STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
FAMILY DIVISION

ROBBIN SAWYER,

Plaintiff,

v

Hon. Karen D. McDonald

SUSAN MARIE ERSPAMER,

Case No. 15-833465-DC

Defendant.
_____/

Shelton and Deon Law Group
Amanda J. Shelton (P67770)
Mary K. Deon (P63019)
612 E. Fourth Street
Royal Oak, MI 48067
(248)494-7444

Attorneys for Plaintiff

The Rasor Law Firm, PLLC
Michael J. Miske (P68358)
James B. Rasor (P43476)
201 E. Fourth Street
Royal Oak, MI 48067
(248)543-9000

Attorneys for Defendant

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The American Civil Liberties Union Fund of Michigan files this motion to file an *amicus curiae* brief for the reasons that follow:

1. The American Civil Liberties Union Fund of Michigan is the Michigan affiliate of a nationwide nonpartisan organization consisting of nearly 500,000 members dedicated to protecting rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the fundamental rights of citizens and the ACLU of Michigan's Lesbian Gay Bisexual Transgender (LGBT) Project similarly commits itself to addressing public policy concerns, combating discrimination, and protecting the civil liberties of LGBT people in Michigan. This case presents an important issue regarding the recognition of the relationship

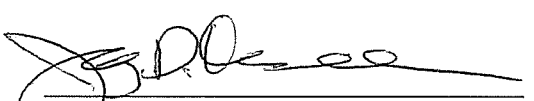
between children and an adult who has functioned as their parent in every way since birth and has a significant impact on LGBT families who are raising children.

2. The ACLU Fund of Michigan has provided direct representation and has submitted *amicus curiae* briefs in state and federal courts on a wide range of civil liberties issues, including the recognition of LGBT parent-child relationships. Given its experience and long-term interest in civil liberties and LGBT families, the ACLU Fund of Michigan believes that the *amicus curiae* brief in support of plaintiff and her claim of equitable parenthood will provide additional necessary arguments and perspectives to the attention of the Court regarding this important issue.

3. It is of vital importance that children of LGBT parents are afforded the same legal protections as children of heterosexual parents and that such children are not discriminated against because of the marital status and or sexual orientation of their parents, particularly when their parents were unconstitutionally prohibited from marrying.

WHEREFORE, for reasons stated in this Motion, the ACLU of Michigan respectfully requests that this Honorable Court grant this motion to file an *amicus curiae* brief.

Respectfully submitted,



Jay D. Kaplan (P38197)
Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6812

Attorneys for *Amicus Curiae*

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Michael J. Miske (P68358)
James B. Rasor (P43476)
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Royal Oak, MI 48067
(248)543-9000

Attorneys for Defendant

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

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INTRODUCTION

The American Civil Liberties Union Fund of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the fundamental rights of citizens, and the ACLU of Michigan's LGBT Project similarly commits itself to addressing public policy concerns, combating discrimination, and protecting the civil liberties of lesbian, gay, bisexual and transgender people in Michigan.

The ACLU of Michigan has been extensively involved in litigation to combat discrimination based on sexual orientation and gender identity. In 2001 the ACLU of Michigan launched its Lesbian Gay Bisexual and Transgender (LGBT) Legal Project to coordinate and direct such litigation in Michigan. Through this project the ACLU has participated in cases involving the rights of same-sex couples to become parents and to form and raise families.

The issue presented in this case has significant implications for some of the most important civil rights that gay men and lesbians may claim in this State: to become parents, to form families, to raise children, and to maintain their relationships with their children. The issue also impacts the equal protection rights of children of unmarried couples to receive the same legal protections and benefits afforded to children of married couples. For more than a decade, many Michigan family courts have relied upon the majority opinion in *Van v Zahorik*, 460 Mich 320 (1999), which limited the concept of equitable parent to individuals who were legally married, thus denying gay co-parents the ability to petition for parenting time, because they could not legally marry in Michigan. This resulted in tragic consequences for dozens of LGBT families, where co-parents were no longer permitted to see or have contact with the children they raised, due to the unilateral and often vindictive acts of the legal/biological parents.

The legal reasoning of the *Van* majority opinion is both constitutionally flawed and disregards the best interests of the children, which is supposed to be the Court's main consideration when determining child custody and parenting time matters. However, if *Van* remains the legal precedent for a determination of equitable parenthood, the Court's legal analysis cannot end there. This Court must take into account the legal ramifications of the United States Supreme Court decisions in both *Obergefell v Hodges*, 135 S Ct 2584 (2015), and *Windsor v United States,* 133 S Ct 2675 (2013) which stand for the principle that same-sex couples are entitled to the same equal protection guarantees as opposite sex couples for the purposes of marriage, including the benefits of marriage. If equitable parenthood in Michigan is a benefit of marriage, Michigan courts cannot deprive Robbin of the opportunity to be considered an equitable parent, when she was unconstitutionally denied the right to marry Susan in Michigan during the duration of their relationship.

STATEMENT OF THE CASE

This case represents the critical issue of how the courts of this state should treat the bonded relationship between children and an adult who has functioned as their parent in every way since birth with the consent and encouragement of the biological parent. Will such relationships be recognized and protected as would any other parent-child relationship, or will they be denied the court's protections against being arbitrarily and permanently severed?

The relevant facts as alleged by Plaintiff Robbin J. Sawyer may be summarized as follows: She and Defendant Susan Marie Erspamer were in a loving, committed domestic partner relationship for sixteen (16) years.[1] The parties exchanged marriage rings, which they

[1] Throughout the period of their relationship, Robbin and Susan were legally prohibited from marrying under Michigan's constitutional amendment, MI Const Art 1, Sec 25, as well as MCL

wore on a regular basis. They purchased a home together in Wixom in 1991 and jointly owned the property. They also jointly purchased a second home in Lakeview, Michigan, which they ultimately sold. During their sixteen years together, the parties always maintained joint checking accounts through which all expenses were paid. Susan ultimately came to work for Robbin's business through which she was provided health insurance. That health insurance was extended to the minor children. The parties subsequently opened a business together and took out a mortgage on their home to finance it.

Robbin and Susan desired to become parents together and decided that Susan would become pregnant through artificial insemination, selecting an anonymous sperm donor from Cryobank. With Robbin present, Susan was inseminated and the minor child was conceived. On July 12, 2001, Chase Sawyer Erspamer was born to the parties. Robbin was present and participated in Chase's birth and was the first person to hold him in the delivery room. Chase shares Robbin's last name as his middle name.

The parties subsequently decided to have another child and decided to adopt a child from Guatamala. Grace Vivian Tatiana Erspamer was born on March 19, 2005. Both Robbin and Susan paid for the adoption costs through a loan and their joint checking account. The adoption process involved two separate trips to Guatemala which Robbin and Susan took together. Due to restrictions on same-sex couples adopting, Susan is the only listed adoptive parent for Grace.

Until the end of their relationship, the parties co-parented the children together. Susan held Robbin out to Chase and Grace, and the rest of the world as the children's other parent. During their relationship and consistent with their parenting understanding, the parties shared

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551.1. Furthermore, both the Amendment and MCL 551.271 prohibited the State of Michigan from recognizing a legal marriage between Robbin and Susan from another jurisdiction.

finances, kept a home together, pooled assets for the benefit of the minor children and jointly made decisions regarding the welfare of their children.

Robbin and Chase mutually acknowledge a relationship as parent and child and Susan has cooperated in the development of such relationship since Chase's birth. Robbin and Grace mutually acknowledge a relationship as parent and child and Susan has cooperated in the development of such a relationship since Grace's adoption. Both children were baptized, with both Robbin and Susan present at the baptisms, and acknowledged by the pastors as the children's parents.

Robbin has been an integral part of Chase and Grace's life as one of their two mothers. She has been there for school parties, doctor appointments, homework, stomach aches, the tooth fairy and first steps. She was there every night to help the children get ready for bed. She read to the children nightly and helped put them to sleep.

In the Spring of 2009, the parties ended their domestic partner relationship. Robbin was only afforded contact with the children by Susan if she paid money for the children's health care. Robbin complied with Susan's conditions in order to ensure that her relationship with the children continued. Over time, Robbin's time with the children was decreased by Susan until Susan denied all contact with the children as of March 16, 2012. Although most of her attempts to contact the children were thwarted by Susan, approximately a year and half ago, Robbin was able to speak with Grace one time on the phone, who cried and said "I miss you so much. I want to see you."

ARGUMENT

All people have the right, protected by the state and federal constitutions, to join together and form families. The parent-child relationships that result are constitutionally protected. The

relationship between parent and child, which is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court, *Troxel v Granville*, 530 US 57, 65 (2000), is "far more precious than any property right." *MLB v SLJ*, 519 US 102, 105 (1996) (quoting *Santosky v Kramer*, 455 US 745, 758-759 (1982). A parent's "right to the companionship, care, custody, and management of her children is an important interest that undeniably warrants, absent a powerful countervailing interest, protection." *Stanley v Illinois*, 405 US 645, 651 (1972). The Constitution protects "the integrity of the family unit." *Id* at 649; see also *Moore v City of East Cleveland*, 431 US 494, 503 (1977). Thus, the Constitution places significant substantive and procedural limits on state interference with the relationship. *See, eg, Santosky*, 455 US at 756; *Stanley*, 405 US at 654.

This constitutional protection extends beyond the traditional nuclear family, *Moore*, 431 US at 502 (grandmother who was raising her grandsons had constitutionally protected relationship with them); beyond families headed by married couples, *Stanley*, 405 US at 649 (unwed father's right to seek custody of child protected); *Levy v Louisiana*, 391 US 68 (1968) (children of unmarried parents entitled, like other children, to bring action for the wrongful death of their mother); and beyond biological and adoptive parent-child relationships, *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816 (1977) (certain foster parent-child relationships could be protected by Constitution).

Since at least *Prince v Massachusetts*, 321 US 158 (1944), the U.S. Supreme Court has recognized that it is not biological parents alone whose interest in their relationships with their children is entitled to constitutional protection. There the Supreme Court treated the relationship between a child and her aunt/custodian as a constitutionally protected parent-child relationship.

Prince, 321 US at 159, 169; 431 US at 843, n. 49 (citing *Prince* as an example of parental due process rights extending beyond biological parents).

The core of the family interest protected by the Due Process Clause is the emotional bond that develops between family members as a result of shared daily life. *Lehr v Robertson*, 463 US 248, 261 (1983). As the Court stated in *Smith*, 431 US at 844:

> The importance of familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life" through the instruction of children...as well as from the fact of blood relationship."

Both the United States Supreme Court and Michigan courts have recognized that same-sex couples can be and are parents to the children they raise, even when they are not the children's biological parents. See *Obergefell v Hodges*, 135 S Ct 2584, 2598 (same sex couples can provide loving and nurturing homes to their children, whether biological or adopted); *United States v Windsor*, 133 S Ct 2675 ,2694-2695 (marriage laws at issue harm and humiliate the children of same-sex couples). See also *Usitalo v Landon,* 299 Mich App 222 (2012) (recognizing both the biological and adoptive mother as the child's parents); *Giancaspro v Congleton*, 2009 WL 416301 (Michigan must recognize Illinois adoption order naming both same-sex parties and adoptive parents to their children) (Exhibit A); *Hansen v McClellan*, 2006 WL 3524059 (Michigan adoption order naming same-sex couple as adoptive parents to children, cannot be collaterally attacked by biological same-sex mother years after her relationship ended with the non-biological mother) (Exhibit B).

Plaintiff is an Equitable Parent

A. Michigan law, from *Atkinson* to *Van*

The 1987 case of *Atkinson v Atkinson*, 160 Mich App 601, 604 (1987), established the doctrine of "equitable parenthood" for families in Michigan.[2] The *Atkinson* court held that although the husband in a divorcing couple was not the biological father of a child born to his wife, he nonetheless had rights of paternity. Id at 604. The purpose of the equitable parent doctrine is to protect an established parent-child relationship that has been fostered throughout a child's life, when the non-biological parent wishes to continue the relationship despite the termination of the relationship with the biological parent. The doctrine preserves the stability, consistency, and bond that was created, thus benefiting the child.

In *Atkinson,* after more than eight years of marriage, a couple gave birth to their first child. About three and a half years later the couple separated. The husband then filed for divorce, and requested visitation. The wife asserted that he was not the biological father; he was compelled to submit to a blood test, which affirmed the wife's assertion. Id at 605. In response, the husband argued that he should nonetheless be "treat(ed)....as a parent due to the close father-son relationship the two shared, in deciding custody and visitation." Id at 608.

The court agreed. Reasoning that "the Child Custody Act is 'equitable in nature' and its provisions are to be liberally construed," Id at 609 (citing MCL 722.26), the court articulated an "equitable parent" doctrine arising implicitly out of the Child Custody Act. Although "(i)t is

[2]State appellate courts have recognized same-sex couples as parents under the theory of equitable parenthood in Arkansas (*Bethany v Jones*, 2011 WL 553923), California (*Elisa B v Superior Court*, 37 Cal 4th 108 (Cal 2005)), Colorado (*In re ELMC*, 100 P 3d 546 (Col App 2004)), Indiana (*King v SB*, 837 NE 2d 965 (Ind 2005)), Maine (*CEW v DEW*, 845 A 2d 1146 (Me 2004)), Maryland (*SF v MD*, 751 A 2d 9 (Ct Spec App Md 1999)), Massachusetts (*ENO v LMM* 429 Mass 824 (1999)), Nebraska (*Latham v Schwerdtfeger*, 282 Neb 121 (Neb 2011)), New Jersey (*VC v MJB*, 725 A 2d 13 (NJ 1999)), New Mexico (*Barnae v Barnae*, 943 P 2d 1036 (NM Ct App 1997)), North Carolina (*Mason v Dwinnell*, 660 SE 2d 58 (NC App 2008)), Pennsylvania (*TB v LRM*, 786 A 2d 913 (Pa 2001)), Rhode Island (*Rubano v DiCenzo*, 759 A 2d 959 (RI 2000)), South Carolina, (*Middleton v Johnson*, 633 SE 2d 162 (SC App 2006)); Washington (*In Parentage of LB*, 122 P 3d 161 (Wash 2005)), West Virginia (*In re Clifford K*, 619 SE 2d 138 (W Va 2005)) and Wisconsin (*In re custody of HSH-K*, 533 NW 2d 419 (Wis 1995)).

generally recognized that *biological* parents are obligated by law to maintain and support their children," *Id.* (emphasis added), which duty in turn gives rise under the Child Custody Act to "the right of custody and visitation," id, the court cited a number of "recognized exceptions to this rule of first finding a biological relationship before imposing a support obligation." *Id.* From those cases, the court recognized "that under circumstances, a person who is not the biological father of a chld may be considered a parent when he desires such recognition and is willing to support the child as well as wants the reciprocal rights of custody or visitation afforded to a parent." Id, 610. Citing the "close and affectionate" relationship between the husband and child, and the fact that the husband " is the only father (the child) has ever known and is active in (the child's) life," along with the father's "desire() to have the relationship continued and to have the rights accorded to a father, along with the responsibility of supporting the child," the court concluded that the equitable parent doctrine meant that the husband was "clearly entitled to be treated as a natural father." *Id.*

The *Atkinson* court went on to note, though, that it is not only the rights of a parent that the equitable parent doctrine protects:

> (L)et us not forget that *the best interests of the child is the major concern of any custody determination.* Plaintiff was married to (the child)s mother when (the child) was conceived and born. He has been a father to (the child) in all respects. Following the parties' separation, he remained active in (the child's) day –care program, school and church....Given such a close relationship, it is unlikely that forbidding plaintiff from having custody or visitation rights is in (the child)'s best interest.

Id at 611-612, (citing MCL 722.25; *Hackley v Hackley*, 426 Mich 582, 597 (1986)) (emphasis added); see also *York v Morofsky*, 225 Mich App 333, 338 (1997) ("[S]tability in acknowledged parent-child relationships is generally in the child's best interests.... [F]or (a child) to suddenly be deprived of the only father he has ever known might be emotionally traumatizing....We

believe that the child's best interests are....of major concern in determining whether a party is an equitable parent[.]

The Court articulated three elements of the equitable parent doctrine:

> (A) Husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Id at 608-09.

Robbin has alleged facts that support a finding of entitlement to parenting time under the equitable parent doctrine as described in *Atkinson.* Specifically, Robbin has alleged the following:

1. Chase was conceived and born during the course of Robbin and Susan's relationship.
2. Grace was adopted during the course of Robbin and Susan's relationship.
3. Robbin desires recognition as the children's parent.
4. Robbin is willing to support the children financially, and in fact, has done so for many years.
5. Robbin wants the reciprocal rights of custody afforded to a parent and has attempted to establish a custody arrangement without resorting to judicial intervention.
6. Robbin has a close and affectionate relationship with the children.
7. Susan cooperated in the development of the parenting relationship between Robbin and the children.
8. Apart from Susan, Robbin is the only other parent the children have ever known.
9. Robbin has acted as a mother in all respects to the children, active in all aspects in their daily lives.

Following *Atkinson,* however, the Michigan Supreme Court considered the equitable parenthood doctrine in *Van v Zahorik*, 460 Mich 320, 597 NW2d 15 (1999), and imposed a new limitation. Writing for the majority, Justice Taylor held that the doctrine of equitable parenthood was rooted in marriage and "that by extending it to persons who were never married would have

repercussions on the institution of marriage. Michigan's public policy favors marriage." Id at 330-31[3]

Van involved an unmarried, heterosexual couple who cohabited for five years, during which one child was born. They then ceased living together, although plaintiff Scott Van said that he and defendant Mary Zahorik continued to have a relationship. Two years after they began living apart, another child was born. Three years after the birth of the second child, plaintiff Van began living with another woman, and at that time, Zahorik forbade Van from seeing either child. As in *Atkinson*, a blood test administered during the course of the subsequent visitation proceedings revealed for the first time that Van was not the biological father of either child; in fact, two other biological fathers were identified, and orders of filiation and support were entered with respect to them. Van argued that the equitable parent doctrine nonetheless gave him visitation rights.

The *Van* court majority disagreed, giving significant weight to the fact that the parties had the option to get married in Michigan, yet chose not to do so:

> Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage. Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?

Id at 331(quoting *Carnes v Sheldon*, 109 Mich App 204, 216 (1981)).

However, the rationale behind the *Van* decision is severely flawed. As Justice Brickley noted in his dissent, the majority decision "focuses on the adult's marital status and legal

[3] It should be noted that out of all the State courts that have recognized the concept of equitable parenthood, Michigan is the only State where the Court has limited this concept to the context of a legal marriage.

relationship with the child, but ignores the equitable considerations presented by this case. It devalues the importance of the child's personal relationship with the putative father." *Van* at 333.

The issue of cases involving parenting time and custody disputes should not be sexual relationships or the marital status of the parties. The issue is the best interests of children and the role of the court in protecting them. *Id.*

> The majority uses an adult-centered approach to resolve a dispute that primarily affects the lives and development of children. Because children do not participate in the formation of their biological or legal child-parent relationships, they are wholly blameless for the shortcomings of their relative -- legal, biological, or otherwise. By placing an artificial restriction on the definition of 'parent' the majority absolves itself from addressing, as mandated by the legislature, the organizing principle of the Child Custody Act -- the best interest of the child. *Id* at 333.

As Justice Brickley notes, Black's Law dictionary defines "parent" as comprehending "much more than (the) mere fact of who was responsible for (a) child's conception and birth." It is instead one who "shares mutual love and affection with a child and who supplies child support and maintenance, instruction, discipline and guidance." *Id.* 333.

The Child Custody Act is equitable in nature and is to be liberally construed. The best interest factors in Section 23 not only represent an equitable standard providing courts great latitude in protecting children, but Section 25 articulates a policy directing a court to consider matters before it from a child's perspective. *Van* at 334.

MCL 722.27(a) specifically states that "it is presumed to be in the best interests of the child to have a strong relationship with both of his or her parents" and that "parenting time shall be granted to a parent in a frequency, duration and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." The majority's holding in *Van* completely ignores this presumption. As the *Van* dissent noted, Justice Markman had it right in *York v Morofsky*, 225 Mich App 333, 338 (1997), when he wrote "The child's best

interests are also of major concern in determining whether a party is an equitable parent. . . Stability in acknowledged parent-child relationships is generally in the child's best interests." *Id* 334.

Nevertheless, *Van* is legal precedent in Michigan and since *Van*, the benefits and protections afforded under equitable parenthood have been limited to marriage and to couples who could legally wed in Michigan. But that is not where this Court's analysis should end.

