L.B. from Mian's regular contact is not absolute even though she is L.B.'s biological mother. As one court has noted, "although the family structure is a fundamental institution of our society, and parental

prerogatives are entitled to considerable deference, they are not absolute and must yield to the fundamental rights of the child or important interests of the state.” *State v. Koome*, 84 Wn.2d 901, 907, 530 P.2d 260 (1975).

As a result of L.B.’s six and a half years of intimate daily contacts with Mian and Page, L.B. should have the right to continue this parent-child relationship. It was fundamentally unfair for the state to allow Page and Mian to assert their rights over L.B. while not allowing L.B. an effective voice to exercise her own constitutional rights.

L.B., Page, and Mian were all a part of the same family unit. Given the existence of a constitutionally protected familial relationship, L.B. has a substantive due process right to maintain and pursue her relationship with Mian if she so chooses. This right is fundamental and cannot be deprived without the showing of a compelling state interest. The record illustrates that L.B. played no role in the proceedings below and that no state interest for excluding her was ever offered. Thus, the lower court deprived L.B. of her federal and state constitutional right to pursue and maintain an important familial relationship under the Substantive Due Process Clause.

C. L.B. may not be deprived of a protected liberty interest without due process of law under the Fourteenth Amendment to the U.S. Constitution.

The Fourteenth Amendment to the U.S. Constitution establishes that no “state [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. To apply procedural due process, a state must take action to deprive an individual of a protectable interest in life, liberty, or property. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-73, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Judicial action qualifies as state action for procedural due process purposes. *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). The Supreme Court established that familial relationships are a liberty interest encompassed by procedural due process. *Smith*, 431 U.S. at 842-43 (1977).

In 1976, the Supreme Court created a three-part balancing test to determine what process is due when an individual has been deprived of a liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The three factors set out by *Mathews* are:

[F]irst, the private interest that will be affected through the procedures used; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

Id. at 335. Three critical procedural due process rights are the right to notice, a meaningful hearing, and representation or counsel. *In re Gault*,

387 U.S. 1, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). The Supreme Court has determined that these rights extend to children when their protected liberty interests are threatened by state action. *Id.* at 28-31.

a. L.B.'s liberty interest in this case is substantial as it involves L.B.'s right to continue an intimate relationship.

In this case, the private interest affected is substantial. L.B. has spent the majority of her life, six and a half of her eight years, living in a family and forming a parent-child bond with both Mian and Page. Therefore, the liberty interest affected in this case is L.B.'s right to choose to maintain a parent-child relationship with Mian.

b. Erroneous deprivation of L.B.'s rights is likely when she has not been afforded notice, hearing, or counsel.

The risk of erroneous deprivation in this case is great, and the severity of this risk entitles L.B. to notice, a hearing, and representation by counsel during any proceeding that could potentially limit her ability to pursue and maintain a parent-child relationship. *See Gault*, 387 U.S. at 28-31. By excluding L.B. from the lower court proceeding, the court deprived L.B. of her right to continue a relationship with a member of her family. If this Honorable Court continues to deny L.B. a voice, the Court may permanently sever a parent-child relationship that is irreplaceable.

In addition, the procedural safeguards provided to L.B. by the lower court were inadequate to guarantee her constitutional rights. At a minimum, due process requires that an individual be given notice and an opportunity to be heard, and these rights must be accorded “in a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). To satisfy the constitutional requirement of notice, an individual must be informed of the “pendency of the proceedings affecting him or his property, and must afford an opportunity to present his objections before a competent tribunal.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

In this case, L.B.’s constitutional guarantees of notice, a hearing, and counsel have not been provided by the state. The record does not show that the state afforded L.B. notice of the proceedings. The only parties heard from thus far in the litigation are the adults in L.B.’s life, who are focusing on their rights to continue their relationships with L.B. L.B. has not had the opportunity to express her preferences, thereby depriving her of her interest in maintaining familial relationships with the individuals *she* chooses.

- c. **The magnitude of L.B.’s liberty interest outweighs any governmental interest the state may have.**

Given the liberty interest at stake, the governmental interests in this case are *de minimis*. The state has an interest in protecting the rights of children when they are not being cared for appropriately by their parents. *Prince v. Massachusetts*, 321 U.S. 158, 166-69, 64 S. Ct. 438, 88 L. Ed. 645 (1944). This protective power of the state extends to situations in which parents place their children at risk of physical or emotional harm. However, in this case, the Superior Court specifically found that Mian and Page were both appropriate caregivers for L.B. (Findings of Fact, ¶¶ 2.2, 2.4, and 2.5). As Mian and Page have not endangered L.B., the state's protective responsibility has not been triggered. Thus, the interest of the state in protecting L.B. does not outweigh L.B.'s constitutional right to maintain and pursue her intimate family relationships.