B. The Obergefell Effect

On June 26, 2015 the United States Supreme Court in *Obergefell v Hodges*, 135 S Ct 2584 (2015) held that the right to marry is a fundamental right inherent in the liberty of the person, under the Due Process Clause and Equal Protection Clause of the 14th Amendment, and that same-sex couples may not be deprived of that right and liberty. Furthermore, States must recognize lawful marriages between same-sex couples performed in to other states. As a result of this decision, laws such as Michigan's that denied same-sex couples the right to marry and to have the benefits associated with marriage were struck down as unconstitutional.

In holding that same-sex couples cannot be denied the right to marry, the Court made it clear that this right includes the benefits and protections associated with marriage. "By denying those benefits of marriage, same-sex couples (and their families) are consigned to an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell*, 135 S Ct at 2599. Thus, *Obergefell* also affirmed the longstanding constitutional right to have a family and raise children.

In holding that the right of same-sex couples to marry is a fundamental right, the Court cited as one of the four principles and traditions of marriage, that it "safeguards children and families and thus draws meaning from the related rights of child-rearing, procreation, and

education. . . . Marriage also affords the permanency and stability important to children's best interests. . . . Without recognition, stability and predictability that marriage offers, their children suffer the stigma of knowing that their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples." *Obergefell* at 2600, quoting *United States v Windsor*, 133 S Ct 2675, 2694-25 (2013).

The impact of the *Obergefell* decision is that Michigan can no longer deny same-sex couples the same protections and benefits associated with marriage afforded to heterosexual couples, including the doctrine of equitable parenthood. Clearly, the Michigan Supreme Court recognized this when it vacated the Michigan Court of Appeals decision in *Stankevich v Milliron*, 498 Mich 877 (2015) (Exhibit C), directing the Court of Appeals to reconsider its decision in light of *Obergefell*. In *Stankevich*, the parties entered into a same-sex marriage in Canada in June 2007, prior to the birth of their daughter. After the parties separated in March 2009, the plaintiff petitioned the trial court for parenting time, contending that she was an equitable parent. The trial court dismissed her petition, holding that she lacked legal standing. The Michigan Court of Appeals affirmed, citing then-current Michigan laws that prohibited recognition of the couple's Canadian marriage and applying the *Van v Zahorik* limitation on equitable parenthood. 2013 WL 5663227 (Exhibit D). On November 19, 2015 the Michigan Court of Appeals reversed its previous decision), holding that because of *Obergefell* Michigan is required to recognize the parties' same-sex Canadian marriage and plaintiff's complaint alleges facts that, if proven, are sufficient to establish equitable parenthood. (Exhibit E). The Court remanded the case to the trial court for an evidentiary hearing to determine whether plaintiff is

entitled to be deemed an equitable parent. In issuing its decision, the Michigan Court of Appeals did not have to overrule *Van v Zahorik*, but took into account the effect of the *Obergefell* decision, that Michigan had unconstitutionally denied the parties' recognition of their Canadian marriage prior to June 26, 2015.

Given that the parties in *Stankevich* had been married in another jurisdiction and that Michigan law now recognizes such extra-judicial marriages by same-sex couples, the *Stankevich* court did not need to reach the question here: whether, having been prohibited by an unconstitutional Michigan law from marrying, it was incumbent upon Robbin and Susan to travel to another state or country to participate in a ceremony that would have had no legal validity in Michigan. As Susan repeatedly emphasizes in her brief, the parties here did not go out of state to get married. But non-biological parents such as Robbin should not be denied the protection of equitable parenthood, which, according to Van, is a benefit of marriage, simply because they were precluded from marrying by Michigan laws that have now been declared unconstitutional.

In *Ramey v Sutton*, 2015 WL 7253501 (Exhibit F), the Oklahoma Supreme Court held that a biological mother's former same-sex partner had legal standing to seek custody and visitation, where the couple was not able to take advantage of the legal protections of marriage in Oklahoma before their relationship ended. The partner had been intimately involved in the conception, birth and parenting of the child at the biological mother's request, and the biological mother and partner had made a conscious decision to have a child and co-parent as a family. The Court fully incorporated the *Obergefell* decision in its legal analysis, including *Obergefell's* reminder that the constitutional right to marry includes the liberty interest of establishing a home and raising children, reaching the conclusion that the couple's failure to marry during their relationship (when Oklahoma, like Michigan, denied them that right, along with refusing to

recognize out of state marriages) could not be used now to deny the non-biological parent the status of equitable parenthood, which was determined to be in the best interests of the child.

In another related case, the Court of Appeals of Oregon held that a statute creating parentage by operation of law applies to same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination and the couple would have chosen to marry had that choice been available to them. *In re Madrone*, 350 P 3d 495 (Or App 2015) (Exhibit G). In *In re Madrone*, although the same-sex couple had held a commitment ceremony and filed a declaration of domestic partnership, they were barred from marrying in Oregon during their relationship. *In re Madrone* was decided before *Obergefell*, but after a federal district court held that Oregon's constitutional ban on same-sex couples marrying was unconstitutional. *Geiger v Kitzhaber*, 994 Fed Supp 2d 1128 (D Oregon 2014). Whether the same-sex couple would have chosen to be married in Oregon if it was available during their relationship is a question of fact for a trial court to determine. *In re Madrone*, 350 P 3d at 501. The court cited various factors that might be relevant in this determination, taking advantage of other legal options available in the State: whether the parties held each other out as spouses; considered themselves to be spouses; had children during the relationship and shared child-rearing responsibilities; shared finances; had a commitment ceremony; sought to adopt the children if adoption was available. *Madrone* at 502.[4] The Court acknowledged that while no

[4] *In re Madrone* also discusses *Shineovich and Kemp*, 214 P 3d 29 rev den, 222 P 3d 191(2009), which held that it was unconstitutional to exclude a same-sex (and thus, necessarily at the time unmarried) couple access to an Oregon statute creating parentage in the husband of a woman who bears a child conceived by artificial insemination, if the husband consented to insemination. *See also TMH v DMT*, 79 SO 3d 787 (Fla. 2011) (holding pre-*Obergefell* that statute allowing married heterosexual who provides gametes to spouse to retain parental rights but not treating individual who provides gametes to same-sex partner the same way violated the Constitution).

particular fact is dispositive of this inquiry, collectively they help to infer whether a couple would have married had that choice been available in Oregon.

Applying the factors in *Madrone* to this case clearly supports the inference that Robbin and Susan would have married if they had the choice to do so in Michigan. They were in a committed relationship, they exchanged rings, they purchased two homes together; they held themselves out as a couple; they decided to have children together and acknowledged each other as their children's parents. Unlike the heterosexual couple in *Van*, Robbin didn't have the option of marrying Susan and simply chose not to. Rather, like the petitioner in *Ramey*, Robbin's failure to marry Susan (and obtain the protection of equitable parenthood) was due to Michigan's unconstitutional laws and she, Chase and Grace should not be penalized because of this. In conclusion, without overruling or disregarding *Van v Zahorik*, this Court, by fully taking into account the ramifications of the *Obergefell* decision, can find that Robbin is an equitable parent.

After *Obergefell*, it would violate the Equal Protection Clause to deny access to the equitable parent doctrine to same-sex couples who did not marry because they were precluded from doing so by an unconstitutional law. *Cf. Alaska Civil Liberties Union v. Alaska*, 122 P 3d 781 (Alaska 2005) (holding that State's exclusion of same-sex couples from marriage and then conditioning family health benefits for public employees on marriage violated the right to equal protection).

So far, at least four Michigan trial courts have addressed this factual scenario, post *Obergefell,* and have refused to dismiss the petitioners' equitable parenthood claims. *Lake v Putnam*, 15-1325 DC (Judge Darlene O'Brien, Washtenaw County), finding that petitioner has

legal standing to request parenting time), (Exhibit H);[5] *Buyarski v Przewrocki*, 15-15091-DC (Judge Mary Barglind, Menominee County), (Exhibit I), *Phillips v Berndt*, 15-09161-DC (Judge Kathleen Feeney, Kent County), (Exhibit J).[6] While neither of these decisions are controlling in Oakland County, they, along with case decisions from other states addressing this same issue, can provide helpful guidance to this Court.

An additional reason *Van v Zahorik* is not a barrier to applying the equitable parent doctrine here is that the Court in that case did not consider the equal protection implications of denying such protections to children of unmarried couples. Denying children of unmarried parents, especially lesbian and gay parents who could not legally marry in Michigan, the benefits of equitable parenthood, while allowing children of married couples to reap these benefits, violates the children's right to equal protection. Those benefits include the right to inherit, access to employee health insurance benefits, the right to be in the custody of the second parent if the first parent dies, and the ability to maintain a relationship with both parents and to receive child support if the parents separate.[7]

The U.S. Supreme Court's watershed decisions in *Windsor,* striking down the bar erected by the so-called Defense of Marriage Act ("DOMA") to federal recognition of marriages of same-sex couples, and *Obergefell*, striking down state bars to these couples' marriage, are also informative here. Both decisions focused on the stigma and insecurity inflicted on many

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[5] In footnote 16 in her opinion, Judge O'Brien questions the ability of courts to require that same-sex couples should have traveled to another jurisdiction to obtain a marriage (which would have not been recognized in Michigan), particularly where these couples would have lacked the financial resources to travel to another state to marry.

[6] Prior to *Obergefell*, Kent County Judge Patrick Hillary held that a that a former same-sex partner was an equitable parent in *Stiles v Flowers*, 13-06970. (Exhibit K).

[7] There is a presumption in Michigan Child Custody laws that it is the best interests of a child for the child to have a strong relationship with both of his or her parents. MCL 722.27a (1).

children of same-sex couples from the government's unconstitutional refusal to accord legal recognition to their families.

Notably, both decisions regarded *both* members of same-sex couples as "parents" to their children, without reference to whether the parents and children had genetic or adoptive ties. The Supreme Court did not call only those partners with genetic or adoptive links the children's "parents" and relegate the other partners to non-parent, non-familial status. In *Windsor*, the Court emphasized that DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S Ct at 2694. And in *Obergefell* the Court wrote that marriage "affords the permanency and stability important to children's best interests....The marriage laws at issue....harm and humiliate the children of same-sex couples." 135 S Ct at 2600-01.

Significantly, the Supreme Court featured in its *Obergefell* opinion the plight of Michigan plaintiffs April DeBoer and Jayne Rowse, each of whom had adopted children from the foster care system but were barred under Michigan law from marrying and entering into second parent adoptions for their children. The Court felt particular urgency to address their children's needs, nothing that the state's disrespect denied "them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon." *Obergefell*, 135 S Ct at 2606. The Court described them as a "family" and condemned Michigan for treating children "*as if* they had only one parent." *Obergefell*, 135 S Ct at 2595 (emphasis added). Yet that is exactly how the applying *Van,* without further constitutional analysis, treats Chase and Grace. As with the children in *Obergefell,* Chase and

Grace were first denied the "recognition, stability and predictability" that marriage would have brought their family, and these children continue to be denied these protections because their relationship with their mother Robbin is being disrespected. Id at 2600. To merely apply *Van* as a means to close the door on Robbin's claim of equitable parenthood, is to permit her erasure from her children's lives. It is to tell Chase and Grace that they must "suffer the stigma of knowing" their family is "somehow lesser" and their primary relationships more precarious. Id. Their childhood should not pass without the stability and love that come from their relationship with their other mother, Robbin.

There are a series of United States Supreme Court cases that have struck down classifications of non-marital ("illegitimate") children as violating the Equal Protection Clause. The Court has repeatedly rejected laws discriminating against non-marital children by denying them benefits accorded to other children. See *Gomez v Perrez*, 409 US 535, 538 (1973) (child support); *Weber v Aetna Casualty and Surety Co*, 406 US 164 (1972) (right to workers compensation recovery for death of father); *Levy v Louisiana,* 391 US 68 (1968) (right to bring wrongful death action). These decisions were based on the Court's reasoning that this is not only unfair to the child, who is not responsible for his status, but also an illogical way to deter non-marital parenting. As the Court noted in *Weber*, it cannot be thought "that persons will shun illicit relationships because the offspring may not one day reap the benefits of workmen's compensation." *Weber*, 406 US at 173. The Court explained:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting condemnation on the head of an infant is illogical and is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as unjust way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause

> does enable us to strike down discriminatory laws....where- as in this case- the classification is justified by no legitimate state interest, compelling or otherwise.

Weber, 406 US at 175 (emphasis added).[8]

Similarly in *Plyler v Doe*, 457 US 202 (1982), the Supreme Court held that denying public education to children of undocumented immigrants due to their parents' status violated the Equal Protection clause. The Court reasoned that adults who enter the country illegally "should be prepared to bear the consequences," but their children "can affect neither their parents' conduct nor their own status." *Id* at 220, quoting *Trimble v Gordon*, 430 US 762, 770 (1977) (striking "illegitimacy" classification). The Court added that "(e)ven if the state found it expedient to confront the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental concepts of justice." *Id* at 220, citing *Weber*, 406 US at 175.

It would also be irrational and unjust for Michigan to deny Chase and Grace the benefits and protections of equitable parenthood because their parents were unmarried, especially given that the only reason they were unmarried is that they were unconstitutionally denied the right to marry during their relationship.

CONCLUSION

Robbin Sawyer has alleged facts that she has played a parental role in the lives of Chase and Grace, who she raised together with Susan Asperamer, the children's legal parent. Both

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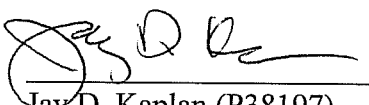
[8] The United States Supreme Court requires that laws or policies that disadvantage children who are born to unmarried parents be evaluated under heightened scrutiny. *Mills v Habluetzel*, 456 US 91, 99 (1982) (holding that restrictions on support suits by illegitimate children "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"); *United States v Clark*, 445 US 23, 27 (1980) (ruling that "a classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular....interests (the) statute is designed to serve. *Lalli v Lalli*, 439 US 259, 265 (1978) (plurality opinion) (holding that "classifications based on illegitimacy. . . re invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests.").

parties consented to the parent-child relationships between Robbin and the children. Robbin has lived with the children and has been a mother to them, establishing a bonded parent-child relationship. This Court's analysis of Robbin's claim of equitable parenthood cannot end with the mere application of the *Van* decision, which limited equitable parenthood to the context of a legal marriage. This Court must take into account the subsequent United States Supreme Court marriage equality decisions in *Windsor* and *Obergefell,* which stand for the principle that same-sex couples are to be treated equally with opposite sex couples for the purposes of marriage, including the benefits of marriage. If *Van* stands for the principle that equitable parenthood is a benefit of marriage, same-sex couples cannot be denied that benefit because they were unconstitutionally denied the right to marry in Michigan (or to have an out of state marriage recognized by Michigan). Any other result would undermine the stability of parent-child relationships, and violate the equal protection rights of children of unmarried parents, as well as the equal protection rights of their parents.

Respectfully submitted,



Jay D. Kaplan (P38197)
Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6812

Attorneys for *Amicus Curiae*

EXHIBIT A

Giancaspro v. Congleton
Court of Appeals of Michigan. February 19, 2009 Not Reported in N.W.2d 2009 WL 416301 *(Approx. 7 pages)*

2009 WL 416301
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Diane Lorraine GIANCASPRO, Plaintiff-Appellant,
v.
Lisa Ann CONGLETON, Defendant-Appellee.

Docket No. 283267. Feb. 19, 2009.

Synopsis

Background: After parties' same sex relationship broke down, plaintiff filed complaint for custody, support and parenting time pursuant to Michigan's Child Custody Act. The Berrien Circuit Court ruled that the Full Faith and Credit Clause only extended as far as recognizing the fact and validity of the Illinois adoption by both parties and granted defendant's motion for summary disposition, and plaintiff appealed.

Holdings: The Court of Appeals held that:
1 Illinois Judgment of Adoption, under which both parties were made the adoptive parents of the minor children who were adopted were China, had to be recognized as valid and binding in Michigan; and
2 this was a child custody dispute between parents, under which the best interests of the child controlled.

Reversed and remanded.

Wilder, J., filed dissenting opinion.

West Headnotes (5)

Change View

1 **Adoption** Foreign Adoption
Under the Full Faith and Credit Clause, the Illinois Judgment of Adoption, under which both parties to same-sex relationship were made the adoptive parents of children who were adopted from China, had to be recognized as valid and binding in Michigan, irrespective of whether such an adoption could be granted by a Michigan court. U.S.C.A. Const. Art. 4, § 1.

2 **Adoption** Foreign Adoption
Michigan's legal framework for protecting and promoting the best interests and welfare of children within its jurisdiction does not exclude children with a parent or parents who could not have adopted them under Michigan law.

3 **Adoption** Persons Who May Adopt Others
Child Custody Adoption
Child Custody Act does not contain requirement of male and female adoptive parents, nor does it contain any preclusion against individuals who adopted children in other states from invoking its provisions. MCL 722.22(h); M.C.L.A. § 722.25(1).

4 **Child Custody** Adoption

SELECTED TOPICS

Adoption
Inheritance by Adopted Children
Right of Child of Adopted Testatrix Natural Sister
Statutory Provisions
Persons Who May Adopt

Secondary Sources

Adoption as affecting right of inheritance by, through, or from natural parent or other natural kin

123 A.L.R. 1038 (Originally published in 1939)

...This annotation, in division III, supplements the annotation in 80 A.L.R. 1403. The scope of the present annotation is strictly confined to a consideration of the rights of inheritance existing as betw...

Right of children of adopted child to inherit from adopting parent

94 A.L.R.2d 1200 (Originally published in 1964)

...This annotation supersedes an annotation in 15 A.L.R. 1265, and discusses the right of an adopted child's child to inherit from the adopting parent. The question usually arises when an adopted child pr...

Rule3.800.Applicable Rules; Interested Parties; Indian Child

5 Mich. Ct. Rules Prac., Text R 3.800 (5th ed.)

...[Formerly Rule 5.750, effective March 1, 1985. Renumbered 3.800 and amended December 18, 2001, effective May 1, 2002, 465 Mich; amended February 4, 2003, effective May 1, 2003, 467 Mich; February 2, 20...

See More Secondary Sources

Briefs

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Legal Aid Society of New York City.

1978 WL 207158
Abdiel CABAN, Appellant, v. Kazim MOHAMMED and Maria Mohammed, Appellees.
Supreme Court of the United States.
June 30, 1978

...The Legal Aid Society of New York City respectfully moves this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of the ap...

Brief of the Domestic Violence Project Inc./Safe House (Michigan); the Pennsylvania Coalition Against Domestic Violence, Inc.; the Florida Coalition Against Domestic Violence, the Iowa Coalition Against Domestic Violence, and the Missouri Coalition A gainst Domestic Violence as Amici Curiae in Support of Respondent.

1999 WL 1186737
In re Visitation of Troxel
United States Supreme Court Amicus Brief.
December 13, 1999

...FN*Counsel of Record for Amici Curiae[Additional Counsel Listed Inside] Amici are comprised of various non-profit state organizations and coalitions dedicated to addressing the legal and societal probl...

The only relevant consideration in child custody case involving same sex couple was each individual party's established relationship as an adoptive parent with the children, not their relationship with each other.

5 Adoption Foreign Adoption
Child Custody Adoption
The Full Faith and Credit Clause compelled the courts of Michigan to recognize, pursuant to the Illinois Judgment of Adoption, that both parties of same sex relationship were adoptive parents of the minor children who were adopted from China and, therefore, the plain language of the Child Custody Act required the conclusion that each of the parties was a "parent"; and because that fact was binding, the parties' relationship with each other simply did not matter, and, as a consequence, action was a child custody dispute between parents, under which the best interests of the child controlled. U.S.C.A. Const. Art. 4, § 1; MCL 722.22(h).

Berrien Circuit Court; LC No.2007-002194-DC.

Before: DAVIS, P.J., and WILDER and BORRELLO, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We reverse and remand for further proceedings.

This case concerns three minor children. The parties in this matter have never been married, but they began cohabiting in 1995. At some point, [1] defendant adopted the children as the sole legal parent in the People's Republic of China. The parties then petitioned to adopt the children in the state of Illinois, pursuant to Illinois law. We have not been provided with any Illinois documentation, and neither party cited any Illinois law in the trial court. Defendant contended that plaintiff was "added as a second parent by way of the second parent adoption procedure in Illinois, on the basis of the same-sex lesbian relationship between the parties." Plaintiff contended that the parties co-petitioned for adoption, and the Judgment of Adoption was based on the parties having resided together for at least five years and the children having resided with both of them since March 3, 2003. In any event, it is undisputed that a valid Judgment of Adoption was entered by an Illinois court, under which both parties are recognized as the children's adoptive parents under Illinois law.

The parties' relationship with each other broke down, and in August 2007, plaintiff filed her complaint "for custody, support and parenting time" pursuant to Michigan's Child Custody Act, MCL 722.21 *et seq.* Defendant moved for dismissal, arguing primarily that the relief plaintiff sought in this action was contrary to both Michigan and Federal public policy, so the Full Faith and Credit Clause, U.S. Const, art IV, § 1, was inapplicable. The trial court concluded that there was no public policy exception to the Full Faith and Credit Clause, but that the Full Faith and Credit Clause only extended as far as recognizing the fact and validity of the Illinois adoption by both parties. The trial court further concluded that *enforcement* thereof was, however, not available under Michigan's Child Custody Act, because that would be violative of Michigan's public policy. The trial court ruled that "[t]he court's position is just simply clearly that they are co-parents with equal rights as it stands presently. There are no other ... existing orders." The trial court therefore granted defendant's motion for summary disposition.

We review de novo a trial court's ruling on a motion for summary disposition, and we also review de novo questions of statutory interpretation. *Coblentz v. City of Novi,* 475 Mich. 558, 567, 719 N.W.2d 73 (2006). Neither the trial court nor the parties articulated which court rule formed the basis for the grant of summary disposition. The trial court considered facts not found in the pleadings, suggesting it ruled on the basis of MCR 2.116(C)(10). However, it appears that those facts were undisputed in relevant part, and the most rationally applicable standard is pursuant to MCR 2.116(C)(8), under which summary disposition is appropriate where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving

party. *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999). Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.*, 119-120, 597 N.W.2d 817. A constitutional issue is reviewed de novo by an appellate court. *Harvey v. Michigan,* 469 Mich. 1, 6, 664 N.W.2d 767 (2003). However, a court generally will not address a constitutional question if a case can be resolved on other grounds. *People v. Johnson,* 427 Mich. 98, 137, 398 N.W.2d 219 (1986).

*2 The Full Faith and Credit Clause, U.S. Const. art IV, § 1, as applied to judicial proceedings, is to avoid the relitigation of adjudicated issues in other states. *Van Pembrook v. Zero Mfg. Co.*, 146 Mich.App. 87, 104, 380 N.W.2d 60 (1985). The foreign judgment must be given the same effect that it has in the state of its rendition, *id.*, although only to the extent of what was actually adjudicated. See *Owen v. Owen,* 389 Mich. 117, 121, 205 N.W.2d 181 (1973). A state need not give full faith and credit to a judgment issued by a court that lacked subject-matter jurisdiction over the litigation or jurisdiction over the parties. See *Henkel v. Henkel,* 282 Mich. 473, 486-487, 276 N.W. 522 (1937); *Blackburne & Brown Mortgage Co. v. Ziomek,* 264 Mich.App. 615, 621, 692 N.W.2d 388 (2004). However, although defendant asserted that the Illinois adoption was contrary to the law of the People's Republic of China, no jurisdictional argument was raised below. Significantly at issue in the instant case, the Full Faith and Credit Clause only applies to sister states' *judgments,* not necessarily their practices for enforcement thereof. *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 235, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998).

1 We find persuasive[2] the decision of *Finstuen v. Crutcher,* 496 F.3d 1139, 1153-1154 (C.A.10, 2007), wherein the Tenth Circuit Court of Appeals held that the Full Faith and Credit Clause applies to final adoption orders, but that a state may continue to exercise authority over the manner in which the adoptive relationship should be enforced and the rights and obligations flowing from the adoptive relationship. Further, while a state need not provide a mechanism for enforcing adoption orders, if it does so, it must do so in an even-handed manner. *Id.* at 1154. The Tenth Circuit held that a statutory amendment in Oklahoma that expressly refused to recognize same-sex adoptions from another state violated the Full Faith and Credit Clause. *Id.* at 1141-1142. We therefore conclude that the trial court correctly recognized that the Illinois Judgment of Adoption, under which both parties were made the adoptive parents of the minor children,[3] must be recognized as valid and binding in Michigan, irrespective of whether such an adoption could be granted by a Michigan court.

However, the trial court erred in considering "enforcement" thereof. The pleadings, viewed in a light most favorable to plaintiff, do not indicate that this is an enforcement action. "A court is not bound by the party's choice of labels for the cause of action because to do so would exalt form over substance." *Johnston v. City of Livonia,* 177 Mich.App. 200, 208, 441 N.W.2d 41 (1989). Insofar as we can determine, custody was not in any way adjudicated in Illinois, so beyond the fact that both parties are legally parents of the minor children, there is nothing else from Illinois to enforce. Rather, *given that* both parties are legally parents of the minor children, plaintiff has stated an independent claim under the Child Custody Act seeking to have Michigan law applied to determine the rights and obligations of the parties with respect to child custody and support matters.

2 *3 Therefore, the question is really whether Michigan's legal framework for protecting and promoting the best interests and welfare of children within its jurisdiction excludes children with a parent or parents who could not have adopted them under Michigan law. We conclude that it does not.

This state has an interest as *parens patraie* in protecting the welfare of children within its jurisdiction. See generally *Bowie v. Arder,* 441 Mich. 23, 38, 490 N.W.2d 568 (1992) (discussing a court's equitable jurisdiction over children); *In re Brock* 442 Mich. 101, 112-113, 499 N.W.2d 752 (1993) (discussing child protection proceedings). In general, the Child Custody Act provides a comprehensive scheme for resolving all custody disputes. *Harvey v. Harvey,* 470 Mich. 186, 191-192, 680 N.W.2d 835 (2004).

> The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23. MCL 722.25(1). It places an affirmative obligation on the circuit court to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act" whenever the court is required to adjudicate an action "involving dispute of a minor child's custody." MCL 722.24(1); *Van, supra* at 328 [*Van v. Zahorik*, 460 Mich. 320, 328, 597 N.W.2d 15 (1999)]. Taken together, these

statutory provisions impose on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child. [*Harvey, supra*. 470 Mich. at 192, 680 N.W.2d 835.] Thus, the legislative intent was to promote the best interests and welfare of children. *Id.*, 191-192, 680 N.W.2d 835.

3 The Child Custody Act does not create substantive rights.[4] *Bowie, supra* at 43, 490 N.W.2d 568. Rather, it provides a procedure, with presumptions and standards, to resolve competing custody claims. *Id.* MCL 722.25(1) provides:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.
> "Parent" is defined as "the natural or adoptive parent of a child." MCL 722.22(h). It is apparent that the trial court ignored this definition and construed the word "parents" in the Child Custody Act as requiring male and female adoptive parents. The Child Custody Act does not contain any such requirement, nor does it contain any preclusion against individuals who adopted children in other states from invoking its provisions. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v. Mecosta Co. Gen. Hosp.*, 466 Mich. 57, 63, 642 N.W.2d 663 (2002).

4 5 ***4** The trial court further erred in considering whether the parties could have jointly adopted the minor children had they attempted to do so in Michigan,[5] and it erred in considering whether the parties' relationship with each other could be recognized in Michigan.[6] The only relevant consideration in this matter is each individual party's established relationship as an adoptive parent *with the children,* not their relationship with each other. As discussed, the Full Faith and Credit Clause[7] compels the courts of this state to recognize, pursuant to the Illinois Judgment of Adoption, that both parties *are* adoptive parents of the minor children. Therefore, the plain language of the Child Custody Act requires the conclusion that each of the parties is a "parent;" because that fact is binding, the parties' relationship with each other simply does not matter. As a consequence, this action constitutes a child custody dispute between parents, under which "the best interests of the child control."

The trial court correctly concluded that the Judgment of Adoption entered in Illinois is entitled to full faith and credit under the United States Constitution, establishing each party as an adoptive parent of the minor children, irrespective of their relationship with each other and irrespective of whether they could have jointly adopted the children in Michigan. The trial court erred in failing to recognize that, as a consequence, plaintiff has validly stated a claim on which relief can be granted under the Child Custody Act in Michigan.

Reversed and remanded for further proceedings under the Child Custody Act consistent with this opinion and with the Illinois adoption judgments or orders. We do not retain jurisdiction.

WILDER, J., (dissenting).

***5** I respectfully dissent. Because plaintiff has failed to authenticate the Illinois Judgment of Adoption from which she claims rights of enforcement, she has failed to establish entitlement to proceed in a child custody action in the state of Michigan. Accordingly, I would remand to the trial court for further proceedings.

As noted by the majority, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." US Const, art IV, § 1. However, the constitutional full faith and credit clause also provides: "*And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*" US Const, art IV, § 1 (emphasis added). In 28 USC 1738, Congress has required that judgments or orders, for which full faith and credit are sought, "*shall* be authenticated," "*shall* be proved or admitted," and that full faith and credit are only owed to orders "*so authenticated* ". As used in a statute, the word "shall" is mandatory. *In re Estate of Kostin (Williams v. Kent)*, 278 Mich.App. 47, 57, 748 N.W.2d 583 (2008), citing *Roberts v. Farmers Ins. Exch.*, 275 Mich.App. 58, 68, 737 N.W.2d 332, 339 (2007). Thus, before full faith and credit can be accorded to the judgment at issue herein, that judgment is

required to be authenticated. MCL 691.1173 provides in relevant part that "[a] copy of a foreign judgment authenticated in accordance with an act of congress of the laws of this state may be filed in the office of the clerk of the circuit court...." Authentication may be accomplished as provided by MRE 901 or 902.

Not only did plaintiff fail to authenticate the judgment that she seeks to enforce, but none of the pleadings from the Illinois proceeding have been made part of the record. This failure is significant for, as acknowledged by the majority, the foreign judgment is given the same effect that it has in the state of rendition only to the extent of what was actually adjudicated. *Owen v. Owen,* 389 Mich. 117, 121, 205 N.W.2d 181 (1973). Importantly, a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter. *Henkel v. Henkel,* 282 Mich. 473, 486-487, 276 N.W. 522 (1937); *Blackburne & Brown Mortgage Co. v. Ziomek,* 264 Mich.App. 615, 621, 692 N.W.2d 388 (2004). Defendant, who appeared on appeal in pro persona, has asserted that the Illinois adoption was contrary to the law of the People's Republic of China. The majority dismisses this assertion as unworthy of consideration on the basis that no jurisdictional argument was raised below. However, challenges to subject matter jurisdiction can be raised at any time. *Polkton Twp. v. Pellegrom,* 265 Mich.App. 88, 97, 693 N.W.2d 170 (2005). See also, *Bowie v. Arder,* 441 Mich. 23, 56, 490 N.W.2d 568 (1992) ("[A] court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings"). Certainly, a foreign judgment that the presiding court lacked jurisdiction to enter is not entitled to full faith and credit in the state of Michigan. Plaintiff has failed to file an authenticated judgment; therefore, this Court cannot make the necessary determination of what was actually adjudicated and that jurisdiction was properly exercised. [1] As such, there is nothing for the courts of Michigan to enforce.

*6 For the foregoing reasons, I would vacate the circuit court's order, and remand for further proceedings consistent with this opinion (i.e., for an additional opportunity for plaintiff to file, prove, and authenticate the Illinois judgments, and for the circuit court then to have an opportunity to make a ruling on whether the Illinois court that issued the judgments had subject matter jurisdiction).

All Citations

Not Reported in N.W.2d, 2009 WL 416301

Footnotes

1 This matter involves several out-of-state proceedings, but unfortunately no documentation from any of them have been included in the lower court record, and the dates of some events have not been specified by the parties. Because the three minor children were born in 1998, 1999, and 2002, the adoptions in the People's Republic of China-which the parties imply occurred all at once-must have taken place in 2002 or thereafter.

2 We are not bound by decisions of federal circuit courts. *Abela v. Gen. Motors Corp.,* 469 Mich. 603, 606-607, 677 N.W.2d 325 (2004).

3 We reiterate, however, that the record does not contain an actual copy of the Illinois Judgment of Adoption, so our decision is based entirely on the parties' representations.

4 There are certain exceptions to this general rule, like the provision for grandparent visitation rights created by MCL 722.27b. None of these exceptions apply to the instant matter.

5 See *In re Munson,* 210 Mich.App. 500, 504, 534 N.W.2d 192 (1995); *In re Adams,* 189 Mich.App. 540, 547, 473 N.W.2d 712 (1991).

6 See Const 1963, art 1, § 25, and MCL 551.1. The constitutional provision precludes the recognition of same-sex domestic partnerships for any purpose. *Nat'l Pride at Work, Inc. v. Governor,* 481 Mich. 56, 86-87, 748 N.W.2d 524 (2008).

7 Plaintiff cites several Michigan statutory provisions as well, but we find none of

them applicable. Briefly, MCL 333.2831 of the Public Health Code concerns the recordation of birth certificates; MCL 600.2950j concerns protection orders; MCL 722.1312 is explicitly made inapplicable to adoption proceedings by MCL 722.1103; and MCL 710.21b only addresses adoption orders and decrees in other countries, not other states.

1 I would further note that plaintiff, as the appellant, failed to file with this Court the transcript of the oral argument of the parties below. An appellant is responsible for securing the complete transcript of all proceedings, unless excused by court order or the parties' stipulation. MCR 7.210(B)(1); *Admiral Ins. Co. v. Columbia Cas. Ins. Co.*, 194 Mich.App. 300, 305, 486 N.W.2d 351 (1992). Plaintiff's failure to fulfill her duty to provide the complete transcript calls into question the majority's assertion that a challenge to the jurisdiction to the Illinois court that issued the adoption order(s) was not made below. In any event, plaintiff's failure to file the oral argument transcript subjects the appeal to dismissal on this basis alone.

End of Document

EXHIBIT B

Hansen v. McClellan
Court of Appeals of Michigan. December 7, 2006 Not Reported in N.W.2d 2006 WL 3524059 *(Approx. 9 pages)*

2006 WL 3524059
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Karen Sue **HANSEN**, Plaintiff-Appellant,

v.

Martha Florence **McCLELLAN**, Defendant-Appellee.

Docket No. 269618. Dec. 7, 2006.

Ingham Circuit Court; LC No. 06-000015-CZ.

Before: MURPHY, P.J., and METER and DAVIS, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right an order denying her motion for summary disposition and granting defendant's motion for summary disposition. On the same narrow basis relied on by the trial court, we affirm.

The parties in this case have never been married, but they entered into a committed relationship in 1991. On January 21, 1999, plaintiff gave birth to twins that the parties wished to raise together as a family. Pursuant to a joint adoption procedure in place in the Family Division of the Washtenaw Circuit Court, plaintiff voluntarily terminated her parental rights to the children in orders entered July 14, 1999, making the children wards of the court. The parties then jointly petitioned to adopt the children, and the petitions were granted. Orders of adoption naming both parties as parents were entered on July 14, 1999. The parties and the children resided together as a family for several years before the parties' relationship broke down. Defendant moved out of the residence. The parties apparently encountered difficulties negotiating parenting issues with each other thereafter. In January, 2003, plaintiff filed a petition for custody, parenting time, and support in the Ingham Circuit Court, but that action was dismissed by stipulation of the parties.

Plaintiff commenced the present action on January 4, 2006, seeking declarative judgment that the July 14, 1999, adoptions were void because the Washtenaw Circuit Court lacked subject-matter jurisdiction to enter the orders. Plaintiff also sought to have the termination of her parental rights set aside because that termination "was never based on fitness and was solely incidental to the Adoption." The parties cross-moved for summary disposition. The trial court denied plaintiff's motion and granted defendant's motion on the narrow ground "that the circuit court in the State of Michigan has the subject matter jurisdiction to grant adoptions, the family division of the circuit court." The trial court therefore concluded that the adoption orders could not be collaterally attacked irrespective of their correctness. Plaintiff appeals.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). The trial court did not specify the court subrule upon which it based its decision, but because the trial court did not look outside the pleadings, it appears to have granted the motion pursuant to MCR 2.116(C)(8). Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.*, 119-120. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id.*, 119. We review de novo as a question of law whether a court has subject-matter jurisdiction. *Young v. Punturo,* 270 Mich.App 553, 560; 718 NW2d 366 (2006).

*2 A court's "jurisdiction" is its power to act and authority to hear and determine a case. *Wayne Co Chief Executive v. Governor,* 230 Mich.App 258, 269; 583 NW2d 512 (1998). This does not refer to " ' "the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial." ' " *Bowie v. Arder,* 441 Mich. 23, 39; 490 NW2d 568 (1992), quoting *Joy v. Two-Bit Corp.* 287 Mich. 244, 253-254; 283 NW 45 (1938), quoting *Richardson v. Ruddy,* 15 Idaho 488, 494-495; 98 P 842 (1908). A lack of jurisdiction makes any action by the court other than dismissal absolutely void and subject to collateral attack; conversely, if the court has subject-matter jurisdiction over a matter, it has the jurisdiction to make an error, which may only be challenged by a direct attack on appeal, no matter how grave. *Kaiser v. Schreiber,* 258 Mich.App 357, 363-364; 670 NW2d 697 (2003), rev'd on other grounds 469 Mich. 944 (2003).

Plaintiff concedes, as she must, that "the family division of circuit court has sole and exclusive jurisdiction" over adoption proceedings. MCL 600.1021(1)(b). Plaintiff contends that the Family Division of the Washtenaw Circuit Court nevertheless lacked subject-matter jurisdiction to grant joint adoptions to unmarried couples. In other words, plaintiff argues that, despite the court's jurisdiction to adjudicate adoptions, the trial court lacked the power to adjudicate *these particular* adoptions. We disagree.

If we were to assume, as plaintiff argues, that MCL 710.24(1) precludes joint adoptions by unmarried couples, an order by the Family Division of the Washtenaw Circuit Court granting such an adoption nevertheless constitutes an exercise of its power to adjudicate adoptions. The trial court would have committed a clear legal error subjecting the order to a direct attack and reversal on appeal. The trial court would not have acted outside the scope of cases it was authorized to adjudicate.

Plaintiff relies in significant part on *In re Adams,* 189 Mich.App 540; 473 NW2d 712 (1991), and *Ryan v. Ryan,* 260 Mich.App 315; 677 NW2d 899 (2004). However, *Adams* contains no mention of subject-matter jurisdiction. Rather, the *Adams* panel merely indicated in general terms that the jurisdiction, duties, and powers of a court granting an adoption "may not exceed that which is conferred by statute." *Adams, supra* at 542. The Court further noted that all adoption proceedings "must strictly comply with the terms of the authorizing statute." *Id.* This language does not mean that any and all rulings relative to adoptions made pursuant to statute concern subject-matter jurisdiction. Indeed, the Court in *Adams* framed the issue in terms of "who may adopt," rather than whether the court had subject-matter jurisdiction to grant the adoption. *Id.,* 543.

*3 The question presented to us now concerns standing more than subject-matter jurisdiction. "Subject-matter jurisdiction and standing are not the same thing." *Altman v. Nelson,* 197 Mich.App 467, 472; 495 NW2d 826 (1992). Again, subject-matter jurisdiction "is the right of the court to exercise judicial power over a class of cases," while "standing relates to the position or situation" of the party or parties seeking relief. *Id.,* 472, 475. In cases governed by statute, standing is bestowed on a party by statute. *Ryan, supra* at 332. Again presuming the correctness of plaintiff's interpretation of MCL 710.24(1), that statute did not allow the parties to adopt because their "position or situation" was that of two unmarried persons jointly seeking to adopt. With respect to the class of cases, MCL 600.1021(1)(b) specifically gives the family division of the circuit court sole and exclusive jurisdiction over "[c]ases of adoption," and this is indeed a "case of adoption." We conclude that *Adams* does not conflict with our ruling, but rather lends support.

In *Ryan, supra* at 332, a minor attempted to "divorce" her parents, and this Court held that she lacked standing to do so. The *Ryan* panel additionally held that the trial court did not have subject-matter jurisdiction over the plaintiff minor's divorce complaint against her parents, explaining that "a court only has jurisdiction over the dissolution of a marriage between a man and a woman." *Id.,* 332. Because a "marriage" is defined by statute as "inherently a unique relationship between a man and a woman," MCL 551.1, it necessarily followed that there could be no "divorce" between a child and his or her parents. *Id.,* 331-332. In other words, a "divorce" between a child and his or her parents is a legal impossibility under any circumstances. In contrast, it is beyond dispute here that each of the parties in the present case could have individually adopted the children. The problem is that they joined together to do so. Therefore, there were "adoption proceedings" in this case,

although they may have been flawed, whereas in *Ryan*, there technically were no "divorce proceedings" at all, nor could there have been.