Considering L.B.'s constitutionally protected liberty interest, appointing an attorney to advocate L.B.'s rights does not impose considerable costs or administrative burdens on the state. This right is particularly important here given the complex relationships between the parties, and because as a child, L.B. is at a distinct disadvantage to the other parties in her level of sophistication and understanding of courtroom proceedings. *Smith*, 431 U.S. at 842 n.44 (finding that the District Court correctly appointed counsel to represent the best interests of the child). An eight-year-old child like L.B. is competent to form an opinion that is

“entitled to weight in legal proceedings.” Model Rules of Prof’l Responsibility R. 1.14 cmt. 1 (2003). By denying L.B. her constitutional right to counsel, the court has thus far silenced her. Therefore, in order to ensure L.B.’s constitutionally mandated rights, this Court must give L.B. representation.

D. Under the procedural due process clause of the Washington Constitution, L.B. is entitled to notice, a hearing, and counsel.

The Washington Constitution, Article 1, Section 3 generally offers the same protection as the federal constitution. *State v. Ortiz*, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991). Analysis of state due process claims requires application of the same factors enumerated in *Mathews. Rivett v. City of Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994).

3. L.B.’s right to maintain familial relationships is a protected liberty interest.

Washington recognizes the important nature of family as a societal institution, and the protections accorded to all individuals involved in such relationships. *Welfare of Luscier*, 84 Wn.2d 135, 136, 524 P.2d 906 (1974). In *Luscier*, the Washington Supreme Court recognized the need to safeguard the liberty interest of parents in the custody of their children, but also noted that the child has a liberty interest in maintaining familial

relationships. *Luscier*, 84 Wn.2d at 138. The court reasoned that “as a result of a child deprivation proceeding, a child may be deprived of the comfort and association of its [sic] parents,” and assumed that in cases in which a parent’s and child’s wishes differed, a GAL would be appointed for the child. *Luscier*, 84 Wn.2d at 138-39. A child has a protected liberty interest at stake in any proceeding that threatens her right to pursue a familial relationship.

4. Without the protections of due process, L.B. is not able to guard her interests from state interference.

Given the fundamental nature of L.B.’s liberty interest, and the lack of any procedural safeguards in place in the lower court to protect that interest, the risk of erroneous deprivation is great. The nature of the specific liberty interest implicated must be considered, as “the procedural safeguards afforded in each situation should be tailored to the specific function to be served by them.” *Olympic Forest Prods. v. Chausee Corp.*, 82 Wn.2d 418, 423, 511 P.2d 1002 (1973).

At a minimum, L.B. should have been given notice and an opportunity to be heard in the lower court. Notice must be meaningful and must alert an individual that his or her liberty interest may be affected. *Ware v. Phillips*, 77 Wn.2d 879, 882, 468 P.2d 444, 446 (1970). There is no indication that L.B. was ever informed by the state that her intimate

relationship with a parental figure was in jeopardy. Thus, her right to notice was violated.

A meaningful opportunity to be heard encompasses a constitutional right to counsel. The constitutional right to legal representation in civil cases is triggered “where a fundamental liberty interest, similar to the parent-child relationship, is at risk.” *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). Under the due process clause of the Washington Constitution, indigent parents are entitled to appointed counsel in permanent child deprivation proceedings, as well as in proceedings that may result in temporary removal of a child. *Luscier*, 84 Wn.2d at 139; *In re the Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P.2d 841 (1975). Because these proceedings deprive an individual of a fundamental liberty interest, the state must provide an attorney to ensure that an individual’s rights are adequately protected. *Myricks*, 85 Wn.2d at 255.

L.B.’s liberty interest in maintaining a parent-child relationship with Mian was infringed by the adjudication of parentage, yet she was not provided with notice, a hearing, or an attorney to express her wishes to the lower court. In order to ensure L.B.’s meaningful participation in a proceeding that affects her fundamental right to continue in a long-

standing parental relationship, the state was required to provide L.B. with procedural safeguards.

3. The state has no legitimate reason to deny L.B. procedural due process.

In addition to the parent's and child's interests in maintaining a relationship with each other, the state has an interest in protecting the child's welfare. *In re the Welfare of Sumey*, 94 Wn.2d 757, 764, 621 P.2d 108 (1980). However, this *parens patriae* interest justifies intervention and termination of rights by the state only when there has been a showing that "the child has suffered or is likely to suffer physical, mental or emotional harm as a result of the parents' conduct." *Id.* In contrast to the latter, the state has not made a finding of unfitness in this case, and therefore L.B.'s liberty interest outweighs any interest the state might have in protecting her.