To the extent that *Ryan* suggests the result proffered by the dissent, we find that controlling Michigan Supreme Court precedent in *In re Hatcher*, 443 Mich. 426; 505 NW2d 834 (1993), dictates our result, wherein the Court held that, consistent with the case law cited above, "subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate...." The jurisdictional class, as provided in MCL 600.1021(1)(b), is "[c]ases of adoption[,]" and this is a case of adoption. The possible error-again presuming the correctness of plaintiff's interpretation of MCL 710.24(1)-related to the exercise of jurisdiction over the adoption proceedings, not the want of jurisdiction. See *Hatcher, supra* at 439-440. The dissent incorrectly gives a more narrow reading of what constitutes a "class" by examining the particular case at bar instead of the "class" of adoption in general as provided by MCL 600.1021(1)(b), which speaks directly to the court's jurisdiction. The dissenting opinion's narrowed focus would provide an analytical framework to collaterally attack adoptions on other grounds beside the one raised today. We note the *Hatcher* Court's closing remarks:

> *4 Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available. It should provide repose to adoptive parents and other who rely upon the finality of probate court decisions. *[Hatcher, supra* at 444.]

Our ruling should also provide repose to adoptive parents and others who rely on the finality of adoption decisions now rendered by the family division of the circuit court.

We are further persuaded that our view is the correct one by our Supreme Court's decision in *In re Adoption of Knox*, 381 Mich. 582; 165 NW2d 1 (1969), in which the plaintiff challenged the validity of adoption proceedings completed back in 1917. The adopted child's maternal grandmother petitioned for adoption, but her husband, the child's grandfather, did not join in the petition, in contravention of a similarly-worded predecessor statute to MCL 710.24(1), yet an order of adoption was entered. *Id.*, 583. The plaintiff, who was the child's guardian, argued that the adoption order was invalid for the following reasons set forth by the Court:

> Plaintiff claims that chapter 64 of the judicature act of 1915 did not permit the adoption of a minor child by a married person alone and that the probate court had no jurisdiction in 1917 to enter an order of confirmation of the adoption because the husband of [the maternal grandmother] did not sign the articles of adoption or consent to them on the record. Plaintiff claims that the order of confirmation was therefore void from its inception. *[Id.*, 586 .]

The Michigan Supreme Court upheld the adoption, finding that the adoption petition and probate court record did not contain any indication that the child's maternal grandmother was married; therefore, resort to extrinsic evidence to establish that fact would be necessary. *Id.*, 588-589. But the Court, relying on 1948 CL 701.23, stated that "[m]ore than 20 years having elapsed since the date of the adoption proceedings, plaintiff is foreclosed by the presumption of validity imposed by the statute since nothing to the contrary appears on the record. *Knox, supra* at 589. The Court then concluded:

> All of the extrinsic evidence in this case tends to support the adoption. Assuming we were to accept plaintiff's interpretation of the judicature act, there is only one fact to the contrary-the failure of the husband ... to join in the adoption proceedings. We need not and do not determine the extent to which chapter 64 of the judicature act of 1915 requires that married adopting parents both join in an adoption proceeding under the statute. As stated by the Court of Appeals, the 1917 probate court proceedings here under challenge are regular on their face. The presumption of the statute being applicable, it is conclusive. *[Knox, supra* at 589.]

Given that a jurisdictional challenge was made in Knox, the Supreme Court's decision to let the adoption order stand without the need to determine whether the pertinent statute prohibited the adoption strongly indicates that subject-matter jurisdiction was not at issue in the minds of the Justices. This is particularly convincing because of the Court's assumption that the only problem under the statute was the husband's failure to join in the adoption

proceedings. If this were an issue of subject-matter jurisdiction, the Court could not have made that assumption because the assumption would necessarily lead to the conclusion that there was no jurisdiction, thus making the adoption void, yet the adoption was upheld. Further, if subject-matter jurisdiction were at issue in *Knox,* the Court could not have determined that it was unnecessary to reach the issue of whether the husband was required to join in the adoption proceedings under the statute. Such a determination would be necessary to resolve a jurisdictional question. And had the *Knox* Court concluded that there was no subject-matter jurisdiction, it would have had to void the adoption regardless of the presumption statute upon which it relied, because the probate court would not have had authority even to enter an adoption order giving rise to the presumption.

*5 The supposed defect in *Knox, i.e.,* failure of a party to join in an adoption, is comparable to the alleged and assumed defect here, i.e., improper joinder of a party in an adoption. As in *Knox,* we also need not decide whether a similar statute, MCL 710 .24(1), allowed for the parties' adoption of the twins because the issue does not concern subject-matter jurisdiction, and only the lack of subject-matter jurisdiction would permit the collateral attack pursued by plaintiff. We therefore agree with the trial court's analysis below: even if we were to presume for the sake of argument that the adoption orders entered by the Family Division of the Washtenaw Circuit Court were impermissible by MCL 710.24(1), the court would have erred, but it did not act outside of its jurisdiction. The orders were therefore subject only to direct attack on appeal, and the window of time in which to do so has long since closed.

Plaintiff additionally argues that the Washtenaw Circuit Court lacked jurisdiction because MCL 710.24(1) further provides that adoption petitions must be filed "with the court of the county in which the petitioner resides or where the adoptee is found." There is no dispute that all parties and both children have at all relevant times resided in Ingham County. For the same reasons set forth above, we disagree. Again presuming it was error for the adoption adjudication to take place in Washtenaw County instead of Ingham County, the error was in venue, not jurisdiction. See *Morrison v. Richerson,* 198 Mich.App 202, 206-208; 497 NW2d 506 (1992). Such an error is not subject to collateral attack.

Affirmed.

METER, J. (dissenting).
*5 I respectfully dissent. I would hold that under the Adoption Code, MCL 710.21 *et seq.,* the circuit courts of Michigan do not have subject-matter jurisdiction to grant a joint adoption petition filed by two unmarried persons and that such an adoption, if granted, is subject to collateral attack. I would reverse the trial court's order and remand this case for entry of judgment in favor of plaintiff.

In *Edwards v. Meinberg,* 334 Mich. 355, 359; 54 NW2d 684 (1952), quoting *Jackson City Bank & Trust Co v. Fredrick,* 271 Mich. 538, 544; 260 NW 908 (1935), the Supreme Court noted:

> "There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal."

Therefore, the pertinent question is whether the Washtenaw Circuit Court, in granting the joint adoption petition, was acting without the power to adjudicate or was simply exercising its power to adjudicate.

For guidance, I turn, initially, to the case of *In re Adams,* 189 Mich.App 540; 473 NW2d 712 (1991). In *Adams,* two individuals who were both married, but not to each other, desired to jointly adopt their biological daughter. *Id.* at 541. In support of their adoption petition, they cited MCL 710.24(1), the same provision at issue in the present case. See *Adams, supra* at 541. MCL 710.24(1) states, in pertinent part:

> *6 If a person desires to adopt a child or an adult and to bestow upon the adoptee his family name, or to adopt a child or an adult without a change of name, with the intent to make the adoptee his heir, that person, together with his wife or her husband, if married, shall file a petition with the court of the county in which the petitioner resides or where the adoptee is found....

The *Adams* Court noted that "[t]he entire subject of adoption is governed solely by statute."

Adams, supra at 542. It also noted that "the provisions of the Adoption Code [MCL 710.21 *et seq.]* must be strictly construed" and that jurisdiction over adoption proceedings is governed solely by that code. *Adams, supra* at 542-543. The Court ultimately held that the petitioners could not jointly adopt their biological daughter, stating:

> [W]e conclude that the probate court correctly construed the requirement of § 24 that both spouses to a marriage join in the petition to adopt as precluding petitioners ..., who are married, but not to each other, from adopting their natural daughter.... *[Id.* at 543.]

Adams is instructive here for two reasons. First, it makes clear that the Adoption Code must be strictly construed and that a court's jurisdiction is derived from that code. Second, in the course of its analysis, the Court touched upon the issue we face today, stating:

> In the absence of a statutory prohibition, an unmarried person may adopt another person. However, it has been held inconsistent with the general scope and purpose of the adoption statutes to allow two unmarried persons to make a joint adoption.... In *Adoption of Meaux,* 417 So.2d 522 (La App, 1982), the Louisiana Court of Appeals held that under a Louisiana adoption statute which allowed a single person or a married couple to adopt a child, the natural parents of a minor child, who were apparently living together but not married to each other, could not jointly adopt their natural child because they were neither "a single person" nor a married couple. *[Adams, supra* at 544.]

Here, two unmarried persons attempted to jointly adopt the children. However, the Adoption Code, which must be strictly construed, does not provide for a joint adoption by two unmarried persons. [1] MCL 710.24(1) states that a "person" may file an adoption petition, "together with his wife or her husband, if married...." There is simply no provision in the Adoption Code for a joint adoption by two unmarried persons. Moreover, such an adoption would run contrary to the statement in *Adams, supra* at 544, that "it has been held inconsistent with the general scope and purpose of adoption statutes to allow two unmarried persons to make a joint adoption."

I conclude that, under the current state of the law in Michigan, the Washtenaw Circuit Court erred in granting the joint adoption petition at issue in this case. Moreover, I conclude that this was not merely an error in the *exercise* of jurisdiction; instead, the court was without the power to adjudicate at all. Again, jurisdiction in adoption cases is solely derived from the Adoption Code, *Adams, supra* at 542-543, and the Adoption Code does not provide a court with jurisdiction to grant a joint adoption petition filed by two unmarried persons.

*7 An analogous case is *Ryan v. Ryan.* 260 Mich.App 315; 677 NW2d 899 (2004). In *Ryan, supra* at 323-324, an individual filed for a divorce from her parents. On the question of subject-matter jurisdiction, the Court held:

"Marriage is inherently a unique relationship between a man and a woman." MCL 551.1. It follows that a court only has jurisdiction over the dissolution of a marriage between a man and a woman. In other words, while the family division of the circuit court has subject-matter jurisdiction over married couples seeking a divorce, it is without jurisdiction over claims filed by children to divorce their parents.... When there is a lack of subject-matter jurisdiction, regardless of what formalities the trial court may have taken, its actions are void. *[Id.* at 332.]

Here, while the family division of the Washtenaw Circuit Court had subject-matter jurisdiction *in general* over adoption proceedings, it lacked subject-matter jurisdiction to grant a joint adoption to two unmarried persons. Therefore, its actions are void. *Id.* [2] As stated in *Edwards, supra* at 359, "[i]f there is a true jurisdictional defect, the court has acted without authority [and] its judgment is a nullity and is always subject to collateral attack." [3] Moreover, it is of no import that the parties consented to the jurisdiction of the Washtenaw Circuit Court. As noted in *Shane v. Hackney.* 341 Mich. 91, 98; 67 NW2d 256 (1954), "the parties by consent or conduct cannot give the court jurisdiction over the subject matter where it otherwise would have no jurisdiction[.] (Citations and quotation marks omitted.) Nor, contrary to defendant's argument, can the doctrine of res judicata be used to uphold the adoptions here. As noted in *Reid v. Gooden,* 282 Mich. 495, 498; 276 NW 530 (1937), a prior judgment cannot form the basis of a res judicata decision unless the judgment was rendered "by a court having jurisdiction."

Defendant cites *Hatcher v. Hatcher,* 443 Mich. 426; 505 NW2d 834 (1993), in arguing that

the adoptions here are not subject to collateral attack. In *Hatcher, supra* at 428, the Court concluded that a parent cannot challenge a probate court's assumption of subject-matter jurisdiction over a minor child after the parent's parental rights have been terminated. I do not agree with defendant that *Hatcher* requires us to affirm the Ingham Circuit Court's ruling in this case. First, *Hatcher* dealt with the specific and unique circumstances surrounding child protective proceedings. See, generally, *id.* at 433-436. Second, the *Hatcher* Court stated that "a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Id.* at 444. In the present case, the proceeding before the Washtenaw Circuit Court was *not* "of a class the court is authorized to adjudicate," because the court lacked jurisdiction to grant a joint adoption to two unmarried persons. Defendant's argument concerning *Hatcher* is unavailing.

*8 In my opinion, the Washtenaw Circuit Court lacked subject-matter jurisdiction to grant the joint petition for adoption, and plaintiff's collateral attack in the Ingham Circuit Court was proper. Therefore, the Ingham Circuit Court erred in granting summary disposition to defendant and denying summary disposition to plaintiff. I would hold that the proceedings that occurred in the Washtenaw Circuit Court are void. [4]

I note, however, that my legal reasoning today is limited to *joint* petitions for adoptions. In *In re Munson,* 210 Mich.App 500, 501; 534 NW2d 192 (1995), the petitioner, who was unmarried at the time, attempted to adopt a person, April Munson, who remained the legal child of her biological mother. The Court stated, in part:

Finally, because petitioner is a single person and the Adoption Code permits single persons to adopt, the probate court erred in applying this Court's decision in *Adams, supra,* to the case at bar. *Adams* only addressed situations where more than one person joins in the adoption petition, i.e., where two single people or two married people who are not married to each other attempt to adopt jointly. *[Adams, supra]* at 543-544, 546-547. *Adams* did, however, affirm that the statutory language of § 24 unambiguously limits the "group of persons eligible to adopt to *single persons* and married persons jointly with their spouses." *Id.* at 547 (emphasis added). Here, petitioner alone is asking the probate court to recognize him as April's legal father. Because *Adams* does not address the instant question whether a single man may adopt an adult adoptee after he divorces the adoptee's biological mother, we hold that the probate court erred in denying petitioner's adoption request on the basis of the holding in *Adams* . Instead, we find that as a single person, petitioner is entitled to petition for April's adoption under the Adoption Code, thereby becoming April's legal father and terminating the parental rights of respondent, her biological father.

Munson makes clear that there is a distinction between a joint petition for adoption and a petition involving only one potential adopter. Because alternative factual situations are not before us in this appeal, my legal reasoning today encompasses only those situations involving a joint petition for adoption.

I would reverse the trial court's order and remand this case for entry of judgment in favor of plaintiff.

All Citations

Not Reported in N.W.2d, 2006 WL 3524059

Footnotes

1 I note that if 2005 HB 5399, a pending bill, is adopted, then MCL 710.24(1) would allow for a joint adoption by two unmarried persons.

2 In my opinion, the majority misconstrues the significance of the *Ryan* decision. The majority states that the Washtenaw Circuit Court had "jurisdiction to adjudicate adoptions" and that therefore it had subject-matter jurisdiction over the pertinent proceedings in this case. However, *Ryan* makes clear that even if a court has subject-matter jurisdiction *in general* over a subject like divorce, adoption, marriage, etc., that subject-matter jurisdiction is limited by pertinent statutory authority. See *Ryan, supra* at 332. Here, there simply was no statutory authority authorizing the court to grant a joint adoption petition to two unmarried persons. I also note that the case of *In re Adoption of Knox,* 381

Mich. 582; 165 NW2d 165 NW2d 1 (1969), which the majority relies on, is distinguishable from the present case. In upholding the challenged adoption in *Knox*, the Supreme Court relied heavily on the fact that "[n]othing in the probate record shows [the adoptive mother] to be a married woman" and concluded that the plaintiff should not be able to "resort to extrinsic evidence to establish that fact." *Id.* at 589. Here, the operative fact that plaintiff and defendant were not married to each other is plainly evident from a cursory review of the adoption petition, given that they are both women and that marriage between two women is not and has not been, in the past, legally recognized in this state.

3 "[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal." *People v. Howard*, 212 Mich.App 366, 369; 538 NW2d 44 (1995).

4 Plaintiff makes the additional argument that the Washtenaw Circuit Court lacked subject-matter jurisdiction because the adoption proceedings should have taken place in a different county. MCL 710.24(1) states that an adoption petition shall be filed in the county "in which the petitioner resides or where the adoptee is found...." Plaintiff argues that she, defendant, and the children had no connection with Washtenaw County at the time of the purported adoptions. However, venue and jurisdiction are distinct concepts. See, generally, *Morrison v. Richerson*, 198 Mich.App 202, 206-208; 497 NW2d 506 (1992); see also *Stamadianos v. Stamadianos*, 425 Mich. 1, 5-14; 385 NW2d 604 (1986). Under the analogous case of *Morrison*, *supra* at 206-208, it appears to me that the error complained of by plaintiff here was an error concerning venue, not jurisdiction, and therefore could not be the subject of a collateral attack.

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EXHIBIT C

Order

Michigan Supreme Court
Lansing, Michigan

September 11, 2015

148097 & (35)

JENNIFER STANKEVICH, a/k/a
JENNIFER MILLIRON,
Plaintiff-Appellant,

v

SC: 148097
COA: 310710
Dickinson CC: 12-016939-DP

LEANNE MILLIRON,
Defendant-Appellee.

/

By order of April 25, 2014, the application for leave to appeal the October 17, 2013 judgment of the Court of Appeals was held in abeyance pending the decision in *DeBoer v Snyder*, 772 F3d 388 (CA 6, 2014). and any attendant decision from the United States Supreme Court. On order of the Court, the case having been decided on June 26, 2015, sub nom *Obergefell v Hodges*, ___ US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to the Court of Appeals for reconsideration in light of *Obergefell*. The motion to proceed on the application for leave to appeal is DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 11, 2015

Clerk

s0908

EXHIBIT D

2013 WL 5663227
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jennifer STANKEVICH a/k/a Jennifer Milliron, Plaintiff–Appellant,
v.
Leanne MILLIRON, Defendant–Appellee.

Docket No. 310710. | Oct. 17, 2013.

Dickinson Circuit Court; LC No. 12–016939–DP.

Before: RIORDAN, P.J., and MARKEY and K.F. KELLY, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim). We affirm.

I. FACTUAL BACKGROUND

The parties entered into a same-sex marriage in Canada in July 2007. Before that date, defendant had been artificially inseminated, and later gave birth to a child. Defendant is the biological mother of the child.

The parties' separated in March 2009. While they initially agreed to a visitation schedule, they subsequently found that they could not agree. Thus, plaintiff filed a verified complaint, asserting that she fully participated in the care and rearing of the minor child. She requested relief from the trial court, which included an order dissolving the marriage, an order affirming that she is the parent of the child, and orders regarding custody, parenting time, and child support.

Defendant, however, filed a motion for summary disposition pursuant to MCR 2.116(C)(8). She asserted that plaintiff did not have standing to petition for custody of the child. The trial court granted defendant's motion. Plaintiff now appeals.

II. SUMMARY DISPOSITION

A. Standard of Review

We review the grant of summary disposition de novo. *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint" and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. Furthermore, the motion only should be granted when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotations marks and citation omitted).

"Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo." *Helzel v. Helzel*, 248 Mich.App 1, 28; 638 NW2d 123 (2001).

B. Standing

"Generally, a party has standing if it has some real interest in the cause of action, ... or interest in the subject matter of the controversy." *In re Jajuski*, 283 Mich.App 41, 50; 770 NW2d 1 (2009) (quotation marks and citation omitted). Yet, "this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent[.]" *Id.* (quotation marks and citation omitted).

Under the Child Custody Act (CCA), child custody disputes exist "between the parents, between agencies, or between third persons[.]" MCL 722.25(1). The CCA defines "parent" as the "natural or adoptive parent of a child." MCL 722.22(h). As plaintiff is not the adoptive parent, the question becomes whether she is a "natural" parent. While "natural" parent is not defined under the act, "[u]ndefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v. Bhan*, 470 Mich. 572, 578; 683 NW2d 129 (2004). According

to *Random House Webster's College Dictionary* (2005), "natural" means, in part, "related by blood rather than by adoption: *one's natural parents.*" (Emphasis in original). Here, there is no dispute that plaintiff is not related to the child by blood. Thus, plaintiff is not a parent as defined by MCL 722.22(h). [1]

*2 Moreover, as the Michigan Supreme Court has admonished:

> [A] third party cannot create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the best interests of the child. A third party does not have standing to create a custody dispute not incidental to divorce or separate maintenance proceedings unless the third party is a guardian of the child or has a substantive right of entitlement to custody of the child. The Legislature has not created a substantive right to custody of a child on the basis of the child's residence with someone other than a parent, and this Court is not in a position to do so. [*Bowie v. Arder*, 441 Mich. 23, 48–49; 490 NW2d 568 (1992) (footnotes omitted).]

Plaintiff, however, contends that even though she is not a biological parent, this Court should expand the equitable parent doctrine to include same-sex couples and find that *Van v. Zahorik*, 460 Mich. 320; 597 NW2d 15 (1999), incorrectly limited the equitable parent doctrine to a legal marriage. However, we are bound by the Supreme Court's holding in *Van*.

This Court adopted the equitable parent doctrine in *Atkinson v. Atkinson*, 160 Mich.App 601, 608–609; 408 NW2d 516 (1987). The doctrine provides that a husband who was not the biological father of a child can be treated as a parent under the following circumstances:

> (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. [*Id.*]

In *Van*, 460 Mich. at 323, 329, our Supreme Court was asked to extend the doctrine to a man who was not married to the child's mother and who was not the biological father, but who had cohabited with the mother and was in a relationship with her when the two children were born. The Court declined the invitation to extend the doctrine outside the context of marriage. *Id.* at 330–331. The Court held that because "the children at issue were not born or conceived during marriage ... the doctrine of equitable parenthood would not apply[.]" *Id.* Our Court explained that "the extension of substantive rights regarding child custody implicates significant public policy issues and is within the province of the Legislature, not the judiciary. Accordingly, the primary reason we will not extend this theory here is that the Child Custody Act, which occupies the field of child custody, does not recognize such a theory." *Id.* at 331. The Court further explained that the equitable parent doctrine was "rooted in marriage" and that "extending it to persons who were never married would have repercussions on the institution of marriage." *Id.* at 332.

*3 Plaintiff now asks us to extend the equitable parent doctrine to instances where the parties enter into a union that is not recognized as a marriage in Michigan. To adopt such a ruling would be contrary to the dictates of *Van*, as the Supreme Court specifically limited the application of the equitable parent doctrine to the confines of marriage. 460 Mich. at 330–331. Moreover, as the Court emphasized in *Van*, this issue implicates significant public policy and strikes at the core of custody and marriage. Therefore, it is within the province of the Legislature, not the judiciary, to modify the CCA. *Van*, 460 Mich. at 327, 331–332. [2]

Furthermore, plaintiff's suggestion that she is married for the purposes of the CCA is contrary to the law in Michigan. Earlier this year in *United States v. Windsor*, — U.S. —: 133 S.Ct. 2675, 2689–2690; 186 L.Ed.2d 808 (2013), the

United States Supreme Court reiterated, in the context of the Defense of Marriage Act (DOMA), that "[b]y history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." The Court affirmed that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." *Id.* at 2691 (quotation marks, citation, and brackets omitted).

Consistent with *Windsor*, the Michigan Legislature has delineated the scope of marriage within this state. MCL 551.1 defines marriage as between a man and a woman, and invalidates marriages between same-sex individuals. MCL 551.1 reads as follows:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Additionally, MCL 551.272 provides:

> This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws, and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction. [3]

Further, while not challenged on appeal by plaintiff, Article I, Section 25 of the Michigan Constitution of 1963 provides:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Thus, to recognize plaintiff's same-sex union as a marriage under the equitable parent doctrine would directly violate the constitutional provision that, "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union *for any purpose*." Const.1963, art. 1, § 25 (Emphasis added); see also *Nat'l Pride At Work, Inc v. Governor of Michigan*, 481 Mich. 56, 87; 748 NW2d 524 (2008) (where the Michigan Supreme Court struck down a provision providing health-insurance benefits to same-sex domestic partners because it violated the marriage amendment found in Const.1963, art. 1, § 25).

*4 As we are bound by the Michigan Constitution and the plain statutory language, we agree with the trial court that plaintiff is not a parent as defined under the CCA or the equitable parent doctrine, and therefore lacks standing to bring this action.

C. Equal Protection

Plaintiff also argues that the Court's holding in *Vun*, limiting the equitable parent doctrine to marriage, violates the equal protection of children born to an unmarried couple, including children born to same-sex couples. [4] Plaintiff also submits numerous other arguments for why, in her opinion, *Vun* was wrongly decided. Yet, a Supreme Court decision is binding precedent on the Court of Appeals. *State Treasurer v. Sprague*, 284 Mich.App 235, 242; 772 NW2d 452 (2009). Accordingly, we lack the authority to declare that *Vun* was wrongly decided or that the Supreme Court's ruling violated the equal protection clause.

III. CONCLUSION

Because plaintiff lacked standing to bring this action, the trial court did not err in granting summary disposition to defendant pursuant to MCR 2.116(C)(8). We affirm.

All Citations

Not Reported in N.W.2d, 2013 WL 5663227

Footnotes

1 Moreover, plaintiff does not contend that she is "third person" who could bring this action pursuant to MCL 722.26c. Plaintiff also does not advance any argument that she could maintain this action pursuant to MCL 722.26b, as she is not a guardian or limited guardian, or pursuant to MCL 722.27b, as she is not a grandparent.

2 While plaintiff argues that the instant case is distinguishable from *Van* because the parties here were married, as discussed more fully *infra*, a same-sex union is not recognized in Michigan as a marriage. Furthermore, while plaintiff cites numerous cases in other jurisdictions to support her argument, they are inapposite, as none include the same language as found in the CCA, in *Van*, or in the statutes and constitutional amendments discussed *infra*.

3 While we are aware of pending legislation modifying MCL 551.1 and MCL 551.272, that does not diminish the legal effect of these statutes that currently reflect the law in Michigan.

4 On appeal, plaintiff does not assert any equal protection argument based on her status, but only on the child's behalf.

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EXHIBIT E

STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER STANKEVICH, a/k/a JENNIFER MILLIRON,

Plaintiff-Appellant,

v

LEANNE MILLIRON,

Defendant-Appellee.

FOR PUBLICATION
November 19, 2015
9:00 a.m.

No. 310710
Dickinson Circuit Court
LC No. 12-016939-DP

ON REMAND

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition for failing to state a claim under MCR 2.116(C)(8). Pursuant to the dictates of the United States Supreme Court in *Obergefell v Hodges*, ___ US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), we remand this matter for proceedings consistent with this opinion.

I. BACKGROUND

In our October 17, 2013 opinion in this matter, we summarized the factual background of the case:

> The parties entered into a same-sex marriage in Canada in July 2007. Before that date, defendant had been artificially inseminated, and later gave birth to a child. Defendant is the biological mother of the child.
>
> The parties' [sic] separated in March 2009. While they initially agreed to a visitation schedule, they subsequently found that they could not agree. Thus, plaintiff filed a verified complaint, asserting that she fully participated in the care and rearing of the minor child. She requested relief from the trial court, which included an order dissolving the marriage, an order affirming that she is the parent of the child, and orders regarding custody, parenting time, and child support.
>
> Defendant, however, filed a motion for summary disposition pursuant to MCR 2.116(C)(8). She asserted that plaintiff did not have standing to petition for

custody of the child. The trial court granted defendant's motion. Plaintiff now appeals. [*Stankevich v Milliron*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 1, vacated and remanded 498 Mich 877 (2015).]

In our previous opinion, we upheld the grant of summary disposition to defendant because plaintiff lacked standing to bring this action. *Stankevich*, unpub op at 1. We noted that the Child Custody Act (CCA) defines "parent" as the "natural or adoptive parent of a child." *Id.* at 2, citing MCL 722.22(h).[1] Plaintiff is not a parent under this definition because she is not an adoptive parent and because she is not related to the child by blood. *Id.*, citing *Random House Webster's College Dictionary* (2005) (defining "natural" as, in part, "related by blood rather than by adoption: *one's natural parents*."). Likewise, we rejected plaintiff's request to apply the equitable parent doctrine that was adopted in *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). *Stankevich*, unpub op at 3-5. The basis of our conclusion was that applying the doctrine in this case would be contrary to *Van v Zahorik*, 460 Mich 320, 330-331; 597 NW2d 15 (1999), in which the Michigan Supreme Court declined to extend the equitable parent doctrine outside the context of marriage, because recognizing plaintiff's same-sex union as a marriage under the equitable parent doctrine would violate the constitutional and statutory provisions defining marriage. *Stankevich*, unpub op at 3-5.

On November 25, 2013, plaintiff filed an application for leave to appeal with the Michigan Supreme Court. In light of the pending appeals from the decision in *DeBoer v Snyder*, 973 F Supp 2d 757 (ED Mich, 2014), rev'd 772 F3d 388 (CA 6, 2014), rev'd sub nom *Obergefell*, 135 S Ct 2584, on April 25, 2014, our Supreme Court entered an order holding the application in the instant matter in abeyance. *Stankevich v Milliron*, ___ Mich ___; 844 NW2d 724 (2014).

With the United States Supreme Court's decision in *Obergefell*, on September 11, 2015, the Michigan Supreme Court vacated our judgment in this case and remanded it to us for reconsideration. *Stankevich v Milliron*, 498 Mich 877; 868 NW2d 907 (2015).

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review the grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. Furthermore, the motion only should be granted when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

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[1] MCL 722.22(h) was subsequently amended by 2015 PA 51, effective September 7, 2015. The definition of "parent" remains the same, although it is now codified under MCL 722.22(i).

"Whether a party has legal standing to assert a claim constitutes a question of law that we review de novo." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

B. ANALYSIS

Because of the United States Supreme Court's opinion in *Obergefell*, plaintiff has standing under the equitable parent doctrine since Michigan now is required to recognize the parties' same-sex marriage, and plaintiff's complaint alleges facts that, if proven, are sufficient to establish equitable parenthood.[2]

"Generally, a party has standing if it has some real interest in the cause of action, . . . or interest in the subject matter of the controversy." *In re Anjoski*, 283 Mich App 41, 50; 770 NW2d 1 (2009) (quotation marks and citation omitted; alteration in original). Yet, "this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent[.]" *Id.* (quotation marks and citation omitted; alteration in original).

However, this Court adopted the equitable parent doctrine in *Atkinson*, 160 Mich App at 608-609, holding:

> [W]e adopt the do[c]trine of equitable parent and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

This Court stated that, given its recognition that "a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child[,]" such a person, in being treated as a parent, may also seek the rights of custody or parenting time. *Id.* at 610. This Court also has applied the equitable parent doctrine in later cases. See, e.g., *York v Morofsky*, 225 Mich App 333, 335, 337; 571 NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 34; 553 NW2d 619 (1996). However, as mentioned *supra*, our Supreme Court declined to extend the equitable parent doctrine outside the context of marriage in *Van*, 460 Mich at 337.

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[2] The remaining aspects of our previous opinion are unaffected by *Obergefell* because the opinion only affected our analysis of the equitable parent doctrine. Our application of the definition of "parent" under the CCA does not run afoul of *Obergefell* because now that definition applies equally to same-sex and opposite-sex married couples. See MCL 722.22(i) (previously MCL 722.22(h)).

In our previous opinion, we concluded that the equitable parent doctrine should not be expanded to include same-sex couples, such as the parties in this case, because Michigan statutory and constitutional provisions precluded recognition of the parties' same-sex marriage, and *Van* limited the application of the equitable parent doctrine to the confines of marriage. *Stankevich*, unpub op at 3-5. However, now with *Obergefell*, Michigan is required to recognize the parties' same-sex marriage.

In *Obergefell*, 135 S Ct at 2604-2605, the United States Supreme Court held,

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. . . .

The Supreme Court therefore held invalid state laws, including Michigan's constitutional provision defining marriage as a union between one man and one woman, Const 1963, art 1, § 25, *Obergefell*, 135 S Ct at 2593, "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," *id.* at 2605.

The Court also addressed "whether the Constitution requires States to recognize same-sex marriages validly performed out of State[]" and concluded that "the recognition bans inflict substantial and continuing harm on same-sex couples." *Id.* at 2607. Accordingly, the Court held that "same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2607-2608. Thus, under *Obergefell*, the holding in *Van* limiting the equitable parent doctrine to the confines of marriage is no longer a barrier to the application of that doctrine in this case, *Van*, 460 Mich at 337, and we are required to conclude that plaintiff is not barred from asserting the applicability of the equitable parent doctrine.

Plaintiff's complaint alleges that the parties in the instant matter were married in Canada in 2007 and that defendant's biological child was born during the course of that marriage. As *Obergefell*, 135 S Ct at 2604-2605, requires that same-sex couples be permitted to exercise the fundamental right to marry on the same terms and conditions as opposite-sex couples, an application of a legal doctrine excluding same-sex married couples from the doctrine of equitable parenthood goes against the dictates of *Obergefell*, which we are bound to follow.

Should it be determined by the trial court that the parties' proffered marriage was valid pursuant to Canadian, or applicable provincial, domestic relations law and other legal and contractual requirements,[3] plaintiff alleges facts that afford her standing to seek the status of an

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[3] Unlike marriages solemnized in sister states, which are generally recognized as valid in this state, Michigan has no statute requiring the recognition of marriages celebrated in foreign nations. Nonetheless, Michigan courts recognize marriages solemnized in foreign nations as a

equitable parent. As previously discussed, the parties claim that the child was born during the course of their Canadian marriage. Plaintiff alleges that the parties entered into an agreement to conceive and raise the child with the attendant parental rights and responsibilities. Plaintiff also claims that she assisted with the artificial insemination process through which the child was conceived, that she was present at the child's birth, and that she fully participated in the care and rearing of the child until defendant prevented her from doing so. Further, plaintiff alleges that, during the parties' relationship, they shared parental responsibilities and duties equally. She asserts that she always has maintained a strong parental role that included bonding with the child, providing for the child financially, attending the child's health care appointments, making medical decisions with defendant concerning the child's care, and providing a home for the child. Further, after going their separate ways in March 2009, the parties had a parenting-time schedule for a significant period of time. Plaintiff's complaint requests an order that affirms her parental status, an order making custody and parenting time determinations, and an order of child support.

As set forth, plaintiff's allegations would establish factually her standing to file this action seeking equitable parenthood. The facts alleged in the complaint, if proven, would support the elements of the equitable parent doctrine as set forth in *Atkinson*, 160 Mich App at 608-609.

Thus, we remand this matter for an evidentiary hearing to determine whether plaintiff is entitled to be deemed an equitable parent.

III. CONCLUSION

Obergefell, 135 S Ct at 2599-2601, 2604-2605, 2607-2608, requires Michigan to recognize same-sex marriages. Therefore, we reverse the order granting summary disposition in favor of defendant and remand for an evidentiary hearing concerning the validity of the parties'

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matter of comity. It is well settled that Michigan's law and public policy favor the institution of marriage, *Van*, 460 Mich at 332; *Boyce v McKenna*, 211 Mich 204, 214; 178 NW 701 (1920), and Michigan courts have long recognized the validity of marriages celebrated in foreign countries, provided that those marriages are valid in the nation of celebration and that they are not antithetical to Michigan's public policy, see, e.g., *Boyce*, 211 Mich at 215; *People v Imes*, 110 Mich 250, 251; 68 NW 157 (1896); *Hutchins v Kimmell*, 31 Mich 126, 130-131 (1875). The rule in Michigan is that the validity of a foreign marriage must be determined by reference to the domestic relations law of the country of celebration. *Hutchins*, 31 Mich at 131; see also *Noble v Noble*, 299 Mich 565, 568; 300 NW 885 (1941); *In re Osborn's Estate*, 273 Mich 589, 591; 263 NW 880 (1935); 16 Michigan Civil Jurisprudence, Marriage, § 4, p 561.

Upon remand, the trial court must determine the validity of the parties' Canadian marriage by referencing the domestic relations law of the place in which the plaintiff alleges that she was married to the defendant.

alleged Canadian marriage and the applicability of the equitable parent doctrine. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

EXHIBIT F

2015 WL 7253501

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Oklahoma.

Charlene RAMEY, Plaintiff/Appellant,

v.

Kimberly SUTTON, Defendant/Appellee.

No. 113778. | Nov. 17, 2015.

Synopsis

Background: Biological mother's former same-sex partner filed petition seeking determination of parental rights and custody. The District Court, Oklahoma County, Howard Haralson, J., granted biological mother's motion to dismiss. Former partner appealed.

[Holding:] The Supreme Court, Watt, J., held that, as a matter of first impression, former partner had standing to seek custody and visitation, overruling *Dubose v. North*, 332 P.3d 311.

Reversed and remanded with instructions.

Winchester, J., concurred in result and filed opinion in which Taylor, J., joined.

West Headnotes (4)

[1] **Pretrial Procedure**
Nature and scope of remedy in general

Motions to dismiss are not favored.

Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

The dismissal of a petition by the trial court is reviewed de novo.

Cases that cite this headnote

[3] **Appeal and Error**
Pleading

The reviewing appellate court must accept all allegations in a petition as true.

Cases that cite this headnote

[4] **Child Custody**
Parties; intervention

Biological mother's former same-sex partner had standing to seek custody and visitation under Uniform Custody Jurisdiction and Enforcement Act; couple had not had opportunity to take advantage of legal protections of marriage before their relationship ended, partner had been intimately involved in conception, birth, and parenting of child at biological mother's request, and biological mother and partner had made a conscious decision to have a child and co-parent as a family; overruling *Dubose v. North*, 332 P.3d 311. 43 Okl.St.Ann. § 551–101 et seq.

Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional
Const. Art. 1, § 35(A, B).

On Appeal from the District Court of Oklahoma County; the Honorable Judge Howard Haralson, Presiding.

¶ 0 Same sex couple planned to have a child and co-parent. Upon the termination of their relationship and following almost ten years of co-parenting, the biological mother denied plaintiff's status as a parent and sought to end all interaction between plaintiff and child. Couple did not have a written agreement regarding parenting. Plaintiff petitioned the District Court in Oklahoma County seeking a determination of parental rights and custody. The

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District Court granted defendant's motion to dismiss. Plaintiff appealed and this Court issued an Order granting plaintiff's motion to retain this appeal.

DISTRICT COURT'S JUDGMENT REVERSED; REMANDED WITH INSTRUCTIONS.

Attorneys and Law Firms

Brady R. Henderson, ACLU of Oklahoma Foundation, Oklahoma City, Oklahoma, for Appellant.

Rhonda G. Telford Naidu, The Law Office of Rhonda Telford Naidu, Oklahoma City, Oklahoma, for Appellant.

Kacey L. Huckabee, Oklahoma City, Oklahoma, for Appellee.

OPINION

WATT, J.

*1 ¶ 1 The issue before this Court is whether the district court erred in granting the defendant's motion to dismiss for lack of jurisdiction finding the plaintiff/Ramey lacked standing as a non-biological parent seeking custody and visitation. Questions raised are (1) whether the district court erred finding that a non-biological parent lacked standing because the same sex couple had not married and had no written parenting agreement; (2) whether a biological mother has the right as a parent to legally erase an almost ten year parental relationship that she voluntarily created and fostered with her same sex partner. We answer the first question in the affirmative and the second question in the negative. Accordingly, we reverse the decision of the district court and remand for further proceedings.

¶ 2 This is a matter of first impression before this Court. In *Eldredge v. Taylor*, 2014 OK 92, 339 P.3d 888, we upheld the right of the non-biological mother, and former partner in a same sex civil union to enforce the terms of a *written* co-parenting agreement. *Eldredge* was limited to its facts and was based on the enforcement of a written contract. Although in the instant matter, the couple did not enter into a written parenting agreement, marriage or civil union, the plaintiff asks to be recognized as a legal parent and seeks custody rights under *Eldredge* and Oklahoma's Uniform Child Custody Jurisdiction and Enforcement Act, 43 O.S.2011, 551–101 *et seq.* Since *Eldredge* was adopted, the Supreme Court of the United States ("SCOTUS") has ruled that marriage is a constitutionally guaranteed fundamental right for same sex couples in every state in this nation and affirming the longstanding constitutional right to have a family and raise children, *Obergefell v. Hodges*, 576 U.S. ____ (2015), ____ U.S. ____, 135 S.Ct. 2584, 192 L.Ed.2d 609.[1] Today we broaden *Eldredge*, acknowledging the rights of a non-biological parent in a same sex relationship who has acted *in loco parentis*[2] where the couple, prior to *Bishop*[3], or *Obergefell, supra.*, (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner's parental role following the birth of the child.

¶ 3 In her petition in error, Ramey contends as a non-biological mother she has a legally protected interest giving her standing (1) as a parent under the provision "as otherwise provided by law" under the Oklahoma Uniform Parentage Act, ("OUPA") 10 O.S.2011, 7700–101–7700–637; (2) as a third party recognized as a parent under Oklahoma common law estoppel principles; and (3) as a parent whose rights are constitutionally protected through the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Because we hold that the long recognized equitable doctrine of *in loco parentis* provides Ramey standing to pursue a hearing on custody and visitation, we need not reach the other theories raised by Ramey.

*2 ¶ 4 Sutton admits to Ramey's involvement with their minor child from conception. However, she claims that Ramey has no legally protected interest in custody or visitation with their child for the reasons that (1) they never married or entered into a civil union even though such options were legally available in states outside of Oklahoma; and (2) they never entered into a written parenting agreement. Sutton makes no allegation that Ramey is an unfit parent. We find Sutton's argument unpersuasive.