The Washington Constitution mandates the appointment of a GAL for children involved in paternity adjudications and the appointment of counsel for indigent parents in child protection proceedings. *State on Behalf of McMichael v. Fox*, 132 Wn.2d 346, 353, 937 P.2d 1075 (1997); *Luscier*, 84 Wn.2d at 139. The state has already taken on the

administrative burden of appointing representation for indigent parties whose liberties are at risk and has assumed financial responsibility for this representation. Therefore, the financial and administrative burdens imposed on the state by retaining counsel for L.B. are *de minimis*. These burdens do not outweigh the significant, permanent infringement of L.B.'s liberty interest that resulted from the absence of procedural safeguards.

E. Freedom of association under the First Amendment to the U.S. Constitution protects L.B.'s right to maintain and pursue a parent-child relationship.

Under the First Amendment, freedom of association allows individuals to “enter into and maintain certain intimate human relationships” without interference by the state. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). In *Roberts*, the Court emphasized the importance of relationships for emotional well-being and individual growth. *Id.* at 619. Although the Court decided that the relationships formed in the Jaycees were not subject to constitutional protection, the Court specifically discussed the importance of constitutional protection for the unique relationships created within families. *Id.* at 619. Indeed, the Court stressed the nature of a family relationship as one of the most intimate and open relationships between individuals. *Id.* at 619-20.

In L.B.'s case, her relationship with Mian merits protection under the Association Clause, as it falls within the constitutional protections for familial relationships contemplated in *Roberts*. The relationship L.B. has with Mian is anchored in a family setting, creating the same bonds as a parent and daughter; L.B. considered Mian her "mama." After L.B. was denied visitation with Mian, L.B. became upset to the point of becoming physically ill. L.B. thus enjoys a First Amendment right to pursue this intimate relationship, which requires utmost deference from the state.

F. The Washington Constitution protects L.B.'s right to maintain intimate relationships through its freedom of association clause in Article 1, Section 4.

The principles of substantive due process serve as a guide for gauging the boundaries of the right of intimate association. *City of Bremerton v. Widell*, 146 Wn.2d 561, 577, 51 P.3d 733 (2002). While the court declined to extend the right of intimate association to "an engaged couple who is not cohabitating," the court also refused to limit protection to associations implicating only biological family relationships. *Id.* The key factor in determining the scope of the right in issue is the role the relationship has played "in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Id.* at 578. The relationship between a parental caregiver and a child is a crucial attachment that is required for healthy development and is critical to the

transmission of values and beliefs. *See* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. Pub. Int. L.J. 259, 266 (2003).

L.B.'s relationship to Mian was that of child to parent. L.B. and Mian lived in the same household, and Mian was an active caregiver. L.B.'s constitutional right to preserve this relationship from interference by the state was violated by the Superior Court. Given the nature of L.B.'s interactions with Mian and Page as described above, these parent-child relationships fall within the constitutionally protected realm of intimate associations. L.B.'s right to maintain and pursue familial relationships must be granted supreme deference by the state.

G. Pursuant to the UPA, a GAL and an attorney should be appointed to articulate L.B.'s interests.

In recognizing the changing landscape of the American family, its parameters no longer limited by marital status, sex, or biology, Washington's recent revision of its Uniform Parentage Act ("UPA") offers a flexible approach to defining family. The UPA requires a child's interests be accorded sufficient weight by providing that a child is a permissible party in actions to establish parentage. RCW 26.26.555(1). Furthermore, if the child is a party, or if the court finds that the interests of

the child are not adequately represented, the court must appoint a GAL to represent the child. RCW 26.26.555(2).

L.B.'s constitutionally protected interests have not been accorded sufficient weight as she did not have notice, a hearing, or representation in the proceedings below. In order to protect these interests, a child must be made a party to an action determining her parentage as "no individual should be bound by a judgment affecting his or her interests where he has not been made a party to the action." *Hayward v. Hansen*, 97 Wn.2d 614, 617, 647 P.2d 1030 (1982). A child must not be a party in name only. *Santos*, 104 Wn.2d at 147. It is crucial that parties whose interests are at stake be given an opportunity to be heard in a meaningful time and manner. *Id.* Since a child cannot represent her own interests, an attorney or a GAL who will protect those interests must be appointed.

In the case at issue, L.B. was bound by the Superior Court's decision even though she was not joined as a party or provided representation. Her right to maintain and pursue a parent-child relationship was adjudicated in a proceeding in which she had no opportunity to participate. Because L.B.'s interest in the outcome of the parentage proceeding warrants constitutional protection and protection under the UPA, she should have been joined as a party and appointed both an attorney and a GAL.

IV. Conclusion

Any decision made by this Honorable Court to resolve the present dispute over the parentage of and visitation rights with L.B. must respect the constitutional and statutory rights of L.B. to maintain and pursue her existing familial relationships as she chooses. For the foregoing reasons, the court below must be reversed and this matter remanded to the trial court for proceedings that adequately provide for and respect the rights of L.B.

Respectfully submitted this _____ day of September, 2003

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