I. STANDARD OF REVIEW

[1] [2] [3] ¶ 5 Motions to dismiss are not favored. *Gens v. Casady School*, 2008 OK 5 ¶ 8, 177 P.3d 565. The dismissal of a petition by the trial court is reviewed *de novo. Eldredge,*

supra. at ¶ 3, *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. As the reviewing appellate court, we must accept all allegations in Ramey's petition as true. *Gens, supra.*

II. FACTUAL BACKGROUND

¶ 6 Following Sutton's proposal of marriage to Ramey in 2004, the couple lived together in a committed relationship signified by a diamond ring for 8½ years. Early in their relationship, they decided to have a child and jointly parent, with Sutton as the biological mother. A friend of the couple agreed to be the donor.[4] Sutton was artificially inseminated, became pregnant and delivered their baby on March 22, 2005. Ramey attended all ultrasound appointments, shared in related pregnancy costs, and was present and participated in the delivery of their newborn. Sutton prepared a baby book for their child identifying both Sutton and Ramey as parents. Sutton gave a card to Ramey congratulating her on becoming a "mother" to their son and that she would be a wonderful mom.

¶ 7 Based on the couple's mutual decision, during the time of Sutton's pregnancy, she did not work and Ramey was the sole means of financial support. After their child's birth, Sutton remained home to care for their newborn and Ramey continued to support the family. Sutton did not return to work until the winter of 2005. Ramey sold her jeep to enable Sutton to continue to be a stay at home mother. Ramey also purchased a larger home to accommodate their expanding family.

¶ 8 During the first four years of their child's life, Ramey was the primary caregiver due to Sutton's work and sleep schedule. Ramey assisted in caring for their child following a tonsillectomy as well as providing other health care related needs. Their child has always referred to Ramey as "mom," but did not begin to refer to Sutton as "mom" until the age of five or six. Even today, their child will sometimes refer to Sutton, the biological mom as Kimberly and not as "mom." Ramey has always been and continues to be listed as "other parent" at her son's school. She was active in her child's school, serving as home room mother, volunteering for school activities including hosting class parties. Ramey has also built family traditions incorporating their child's love of the outdoors.

*3 ¶ 9 Throughout the time they were a couple, Ramey and Sutton lived together and held themselves out as a family to friends and relatives. They took multiple family vacations together. Ramey even claimed their child as a "dependent" on her tax return almost every year of the child's life. After their relationship ended, they continued to live together for another 1½ years as roommates while raising their child.

ARGUMENTS AND LEGAL ANALYSIS

[4] ¶ 10 On July 18, 2014, the United States Court of Appeals for the Tenth Circuit affirmed the Oklahoma federal district court's holding that Oklahoma's ban on same sex marriage was an unconstitutional burden on same sex couples' fundamental right to marry. *Bishop, supra.* After this decision, for the first time in Oklahoma, same sex couples in this state could enter into a legally recognized marriage. Almost a year later, on June 26, 2015, the United States Supreme Court determined that same sex couples in every state of this nation have a fundamental right to marry guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and further that marriages were entitled to full faith and credit between the states. *Obergefell, supra.* Following *Obergefell,* all state marriage laws that excluded same sex couples from civil marriage were invalidated.

¶ 11 One of the four principles central to the reasoning in *Obergefell* is that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education".[5] The U.S. Supreme Court was also reminded of the constitutionally protected liberty interest in the right to marry, to establish a home and to raise children.[6] Central to its consideration is the harm caused to children of same sex couple families who are denied the constellation of benefits that States link to marriage.[7] Although the First Amendment insures that *religious* organizations may continue to advocate their views on same sex marriage, "[t]he Constitution does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."[8]

¶ 12 Prior to *Bishop, supra.,* Oklahoma same sex couples could not enter into a legally recognized marriage in this state. Until *Obergefell, supra.,* Oklahoma law denied full faith and credit to any marriage or civil union performed in another state. [9] Although Sutton extended a proposal of marriage to Ramey in 2004 and then wore a diamond ring to reflect their mutual commitment, it was legally impossible for this couple to wed in Oklahoma. Likewise, had the couple wed or entered into a civil union in another jurisdiction, it would have been a legal nullity in Oklahoma. [10]

¶ 13 The unfortunate demise of Sutton and Ramey's 8½ year relationship occurred more than two years before *Bishop* was decided and three years prior to *Obergefell.* By the time the federal district court and U.S. Supreme Court made their decisions, it was too late for this couple to take advantage of the legal protections of marriage. Oklahoma law deprived this couple from exercising their fundamental right and liberty to marry as guaranteed by our United States Constitution. The couple's failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis,* of a best interests of the child hearing.

*4 ¶ 14 We have consistently given compelling consideration to the best interests of the minor child in custody matters. *Daniel v. Daniel,* 2001 OK 117, 42 P.3d 863, *Taylor, supra.* Our long standing jurisprudence recognizes the fundamental right of a parent to the companionship, care, custody and management of the child as guaranteed by the United States Constitution and the Oklahoma Constitution. [11]

¶ 15 We have held that when persons assume the status and obligations of a parent without formal adoption they stand *in loco parentis* to the child and, as such, may be awarded custody even against the biological parent. [12] Other jurisdictions have relied on this doctrine in finding a former same sex partner had standing to bring a child custody action where the biological parent consented and encouraged her partner to assume the status of parent and acquiesced to the partner's performance of parental duties. [13] One court noted that although the biological mother enjoys many rights as a parent, it does not include the right to erase a relationship that she voluntarily created and fostered with their child. [14]

¶ 16 Ramey, the plaintiff, is not a mere "third party" like a nanny, friend, or relative, as suggested by the district court. On the contrary, Ramey has been intimately involved in the conception, birth and parenting of their child, at the *request* and invitation of *Sutton.* Ramey has stood in the most sacred role as parent to their child and *always* been referred to as "Mom" by their child. The community, school, medical providers and extended family have all known Ramey as the "other parent," all with the knowledge and mutual agreement of Sutton. The uncertainty facing Ramey, as reflected in this litigation, is the *exact* peril identified in *Obergefell, supra.,* 135 S.Ct. at 2600, 2601.

¶ 17 At the time of the conception of their child, Ramey and Sutton, as competent adults, entered into an intentional intimate relationship and made a conscious decision to have a child and co-parent as a family. In this instance, Ramey does not seek custody in lieu of Sutton, the biological mother. Rather, she seeks to be recognized as a parent and to have a district judge consider these issues in a best interest of the child hearing. The couple, in a committed and long term relationship, collectively decided to have a family and then to raise the child together. Sutton now urges that Ramey should not even be allowed a best interest of the child hearing because they were never married, something that before *Bishop* would have been a legal nullity in Oklahoma. This couple and ***more importantly,*** their child, is entitled to the love, protection and support from the only parents the child has known. Sutton's argument must fail in light of the equities before this Court. Ramey is recognized as being *in loco parentis* to their child and is entitled to a best interests of the child hearing.

*5 ¶ 18 Insofar as *Dubose v. North,* 2014 OK CIV APP 68, 332 P.3d 311, is in conflict with this opinion, it is hereby *overruled.*

CONCLUSION

¶ 19 This case is intended to recognize those unmarried same sex couples who, prior to *Bishop* and *Obergefell,* entered into committed relationships, engaged in family planning with the intent to parent jointly and then shared in those responsibilities after the child was born. Public policy dictates that the district court consider the best interests of the child

and extend standing to the nonbiological parent to pursue hearings on custody and visitation. This decision does not extend any additional rights to step-parents, grandparents, or others. Accordingly, we find the district court erred in granting the motion to dismiss, and that Ramey has standing to pursue a best interests of the child hearing.

DISTRICT COURT'S JUDGMENT REVERSED; REMANDED WITH INSTRUCTIONS.

REIF, C.J., COMBS, V.C.J., KAUGER, WATT, EDMONDSON, COLBERT, GURICH, JJ.-CONCUR.

WINCHESTER, J., with whom TAYLOR, J. joins, CONCURRING IN RESULT.

"In child custody cases the Court must determine standing first based on an agreement of the parties. Then and only then is best interest considered to determine custody or visitation."

All Citations

--- P.3d ----, 2015 WL 7253501, 2015 OK 79

Footnotes

1 *Obergefell* relied on *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618, quoting "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause.", *Obergefell, supra.*, 135 S.Ct. at 2600.

2 *See, Taylor v. Taylor*, 182 Okla. 11, 75 P.2d 1132, 1938 OK 77, where we first recognized this doctrine; also see, *Workman v. Workman, 1972 OK 74, ¶ 10, 498 P.2d 1384*, adopting the definition of *'in loco parentis7D* as "one who has assumed the status and obligation of a parent without formal adoption."

3 *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 574 U.S. ——, 135 S.Ct. 271, 190 L.Ed.2d 139 (2014); see also footnote10, *infra.*

4 The donor understood and agreed that Ramey and Sutton would co-parent and raise any child conceived as their own and that he did not have any obligations. The donor has never had a relationship with their son or provided any support. The donor has not asserted any claim for custody or visitation and is not a party to this action.

5 *Obergefell, supra.*, 135 S.Ct. at 2590.

6 *Obergefell, supra*, 135 S.Ct. at 2600, citing *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 64 (1987).

7 *Obergefell, supra*, 135 S.Ct. at 2601, noting that "[s]ame sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."

8 *Obergefell, supra*, 135 S.Ct. at 2607.

9 *See, footnote 10, infra.*

10 Okla. Const., Art. 2, 35, added by State Question No. 711, Legislative Referendum No. 334 and adopted in 2004, provides:

A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.

C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Bishop, supra, held Okla. Const., Art. 2, 35(A) to be unconstitutional; a result recognized by this Court in *Eldridge, supra*, 2014 OK 92, ¶ 14, 339 P.3d 888. However, the *Bishop* court declined to address the merits of the plaintiff's challenge to Okla. Const., Art. 2, 35(B). *Bishop, supra*, 760 F.3d at 1087–96. Accordingly, Okla. Const., Art. 2, 35(B) remained the law in Oklahoma until the decision of the United States Supreme Court in *Obergefell, supra*, where the Court determined "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." 135 S.Ct. 2608.

11 *J.V. v. State, Dept. Of Institutions, Etc.*, 1977 OK 224, 572 P.2d 1283, ¶ 3; *Alford v. Thomas*, 1957 OK 218, 316 P.2d 188,¶ 22.

12 *Taylor, supra.*, footnote 2.

13 *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (2001); *In re Scarlett Z.-D.*, 381 Ill.Dec. 729, 11 N.E.3d 360 (2014).

14 *J.A.L. v. E.P.H.*, 453 Pa.Super. 78, 682 A.2d 1314, 1322.

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EXHIBIT G

which provisions of the Workers' Compensation Law are applicable."). Neither *Hoffman* nor *Willamette Industries, Inc.*, addressed a consequential condition claim. Moreover, neither applies the judicially created rule of responsibility to override the statutory rules of liability for consequential conditions.

The board's determination that claimant's 2006 injury was the major contributing cause of the full rotator cuff tear with impingement—a finding we already have determined is supported by substantial evidence—means that claimant's later work activity could not have been the major contributing cause. Under the framework established by the legislature, the board appropriately classified the claim as a consequential condition for which MPP is liable and appropriately declined to assign liability according to the LIER. We therefore affirm.

Affirmed.

271 Or.App. 116

In the Matter of the Registered Domestic Partnership of Karah Gretchen MADRONE, Petitioner–Respondent,

and

Lorrena Thompson Madrone, Respondent–Appellant.

1201759CV; A154894.

Court of Appeals of Oregon.

Argued and Submitted Nov. 4, 2014.

Decided May 13, 2015.

Background: Same-sex partner of child's biological mother brought declaratory judgment action seeking declaration that partner was child's legal parent by operation of statute creating parentage by operation of law in the husband of a woman who bears a child conceived by artificial insemination, if the husband consented to insemination. The Circuit Court, Klamath County, Dan Bunch, J., granted summary judgment to partner. Biological mother appealed.

Holdings: The Court of Appeals, Hadlock, J., held that:

(1) parentage statute applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination and the couple would have chosen to marry had that choice been available to them, and

(2) genuine issue of material fact as to whether couple in instant case would have chosen to marry had that choice been available to them precluded summary judgment.

Reversed and remanded.

1. Parent and Child ⇐242

Statute creating parentage by operation of law in the husband of a woman who bears a child conceived by artificial insemination, if the husband consented to insemination, applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination and the couple would have chosen to marry had that choice been available to them. West's Or.Rev. Stat. Ann. § 109.243.

2. Judgment ⇐181(20)

Genuine issue of material fact as to whether same-sex couple would have chosen to marry had that choice been available to them, as could trigger application of statute creating parentage by operation of law, in certain circumstances, in the partner of a woman who bears a child conceived by artificial insemination, precluded summary judgment in favor of same-sex partner, in partner's action against child's biological mother seeking declaration that partner was legal parent of child born before effective date of statute providing for establishment of domestic partnership system. West's Or.Rev. Stat. Ann. §§ 109.243, 106.305(6).

John C. Howry, Medford, argued the cause for appellant. On the briefs were Brett A. Baumann and Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, P.C.

Thomas A. Bittner, Portland, argued the cause for respondent. On the brief were Mark Johnson Roberts and Gevurtz, Menashe, Larson & Howe, P.C.

Before SERCOMBE, Presiding Judge, and HADLOCK, Judge, and TOOKEY, Judge.

HADLOCK, J.

[118]In this case, we consider how to determine whether an unmarried same-sex couple is similarly situated to a married opposite-sex couple for purposes of ORS 109.243 and, thus, entitled to the privilege granted by that statute. ORS 109.243 creates parentage in the husband of a woman who bears a child conceived by artificial insemination if the husband consented to that insemination. The statute's effect is automatic; it requires no judicial or administrative filings or proceedings. In *Shineovich and Kemp*, 229 Or. App. 670, 214 P.3d 29, *rev. den.*, 347 Or. 365, 222 P.3d 1091 (2009), we held that the statute violated Article I, section 20, of the Oregon Constitution because it granted a privilege—parentage by operation of law—on the basis of sexual orientation, because it applied only to married couples and because, when we decided *Shineovich*, same-sex couples were not permitted to marry in Oregon. To remedy the violation, we extended the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id.* at 687, 214 P.3d 29. It was undisputed that the parties in *Shineovich* were similarly situated to a married opposite-sex couple, so we did not consider to *which* same-sex couples our extension of ORS 109.243 applies.

This case raises that question. During the parties' relationship, respondent gave birth to a daughter, R, who was conceived by artificial insemination. Shortly thereafter, the Oregon Family Fairness Act took effect, allowing same-sex couples to register domestic partnerships, which petitioner and respondent then did. They later separated, and petitioner brought this action for dissolution of the domestic partnership. Among other claims, petitioner sought a declaration that she is R's legal parent by operation of ORS 109.243. The trial court granted summary judgment for petitioner on that claim based on our analysis in *Shineovich*. Respondent appeals. For the reasons set out below, we conclude that ORS 109.243 applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them. The record in this case includes evidence creating a genuine dispute on the latter [119]point. Accordingly, the trial court erred in entering summary judgment, and we reverse.

The parties present fairly divergent views of the facts. Because this appeal comes to us following a grant of summary judgment, we view the facts in the light most favorable to respondent, the nonmoving party. *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997). The parties, who are both women, met briefly in March 2004 in Oceanside, Oregon, where petitioner lived. Respondent, who lived in Colorado at the time, had recently been in a serious car accident that resulted in numerous injuries and required extensive rehabilitation. The parties corresponded after respondent returned to Colorado. Three months later, respondent returned to Oceanside for a week, during which the parties began a romantic relationship. They wanted to live together, and they moved to Colorado, where respondent continued her rehabilitation from the car accident.

During their time in Colorado, petitioner pressured respondent to hold a "commitment ceremony" with family and friends. The parties agreed that they did not want to seek a legal relationship, because they "did not believe in such social constructs" and "shared a common belief in freedom from marriage." Respondent was hesitant about having a commitment ceremony because petitioner was becoming more controlling of respondent and of their situation. Respondent took comfort in knowing that a ceremony would not be legally binding with respect to either the

parties' relationship or any children that either party might have. The parties believed that, if one of them had a child, the other would not automatically be recognized as a legal parent, and they "made no agreements of any kind that would be binding upon a child either of [them] chose to have * * *." They believed that, if they chose "to be parents together," they would have to take legal action to "make it official."

Notwithstanding respondent's reservations, the parties eventually agreed that they would have the commitment ceremony. Together, they chose and bought rings and dresses for the ceremony and registered for gifts. In mid–2005, respondent succumbed to pressure from petitioner to [120]move back to Oregon. The parties returned to Oceanside and held the commitment ceremony that September, as they had planned. Petitioner and respondent exchanged vows and rings at the ceremony. For several years thereafter, the parties had annual anniversary photos taken in the dresses that they had worn that day.

The month after the ceremony, the parties accepted joint positions managing the Clifftop Inn in Oceanside. They lived and worked at the inn, renovating the business and the premises. In March 2007, they bought the inn.

Respondent had wanted to have a child since before the parties met. By spring 2007, that desire had become urgent. She told petitioner that she "was going to have a child of [her] own no matter what." Respondent felt that it was her decision, and it did not matter to her whether she had the child with petitioner or not. Petitioner was initially hesitant about having a child at that time because she was concerned about the parties' financial stability and about the fact that working at the inn consumed so much of their time and energy. Respondent also had "mixed thoughts" about it, but they eventually "romanticized it and talked about doing it together." Respondent was concerned about having to "legally share" her baby with the biological father, so the parties decided to use two sperm donors in order to obscure the father's identity. Respondent wanted petitioner to be biologically related to the child, so she suggested asking petitioner's brothers if they would donate sperm. Only one of the brothers agreed, so respondent asked a friend of hers, and he agreed to be the other donor. A few days apart, the parties obtained the sperm donations and respondent was artificially inseminated. Petitioner assisted with the first insemination procedure but not the second. Respondent became pregnant.

The parties' relationship deteriorated during the pregnancy. Respondent gave birth to the baby, R, on January 21, 2008. By that point, respondent later asserted, the parties were "nothing more than 'roommates.' " After R was delivered, petitioner told respondent that she had not realized how hard it would be to not have a biological connection with the baby.

[121]Both parties legally changed their last names. Before R was born, respondent had often considered changing her own last name, and, having studied matrilineal societies, she wanted her daughter to have a "powerful, independent" last name. Respondent and petitioner both liked the name Madrone, and they agreed to give R that name. They both changed their last names to Madrone about two weeks after R was born, and it is the surname listed for R on her birth certificate.

The summary judgment record does not disclose who filled out R's birth certificate, but petitioner was not listed as a parent. Respondent did not attempt to put petitioner's name on the birth certificate, because she did not want petitioner to be R's legal parent. Respondent stated in an affidavit that she was "always clear that [she] was the legal, biological and SOLE guardian" of R. She also said, "I had the choice to add [petitioner] to my daughter's birth certificate, and I never did and never intended to." Petitioner never asked to have her name added. The parties were both aware that petitioner's name could be added to the birth certificate, but, in respondent's words, "because of an overall deteriorated relationship and a disconnect in any parenting of [R] by petitioner, it never happened."

Nonetheless, the parties filed a declaration of domestic partnership in March 2008.[1] How the domestic partnership came about is unclear. In her affidavits in opposition to petitioner's motion for summary judgment, respondent gave somewhat conflicting accounts about signing the domestic partnership paperwork. In her first affidavit, she stated that, while she was still recovering from childbirth, the midwife who assisted with R's delivery told respondent that she had to sign the paperwork. According to respondent, she was "out of it" and "not completely aware" of what she was doing; she signed the documents and only later [122]realized what she had done. In her second affidavit, respondent's story changed from not having been aware of what she was doing to having felt pressured to sign the paperwork. Respondent stated that the midwife "had her own agenda" and that respondent was "scrambled by the strength of that agenda," not to mention still in recovery from giving birth. Respondent said that she "never would have sought it, but when [the midwife] showed up with it and said to do it, [she] felt pressured and wrong not to." According to respondent, the midwife notarized the paperwork right then.

Documentary evidence conflicts with both of respondent's accounts. A copy of the declaration of domestic partnership that the parties actually filed indicates that both parties signed it, and the midwife notarized it, on February 19, 2008, nearly a month after R was born.

R was reared with "attachment parenting," a practice that calls for more-or-less constant physical contact between the baby and a caregiver. In respondent's understanding, it is a "mother-centered philosophy" that "does not allow for 'co-parenting.'" R slept between petitioner and respondent in their bed at night, but otherwise, respondent generally carried R in a sling, and R was dependent on her "for everything." Petitioner would spend time with R, but never for very long without respondent being present and never alone for a night, as respondent "always had concerns" about petitioner and R "being alone together."

The parties separated in 2012 and respondent subsequently denied petitioner regular contact with R. Later that year, petitioner commenced this action for dissolution of the domestic partnership. In the operative petition, she asserted a claim for declaratory relief, seeking a declaration that she is a legal parent to R. Petitioner alleged that, at the time of R's conception and birth, she was respondent's "domestic and life partner," that she and respondent had planned the pregnancy with the intent to raise the child together, and that she had consented to the artificial insemination procedure. Petitioner also alleged that the parties would have married had Oregon law permitted them to.

In support of the declaratory-relief claim, petitioner relied on ORS 109.243, which provides:

> [123]"The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination."

Petitioner alleged that the statute unconstitutionally discriminated against her on the basis of sex and sexual orientation because, if she were male and married to respondent, it would create legal parentage in her without regard to whether she was R's biological parent.

Petitioner later moved for summary judgment on her declaratory-relief claim. She relied on our opinion in *Shineovich* in support of the motion. In *Shineovich*, we explained that "ORS 109.243 grants a privilege—legal parentage by operation of law—to the husband of a woman who gives birth to

1. The parties registered their partnership in Tillamook County under the Oregon Family Fairness Act (OFFA), ORS 106.300 to 106.340, which provided for the "establishment of a domestic partnership system [to] provide legal recognition to same-sex relationships." ORS 106.305(6). The OFFA was signed into law in 2007, "but because of a court challenge, did not go into effect until February 4, 2008." *Slater v. Douglas County*, 743 F.Supp.2d 1188, 1190 (D.Or.2010). Thus, the OFFA was not in effect when R was born.

a child conceived by artificial insemination, without regard to the biological relationship of the husband and the child, as long as the husband consented to the artificial insemination." 229 Or.App. at 685, 214 P.3d 29. We held that the statute violates Article I, section 20, of the Oregon Constitution:

> "Because same-sex couples may not marry in Oregon, that privilege is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the intent of being the child's second parent. We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents by other means—namely, adoption. There appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so. Thus, we conclude that ORS 109.243 violates Article I, section 20."

Id. at 686, 214 P.3d 29. We went on to hold that the appropriate remedy for the violation was to "extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id.* at 687, 214 P.3d 29.

In her motion, petitioner argued that, under *Shineovich*, "there are two requirements for application of the [124] statute to [R's] situation: that the parties be domestic partners and that [petitioner] consent to the insemination." She asserted that both requirements were satisfied and, thus, that the court should grant summary judgment in her favor.

In response to the motion, respondent argued that *Shineovich* is distinguishable from this case. She asserted that, there, the parties were registered domestic partners before their children were born, whereas she and petitioner did not become domestic partners until nearly two months after R was born. Respondent contended that "the protections afforded in ORS 109.243 apply to domestic partners, not simply people in a relationship." According to respondent, "[i]f petitioner were male, the situation at hand would be that of a boyfriend trying to assert parental rights over a child who was born before the marriage and is undisputedly not the biological father." Respondent also argued that she had never consented to petitioner being considered her "husband equivalent" and that "to presume such consent now would be to deprive Respondent of significant due process rights to consent or withhold consent to the biological and/or legal paternity of a child born of her body." Respondent argued that this case is further distinguishable from *Shineovich* because, in that case, "the parties were unable to have both parties' names on the birth certificate, but in this case the parties were able, but chose not, to add Petitioner's name to the birth certificate. This gives insight into the parties' intent * * *."

After a hearing, the trial court granted the motion for summary judgment. In a letter opinion, the court stated:

> "No pertinent facts are in dispute regarding the nature of the parties' relationship prior to the birth of [R]. It is crystal clear that they lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child. It is evident that [petitioner] consented to the performance of the artificial insemination."

The court entered a limited judgment declaring that R is the child of petitioner and respondent "the same as if born to them in lawful wedlock" and ordering the State Registrar and the Center for Health Statistics to issue a birth certificate for R designating both parties as legal parents.

[1] [125] Respondent appeals, assigning error to the trial court's grant of summary judgment. She makes three primary arguments. First, respondent contends that summary judgment was inappropriate because there are factual disputes that, if resolved in her favor by a factfinder, distinguish this case materially from *Shineovich*. Second, she argues that the trial court's interpretation of *Shineovich* actually *creates* a privilege or immunity that is not granted to all citizens on equal terms, in violation of Article I, section 20. Specifically, respondent asserts that the trial court created a privilege

for women in opposite-sex nonmarital relationships that women in same-sex relationships do not have: sole legal-parent status for a woman who conceived a child through artificial insemination, did not seek the consent of her partner, and did not intend to be a legal co-parent with her partner. Finally, respondent argues that the trial court's interpretation of *Shineovich* deprives respondent of her due process parental right to make decisions concerning the care, custody, and control of R. We address those arguments in turn.

Respondent's argument that this case is factually distinguishable from *Shineovich* misses the mark, as we addressed a different question in *Shineovich* than we address in this case. In *Shineovich*, we analyzed only whether ORS 109.243 violates Article I, section 20, because it denies a privilege to the same-sex partner of a woman who conceives a child through artificial insemination and, having concluded that the statute does violate Article I, section 20, held that the appropriate remedy was to extend the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." 229 Or.App. at 687, 214 P.3d 29. Beyond addressing those broad points, we did not have reason to articulate a precise standard by which to determine whether the same-sex partner of a mother who conceived by artificial insemination comes within the reach of ORS 109.243. We attempt to draw the line more precisely here.

Article I, section 20, provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally [126] belong to all citizens." As we explained in *Shineovich*, that provision of the constitution

> "protects against disparate treatment of 'true classes'—that is, classes that are defined not by the challenged law itself, but by a characteristic apart from the law, such as gender, ethnic background, residency, military service, and—as pertinent here—sexual orientation. *Tanner v. OHSU*, 157 Or.App. 502, 521, 524, 971 P.2d 435 (1998). Disparate treatment of a subset of true classes—'suspect classes'—is subject to more rigorous scrutiny than disparate treatment of other true classes. Suspect classes are those that have been 'the subject of adverse social or political stereotyping or prejudice.' *Id.* at 523 [971 P.2d 435]. Homosexuals constitute a suspect class. *See id.* at 524 [971 P.2d 435] ('[I]t is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.'). Disparate treatment of suspect classes is permissible only if it can be justified by genuine differences between the class and those to whom privileges or immunities are made available."

229 Or.App. at 681–82, 214 P.3d 29. "[R]equiring privileges or immunities to be granted 'equally' permits the legislature to grant privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same." *State v. Savastano*, 354 Or. 64, 73, 309 P.3d 1083 (2013). If a statute does not treat similarly situated people the same, the statute violates Article I, section 20, and we must determine whether to invalidate the statute or to extend it so that it applies to all who are similarly situated. We will opt to extend the statute if doing so "advances the purpose of the legislation and comports with the overall statutory scheme." *Hewitt v. SAIF*, 294 Or. 33, 53, 653 P.2d 970 (1982). Thus, in determining whether the protections of ORS 109.243 must be extended to a particular citizen or class of citizens, we must consider whether that person or class is similarly situated to the persons or classes expressly affected by the statute.

In *Shineovich*, we held that ORS 109.243 violates Article I, section 20, because it creates a privilege that "is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the [127] intent of being the child's second parent." 229 Or.App. at 686, 214 P.3d 29. In rejecting respondent's contention that the statute does not apply in this case because the parties did not establish a legal relationship before R was born, the trial court noted our reference to intent in *Shineovich*. The court stated that we had "fo-

cused on the parties' intent, not upon their legal status."

In retrospect, we recognize that our reference in *Shineovich* to the nonbiological partner's intent to be the child's second parent may be misleading. The reference simply reflected the facts of that case—there was no question that the petitioner in *Shineovich* intended to be the children's second parent. *See id.* at 672, 214 P.3d 29 ("The parties rushed to perform the ceremony before [the first child's] birth specifically with the intent that petitioner would be his legal parent."). We did not mean for that fact to establish a benchmark for determining whether ORS 109.243 should be applied to any particular same-sex couple. When it enacted the statute, the legislature may have assumed that any husband who consented to his wife's being artificially inseminated intended to be the resulting child's parent, and thus saw no need to include an intent requirement in the statute. Whatever the reason, the statute does not turn on intent, and our ultimate conclusion in *Shineovich* reflects that. We concluded that "the appropriate remedy is to extend the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." 229 Or.App. at 687, 214 P.3d 29.

Extending the statute simply on the basis of intent to be a parent would comport with one purpose of the legislation—protecting the support and inheritance rights of children conceived by artificial insemination—but it would not be consistent with the overall statutory scheme—specifically, the legislature's decision to make the statute apply only to children of married couples. If an unmarried opposite-sex couple conceives a child by artificial insemination using sperm from a donor, the statute does not apply, even if the couple, in the words that the trial court used to describe petitioner and respondent, "lived together as a couple, intended to remain together, and intended to have a child and to co-parent the child." Accordingly, it would be inappropriate for courts to extend the statute to same-sex couples [128] solely on the basis of one or both of the parties' intent to have the nonbiological party assume a parental role. *See Hewitt*, 294 Or. at 53, 653 P.2d 970 (extension of a statute should "comport[ ] with the overall statutory scheme"). Just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice—commitment without marriage. Because ORS 109.243 would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice.

We therefore conclude that *choice* is the key to determining whether ORS 109.243 applies to a particular same-sex couple. Ultimately, the distinction between married and unmarried heterosexual couples is that the married couples have chosen to be married while the unmarried couples have chosen not to be. And, as we have explained, that choice determines whether ORS 109.243 applies. Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite-sex couple contemplated in ORS 109.243 cannot be whether the same-sex couple chose to be married or not. Rather, the salient question is whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to.

Whether a particular couple would have chosen to be married, at a particular point in time, is a question of fact. In some cases, the answer to that question will be obvious and not in dispute. For example, there was no disputing that the parties in *Shineovich* would have chosen to marry—they actually did make that choice, and were not *legally* married only because their marriage was later declared void *ab initio*. *Shineovich*, 229 Or.App. at 672–73, 214 P.3d 29. In other cases, the answer will be less clear. A number of factors may be relevant to the fact finder's determination. A couple's decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each [129] other out as spouses;

considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married. We hasten to emphasize that the above list is not exhaustive. Nor is any particular factor dispositive (aside from unsuccessfully attempting to get married before same-sex marriages were legally recognized in Oregon, as happened in *Shineovich*), given that couples who choose not to marry still may do many of those things. Instead, we view the factors as tending to support, but not compelling, an inference that a same-sex couple would have married had that choice been available.

In this case, the summary judgment record includes evidence pointing to two factors that tend to support the opposite inference—that the couple would not have married in any event: rejection of the institution of marriage and intent not to share legal parentage of any children born during the relationship. We use the phrase "tend to support" advisedly, particularly with respect to rejecting the institution of marriage. A factfinder would need to evaluate a professed rejection of marriage carefully in the light of a couple's conduct and history. It stands to reason that a person who has been denied the benefits of a social institution might react to that denial by rejecting the institution's validity or worth but might, once the prohibition is lifted, change his or her view and embrace the institution. Because the question is whether a couple would have married *if they could have*, the factfinder must determine what the individual's views would have been if marriage had not been prohibited. In some cases, it may be reasonable to infer that the individual's views would not have changed—that is, they still would have declined to marry, just as many committed opposite-sex couples do. In other cases, the more reasonable inference may be that a same-sex couple's rejection of marriage was rooted in the prohibition itself and that, indeed, the couple would have married had the law allowed.

[2] 130 With the above standards in mind, we turn to whether summary judgment was appropriate in this case. "The court shall grant [a summary judgment] motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." ORCP 47 C. Respondent stated in her affidavits that the parties did not want to enter into a legal relationship, because they "did not believe in such social constructs." A factfinder could find that respondent was not credible or, given that the parties registered a domestic partnership (the closest thing to marriage that the state offered to same-sex couples at the time) shortly after such partnerships became available, that her view would have been different had same-sex marriage not been prohibited. However, because the case is in a summary-judgment posture, we must draw all reasonable inferences in respondent's favor. *Jones,* 325 Or. at 420, 939 P.2d 608. A factfinder could reasonably infer, on this record, that the parties would not have chosen to marry even if the law had permitted them to. If the factfinder determines that the parties would not have married in any event, ORS 109.243 would not apply, and petitioner would not be entitled to a declaration that she is R's legal parent in accordance with that statute. It follows that issues of material fact remain and, therefore, that the trial court erred in granting summary judgment.

As noted above, respondent argues that ORS 109.243 does not apply for another reason, namely, that petitioner did not consent to the artificial insemination. Because the meaning of "consent" will be at issue on remand, we address it briefly here. Respondent understands "consent" to require that the biological mother not only *received* the approval of her partner for the artificial insemination, but that she also *sought* that approval in the first place. Respondent notes that the common definition of "consent" is "give assent or approval," *see Webster's Third New Int'l Dictionary* 482 (una-

bridged ed. 2002). She argues that, "before there can be 'consent,' there must first be a request for 'assent or approval.' " In addition, respondent contends that that the use of the word "consent" indicates a legislative intent to limit the application of ORS 109.243 to couples [131]who intend to be legal coparents at the time of conception. In other words, according to respondent, implicit in a would-be biological mother's request for consent to artificial insemination is a request to share the legal benefits and burdens of parentage.

Respondent's argument raises an issue of statutory construction. To determine whether the legislature intended "consent" to be understood to include intent by the mother to share legal parentage, we look to the text of ORS 109.243 in context and to any relevant legislative history. *State v. Gaines*, 346 Or. 160, 171–72, 206 P.3d 1042 (2009). As respondent notes, the common meaning of "consent" is "give assent or approval." *Webster's* at 482. Nothing about that term itself or the statutory context supports respondent's argument that "consent" requires that the artificially inseminated woman intend to share legal parentage with her husband. Nor does the legislative history support that view. In short, ORS 109.243 requires nothing more than that the mother's husband give assent or approval to the performance of artificial insemination. We acknowledge that, as applied in determining which same-sex couples are similarly situated to married opposite-sex couples for purposes of applying ORS 109.243, an intent not to share parentage might indicate that a same-sex couple would not have chosen to marry. However, we see no reason that such intent should bear on the issue of "consent" for couples that would have married.

We turn finally to respondent's due process argument. Respondent asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution " 'protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' " (Quoting *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).) Respondent acknowledges that that "right is not absolute," but she contends that her decision to be R's sole legal parent must be accorded "some special weight," and that applying ORS 109.243 in this case would violate her right to make decisions concerning R's care, custody, and control.

We decline to address that argument for two reasons. First, the parties' very brief arguments on appeal do [132]not adequately grapple with the difficulty in "identify[ing] the scope of the parental rights protected by the Due Process Clause." *O'Donnell–Lamont and Lamont*, 337 Or. 86, 100, 91 P.3d 721 (2004), *cert. den.*, 543 U.S. 1050, 125 S.Ct. 867, 160 L.Ed.2d 770 (2005). More fundamentally, the due process argument is premature, given our resolution of this appeal. Neither the parties nor the trial court had the benefit of this opinion—and its articulation of a standard for determining when ORS 109.243 applies in the context of same-sex relationships—when they addressed the due process question. On remand, if respondent chooses to renew her argument that the Due Process Clause prohibits application of ORS 109.243 in the circumstances of this case, we expect that her argument will address, in detail, how application of the standard that we have announced in this decision results in an unconstitutional interference with her parental rights.

To summarize, the summary judgment record, viewed in the light most favorable to respondent, establishes that there are issues of material fact that, if resolved in respondent's favor, lead to the conclusion that the parties were not similarly situated to a married heterosexual couple. If the factual disputes were resolved in that manner, the result would be that ORS 109.243 does not operate to make petitioner R's legal parent. It follows that the trial court erred in granting petitioner's summary judgment motion.

Reversed and remanded.

EXHIBIT H

STATE OF MICHIGAN
WASHTENAW COUNTY TRIAL COURT

MICHELLE LAKE,
PLAINTIFF

v

KERRI PUTNAM,
DEFENDANT

FILE #: 15-1325-DC

HON. DARLENE A. O'BRIEN

DENIAL OF MOTION FOR SUMMARY DISPOSITION

Ann Arbor, Michigan
Date: October 26, 2015

Before the court is defendant Kerri Putnam's motion for summary disposition. At issue is whether a former partner of a same-sex domestic relationship who acted as a parent to a non-biological child during the time prior to *Obergefell v Hodges*[1] has standing to bring a child parenting time complaint. For the following reasons, the court concludes that plaintiff, Michelle Lake, does have standing.

FACTS[2]

Plaintiff alleges that in 2001, the parties began a committed, romantic relationship and, years later, decided they wanted to become parents. After finding a sperm donor, the parties agreed that Ms. Putnam would carry the baby because Ms. Lake had injured her back in a car accident. In 2007, Ms. Putnam conceived and gave birth to a son on May 3, 2008. During the pregnancy, the parties held themselves out to the public as the child's mothers. Plaintiff was present during the delivery. The parties named the child Austin Harrison Putnam, designating the child's middle name after Ms. Lake's maternal grandfather.

In summer 2008, the parties moved with the child to Florida to be near defendant's family. From early 2009 to 2011, the parties continued living together but not as a committed couple. After reconciling in 2011, the parties renewed their commitment as a couple. In January 2014, the parties moved back to Jackson, Michigan with Austin. Throughout this time, Ms. Lake asserts that she continued to act as Austin's mother. While living together in Florida and Michigan, neither state allowed same-sex marriage.[3]

[1] -- US--, 135 SCt 2584 (2015).
[2] The court limits itself to the allegations in plaintiff's verified petition which the court will treat as the complaint and the affidavits attached to it.
[3] Florida did not allow same-sex marriage until January 2015. *See Brenner v Scott*, 999 F Supp 2d 1278 (ND Fla 2014). Michigan did not allow same-sex marriage until *Obergefell*.

Until the parties separated in September 2014, Ms. Lake claims that she cared for and treated Austin as her own son and that Austin refered to Ms. Lake and Ms. Putnam as "Mommy" and "Mama" respectively. Ms. Lake asserts that she acted as the child's primary care-giver, and also provided primary financial support to Ms. Putnam and Austin during the committed domestic relationship. The parties held themselves out as Austin's two mothers both to friends and to the public. In sum, Ms. Lake alleges that she had a close and affectionate mother-son relationship with Austin who is now seven years old.

After Ms. Putnam left the relationship, Ms. Lake offered to pay child support and gave defendant money for Austin's dental treatment. On June 12, 2015, Ms. Lake filed this case requesting parenting time and that this court enter appropriate orders regarding child support and health insurance. On August 10, 2015, Ms. Putnam filed a motion for summary disposition under MCR 2.116(C)(5) and (8).

LAW AND ANALYSIS

Summary disposition is proper under MCR 2.116(C)(5) if "[t]he party asserting the claim lacks the legal capacity to sue." This court must consider the affidavits, depositions, admissions and other relevant documentary evidence when ruling on a motion brought under MCR 2.116(C)(5).[4]

Summary disposition is proper under MCR 2.116(C)(8) where the alleged claims fail to state a claim upon which relief can be granted, *i.e.*, when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."[5] A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. When reviewing a motion brought under MCR 2.116(C)(8), the court considers only the pleadings.[6] Moreover, the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them.[7]

The Child Custody Act (CCA) forms the basis of a dispute regarding a minor child's custody, support and parenting time.[8] The CCA defines a "parent" as "the natural or adoptive parent of a child."[9] "Parent," however, is construed more broadly by Michigan courts under the equitable parent doctrine. Therefore, this court must consider whether the equitable doctrine applies in these circumstances.

The Michigan Court of Appeals adopted the equitable parent doctrine in *Atkinson v Atkinson*.[10] In *Atkinson*, one child was born during the parties' marriage. For the first

[4] MCR 2.116(G)(5).
[5] *Maiden v Rozwood*, 461 Mich 109, 119, 597 N.W.2d 817 (1999).
[6] MCR 2.116(G)(5).
[7] *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63, 852 NW2d 103 (2014).
[8] *Van v Zahorik*, 460 Mich 320, 328, 597 NW2d 15 (1999).
[9] MCL 722.22(i).
[10] 160 Mich App 601 (1987).

four years of the child's life, the husband acted as the child's father and believed himself to be the child's biological father. After divorce proceedings began, the child's mother asserted that her husband was not the child's father, which DNA tests confirmed. The Court of Appeals found the husband had standing under the equitable parent doctrine.[11]

The *Atkinson* court held that a husband, who is not the biological father of a child, may be considered the "natural" parent of that child where:

> (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.[12]

Adoption of the doctrine was the "logical extension" of *Johnson v Johnson*,[13] in which a husband who held himself out as a child's parent for several years was estopped from denying paternity during divorce. Liberal construction of the CCA's provisions required that the solution be "equitable in nature."[14]

Accordingly, this court begins with the equitable nature and liberal construction of the CCA. The equitable nature of the CCA, however, does not mean the courts may solve all child custody solutions with any equitable remedy. For example, in *Van v Zahorik, supra*, the Michigan Supreme Court declined to extend the equitable parent doctrine outside the marriage context. While *Atkinson* did not specifically list marriage as an element of equitable parent, the court used language limiting its application to marriage. The Michigan Supreme Court made explicit this limitation in *Van* and declined to extend the doctrine beyond the realm of marriage when specifically presented with the opportunity to do so in a case involving a heterosexual couple.[15] As part of its reasoning, the Court noted that extending the doctrine to persons who were never married "would have repercussions on the institution of marriage."[16] This court is presented with the issue of whether a person in a same-sex relationship who resided in states that did not permit same sex marriage before separating may seek relief under the equitable parent doctrine.

Here, however, the court is faced not with two people who could have but chose not to get married but rather, two individuals who were in a committed, same-sex

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[11] *Atkinson*, 160 Mich App at 610.
[12] *Id.* at 608-09.
[13] 93 Mich App 415, 286 NW2d 886 (1979).
[14] *Atkinson*, 160 Mich App at 609, quoting MCL 722.26.
[15] While Ms. Lake urges the court to find the marriage requirement in *Van* no longer applies, this is not necessary. Rather, this limited extension would only apply to same-sex couples who previously were precluded from legal means of becoming married in Michigan yet still satisfy the other elements of the equitable parent doctrine. Post *Obergefell*, same-sex couples who now have opportunity to marry in Michigan may continue not to have standing because of *Van* marriage requirement.
[16] *Van*, 460 Mich at 332.

relationship who resided in jurisdictions that did not permit or recognize same-sex marriage thereby precluding the potential application of the equitable parent doctrine.[17] Michigan's law prevented the parties from becoming married prior to the US Supreme Court's decision in *Obergefell*. The petition and affidavits assert that the parties called each other Austin's mothers, presented themselves to the public as his mothers, and, most importantly, they fostered a dual maternal relationship between themselves and Austin. To separate this child from someone both parties called and he believes is his parent flies in the face of equity and "devalues the importance of the child's personal relationship" with the non-biological mother.[18] In sum, to deny standing to someone acting as a parent who did not have the ability to become married in Michigan could produce an inequitable result for the child.

Equity jurisprudence's unique strength rests in its ability to "mold its decrees to do justice amid all the vicissitudes and intricacies of life."[19] As societal mores and ideas of family change, so too the law must change with it to achieve equitable results. The Court of Appeals has recognized the important, protected interest rests not "in the mere biological link between parent and child" but "in the family life."[20] Thus "constitutionally protected parental rights do not arise simply because of a biological connection between a parent and a child; rather, they require more enduring relationships."[21] Because the CCA places the child's best interests in a preeminent position, allowing the equitable parent doctrine to apply to this situation maximizes the number of individuals potentially available for a child which may be in the child's best interests.

Ms. Lake alleges that she and the child meet the other criteria of Atkinson by (1) having a mutually acknowledged relationship of parent and child and the mother of the child cooperated in the development of that relationship for a significant period of time, (2) she desires to continue this relationship and to have the rights afforded a parent, and (3) she is willing to continue to financially support Austin. The affidavits sufficiently assert facts to withstand a motion for summary disposition under MCR 2.116(C)(5), and plaintiff's petition, together with all reasonable inferences or resulting conclusions is sufficient to withstand the challenge under MCR 2.116(C)(8).

ACCORDINGLY, IT IS ORDERED: The motion for summary disposition is DENIED.

HON. DARLENE A. O'BRIEN (P33182)
Trial Court Judge

[17] While Ms. Putnam contends the parties could have gotten married in another state, *e.g.* Massachusetts or Canada, this does not account for marriage requirements in other states or refute Michigan's previous ban on same-sex marriage. Additionally, that argument does not address other similarly situated couples without the financial ability to travel to another state to marry.
[18] *Van*, 460 Mich at 338 (BRICKLEY, J. dissenting).
[19] *Spoon-Shacket Co v Oakland Cnty*, 356 Mich 151, 163, 97 NW2d 25 (1959).
[20] *Sinicropi v Mazurek*, 273 Mich App 149, 169, 729 NW2d 256 (2006).
[21] *Id.* at 170-71 citing *Lehr v Robertson*, 463 US 248, 260-61 (1983).

EXHIBIT I

STATE OF MICHIGAN

41st JUDICIAL CIRCUIT COURT

MENOMINEE COUNTY

LEAH BUYARSKI,

Plaintiff,

v

REBECCA PRZEWROCKI,

Defendant.

OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

File No.: 2015-15091-DC

The Plaintiff filed a Complaint on April 30, 2015 to establish child custody and parental visitation with two minor children – twins – born to Defendant Przewrocki while the parties were in a same-sex relationship on a theory of equitable parent. An Amended Complaint was filed on October 5, 2015 by the Plaintiff adding a claim for "equitable adoption/defacto" or "psychological parent primary and/or sole custody." The parties stipulated and the Court consented to hear the issue of standing of the Plaintiff to bring an action for equitable parenting (agreement filed August 7, 2015).

The Court has reviewed the pleadings, including the memorandum of law filed by the parties as well as the amicus brief filed by the ACLU by stipulation, the attachments thereto, and affidavits. Oral argument was considered as well.

Standard of Review

Although the Defendant did not file a motion for summary disposition, the parties stipulated that the issue of standing would be decided by the Court on today's date based upon briefs and affidavits utilizing the standards for a motion under MCR 2.116 (C)(5) and MCR 2.116 (C)(8). The Defendant alleges that summary disposition is appropriate and that the Plaintiff is not legally entitled to proceed on her Amended Complaint for Custody. Summary disposition is proper under MCR 2.116 (C)(5) if "The party asserting the claim lacks the legal capacity sue." This Court must consider the affidavits, depositions, admissions and other relevant documentary evidence when ruling on a motion brought under this court rule. (MCR 2.116 (G)(5)) "Generally, a party has standing if it has some real interest in the cause of action ... or interest in the subject matter of the controversy." (In re Anjoski, 283 Mich App 41,50; 770 NW2d 1 (2009))

"Yet this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent(.)" Id.

Defendant alleges summary disposition is also proper under MCR 2.116 (C)(8) where the alleged claims fail to state a claim upon which relief can be granted, such as, when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." (Maiden v Rozwood, 461 Mich 109, 119; 597 NW 2d 817 (1999)). A motion brought under this court rule tests the legal sufficiency of a Complaint. The Court is to consider only the pleadings when reviewing such a motion. The Court must accept all factual allegations in the Complaint as true, and construed in a light most favorable to the nonmovant. Id.

Issue

This case presents the issue of whether a former partner of a same-sex domestic relationship has standing to bring a child custody complaint for equitable parenting time rights as the non-biological parent, where the parties never married and when the relationship and birth occurred prior to Obergefell v Hodges (576 U.S.(2015), 135 S. Ct. 2584, 192 L. Ed. 2d 609).

Facts

The facts as alleged by the Plaintiff in the Complaint and affidavits, indicate that the Plaintiff and the Defendant were in a committed same-sex relationship for approximately 3 years, from 2011 until August of 2014. The Defendant gave birth to twins, Riley Blaize Buyarski and Avery Spike Buyarski, born June 24, 2012 as a result of a sperm donor arranged and paid for, in part, by the Plaintiff. The parties agreed to give both boys the Plaintiff's last name and her name was placed on the boys' birth certificates. The parties agreed that the minor child Avery would have the Plaintiff's grandfather's nickname, Spike, for a middle name and that was placed on his birth certificate. The Plaintiff opened a joint checking account for the boys and placed funds in the account for the children's benefit. The parties and the boys resided together as a family for over two years.

After the parties separated they shared custody on a voluntary basis. So that the children could continue to reside in the home, the Plaintiff would move out when the Defendant exercised her parenting time and the Plaintiff would live in the home when she exercised her parenting time with the children. The Plaintiff has been awarded placement of the minor children as a result of the abuse and neglect petition brought by the State of Michigan in Menominee County in case number 15-050-NA. Plaintiff alleges the children have known and acknowledge the Plaintiff as a mother since their birth. She also states the Defendant has similarly acknowledged and referenced the Plaintiff as a mother to the children, both publicly and privately. (Plaintiff's Exhibit A & B to the affidavit of the Plaintiff).

The parties never married, however, the Plaintiff alleges that she proposed marriage to the Defendant and that she accepted. (Affidavit of the Plaintiff). The Plaintiff added the Defendant's name to the deed for her home with rights of

survivorship. They picked out an engagement ring, the Plaintiff purchased it, and the Defendant accepted it and wore it until they broke up in 2014. (Affidavit of the Plaintiff and attached Exhibits A – D).

The Plaintiff alleges she has been the primary caretaker for the minor children until she was prevented by the Defendant from contacting them. She also alleges she has been contributing to their medical bills from the time of their birth until the Defendant obtained a personal protection order against her and prevented contact.

Law and Analysis

The Child Custody Act (CCA) forms the basis of a dispute regarding a minor child's custody, support and parenting time. (Van v Zahorik, 416 Mich 320, 328, 597 NW 2d 15, (1999)). The CCA defines a "parent" only as "...the natural or adoptive parent of a child. "MCL 722.22 (i): formerly MCL 722.22 (h). It does not define what a "natural" parent includes. Michigan case law has interpreted it to include more than a biological parent. In Atkinson v Atkinson, 160 Mich App 601, 608; 408 NW 2d 516 (1987) the Michigan Court of Appeals extended the definition of parent by adopting the doctrine of equitable parent under certain circumstances and held: "that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child ..." (emphasis added). The decision in Atkinson remains valid and binding law in the State of Michigan and, therefore, it is clear that even in 1987 the definition of "parent" included more than a biological parent.

In Atkinson, one child was born during the parties' marriage. For the first four years of the child's life, the husband acted as the child's father and believed himself to be the child's biological father. The parties went their separate ways, divorce proceedings were begun, DNA tests were taken and confirmed that the husband was in fact not the biological father. Atkinson was significant in applying the equitable parent doctrine to the facts of that case. The test for determining when a husband, who is not the biological father of a child, may be considered the "natural" parent of that child, was set forth, as follows:

> (1) The husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce,
>
> (2) The husband desires to have the rights afforded to a parent, and
>
> (3) The husband is willing to take on the responsibility of paying child support.

Id. 608-609.

In reaching this decision the Atkinson court relied heavily upon the fact that the CCA is "equitable in nature" and that its provisions are to be liberally construed, MCL 722.26.

The Michigan Supreme Court in Van v Zahorik, supra, declined to extend the equitable parent doctrine outside the marriage context. The Michigan Supreme Court in Van considered Atkinson and did not overrule it, however, explicitly limited the decision to the facts of that case which involved an unmarried heterosexual couple. Preserving the sanctity of marriage and the institution of marriage was a major concern for the Van Court. That Court stated: "Further, taking a doctrine rooted in marriage and extending it to persons who were never married would have repercussions on the institution of marriage. Michigan's public policy favors marriage." (Van at 332). The Van Court also quoted the Illinois Supreme Court opinion in Hewitt v Hewitt, 77 Ill 2d 49, 58 (1979); ". . . Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as "illicit" or "meretricious" relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? ..."

The Defendant in the instant case relies upon the Van holding in arguing that the equitable parent doctrine may not apply to the facts of this case given that the parties never married. However, subsequent to the Van decision the United States Supreme Court decided Obergefell v Hodges, supra, which ruled that Michigan and all of the United States is required to recognize same sex marriages. In that case the United States Supreme Court held:

> The right to marry is the fundamental right inherent in the liberty of the person, and under the Due Process and Equal protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them... (supra 135 S. Ct. at 2600)

The Supreme Court, therefore, held invalid state laws, including Michigan's constitutional provision defining marriage as a union between one man and one woman, Const 1963, Art 1, section 25, Obergefell, 135 S Ct at 2593, "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," id. at 2605.

Prior to this ruling Michigan not only prohibited same-sex couples from marrying by statute and constitution, but also refused to recognize a same-sex marriage that had been performed in another state or country. Therefore, the argument that the parties could have married in a state or country that recognized same-sex marriages carries no weight. Furthermore, the Michigan Court of Appeals has recently ruled in the matter of Stankevich v Milliron, (released for publication on November 19, 2015, number 310710) that the equitable parent doctrine may be applied to a case involving a custody dispute between a same-sex married couple.

The underlying basis for the Van court's decision, preserving the sanctity of marriage and discouraging illicit and meretricious relationships, has no applicability to the facts of this case since the United State Supreme Court has ruled that the State of Michigan has been denying same-sex couples the right to marry in violation of their constitutional rights. The facts of this case are significantly distinguishable from those of the Van court in that here the court is faced not with two people who could have but chose not to get married, but rather, two individuals who were in a committed, same-sex relationship who were prevented from marrying by the laws of the state in which they resided that have now been declared unconstitutional. Furthermore, in this case, the minor children do not have a biological father since they were conceived through a sperm donor. If standing is denied, there is no party competing with the Plaintiff for the rights to be these children's biological father. If standing is denied, these children will only have a biological mother for a parent to support, love, nurture and guide them. That biological mother's parental rights have currently been brought into question by the pending abuse/neglect case filed by the Michigan Department of Human Services and the Menominee County Prosecuting Attorney. As a result of that filing the children have been removed from the home of the biological mother and placed with the Plaintiff pending further hearings.

Equity jurisprudence's unique strength rests in its ability to "mold its decrees to do justice amid all the vicissitudes and intricacies of life. (Spoon-Shacket Co. v Oakland County, 356 Mich 151, 163, 97 NW 2d 25 (1959)). To refuse to apply the equitable parent doctrine to a family that was denied the right to marry in this State or to even have a valid marriage elsewhere be recognized as legitimate, because of the unconstitutional laws in existence at the time of their relationship, would appear to this Court to add further insult to injury to this family. Inequitable to say the least, unconscionable for certain.

Other trial courts in this State have begun to let their voices be heard on this issue. While these decisions do not set binding precedent, they are persuasive and informative. (Washtenaw County Trial Court in Lake v Putnam, File Number 15-1325-DC; and Kent County Circuit Court in Stiles v Flowers, 13-06970-DC). These trial courts as well as the Oklahoma Supreme Court in Ramey v Sutton have applied the equitable parent doctrine to same-sex relationships wherein the parties did not marry. (Oklahoma Supreme Court, Case Number 113778, decided November 17, 2015.)

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff has standing to proceed with the complaint for custody and the Defendant's Motions for Summary Disposition pursuant to MCR 2.116 (C)(5) and (8) are denied. This matter will next proceed to an evidentiary hearing on the equitable parent doctrine as applied to the facts of this case which will be heard simultaneous with the Plaintiff's request for custody/parenting time. A pre-trial conference will be held on the 4th day of February, 2016 at 2:00 p.m. o'clock to set a hearing date on these issues.

Dated: 12-8-15

Mary B. Barglind
Circuit Judge

cc: Atty. Randall Philipps
Atty. Arthur Baron
Atty. Jay D. Kaplan
Menominee County Friend of the Court

MBB/rh/mer

EXHIBIT J

STATE OF MICHIGAN

17TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF KENT

FAMILY DIVISION

JOY CHRISTINA PHILLIPS,

Plaintiff,

v File No. 15-09161-DC

AMBER LYNN BERNDT,

Defendant.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE KATHLEEN A. FEENEY, CIRCUIT COURT JUDGE

Grand Rapids, Michigan - Friday, November 20, 2015

APPEARANCES:

On Behalf of Plaintiff:
MR. SCOTT M. SHERLUND (P54861)
Sherlund, Preston and Van Meter, PLLC
80 Ottawa Avenue N.W., Suite 301
Grand Rapids, Michigan 49503
(616)774-3020

On Behalf of Defendant:
MS. CHRISTINE A. YARED (P37472)
Christine A. Yared, PLC
2503 Mason Ridge Court N.E.
Grand Rapids, Michigan 49525
(616)363-9041

On Behalf of the ACLU:
MR. JAY D. KAPLAN (P38197)
ACLU of Michigan
2966 Woodward Avenue
Detroit, Michigan 48201
(313)578-6812

APPEARANCES CONTINUED

RECORDED BY: Jefferson Audio Video Systems

TRANSCRIBED BY: Elizabeth M. Shearer, CER-8971
Certified Electronic Recorder
616-632-5086

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Grand Rapids, Michigan

Friday, November 20, 2015, at 9:52 a.m.

THE COURT: Good morning, Mr. Sherlund.

MR. SHERLUND: Good morning, your Honor.

THE COURT: Good morning, Ms. Yared.

MS. YARED: Good morning, your Honor.

THE COURT: And, sir?

MR. KAPLAN: Good morning, your Honor. My name is Jay Kaplan. I'm with the ACLU of Michigan.

THE COURT: I received your brief.

MR. KAPLAN: Yes.

THE COURT: So thank you, so much. And I guess I'll ask both Mr. Sherlund and Ms. Yared, is it acceptable to you that Mr. Kaplan have an opportunity to speak today --

MS. YARED: Yes, your Honor.

THE COURT: -- or would you prefer that the Court just relies on the brief?

MS. YARED: I would ask that he have an opportunity to speak. He did drive in from Detroit, and we would appreciate if he could be heard today.

THE COURT: Great. Mr. Sherlund?

MR. SHERLUND: I guess it was filed as an amicus brief, your Honor. I don't know if the Court granted leave for an amicus brief to be filed, but I don't know why the ACLU would be arguing today.

THE COURT: Mr. Kaplan, did you want to briefly touch on that?

MR. KAPLAN: Well your Honor, I think that this is a very important issue. I am the staff attorney for the LBGT Project for the State of Michigan, and we see cases like this happening all over the state. And I think its part as a result of -- we have a marriage equality decision that came down in June, yet it doesn't necessarily address the issues of same-sex couples who've broken up before marriage was available in the State of Michigan.

THE COURT: Well, I understand. But I think the question is -- and I'm happy to grant the request to file the amicus brief. I think that's perfectly fine. I have no problem with that. I always love getting briefs with law and those sorts of things. It's always fun. But the question becomes whether or not as a party filing an amicus brief, whether you have an opportunity to speak before the Court, and I think that's what Mr. Sherlund is asking.

MR. KAPLAN: I'm here, your Honor, only if -- only if I can provide anything additional that can be helpful to the Court on this issue.

THE COURT: Very good. All right. Wonderful. So let's see how that pans out. So we're here on Mr. Sherlund's motion for summary disposition. And I've had an opportunity to read everything that's been presented.

MR. SHERLUND: Thank you, your Honor. And frankly, I think the last time we were here we, to some extent, covered this ground as well. But, you know, the argument is very simple, your Honor. *Van v. Zahorik* remains the controlling authority in this case. Until, or if, *Van* is no longer the controlling authority in this case, it's what we have to work with. There are any number of arguments presented by the plaintiff, attempting to work around *Van* or, frankly, claim that *Van* is not the controlling authority, and none of them hold water. Bottom line, your Honor, is the parties were never married. The argument then by the plaintiff, is that they couldn't be married. Well, that's not true. They, in fact, could've been married just like the parties were married in Canada in one of the cases that --

THE COURT: In *Milliron*.

MR. SHERLUND: In *Milliron*, one of the cases that seems to be relied on primarily by the plaintiff. And, of course, there's speculation that it's been vacated and remanded by the Michigan Supreme Court to the Court of Appeals. But it's not factually consistent with our facts, your Honor. We have a situation here where the plaintiff and the defendant were never married, despite the fact that they could've been married, such as in Canada. Then the argument from the plaintiff becomes, well, okay, but Michigan wouldn't have recognized that marriage. But, to the extent that if

they had been married, and we were standing here today, they would have similar facts to *Milliron*. Those facts don't apply, and they aren't present here.

The reality is, as I stated the last time we were before the Court, this doesn't turn on the gender of the parties. This would be the same result, given the facts in this case, if we were dealing with a man and a woman under the same factual circumstances where the parties were never married.

There's all sorts of things flying around this case. Obviously, I'm referencing the motion that opposing counsel filed asking the Court to find that there wouldn't be criminal liability for making a report to CPS. Well, I see the affidavit, of course, that was filed by opposing counsel. What's left out of that is the -- is the way that transpired. In really perspective -- and I saw that in opposing counsel's brief as it relates to text messages -- it all needs to be in perspective. Well, the perspective was that as we were standing before the Court -- my understanding that opposing counsel was walking out of the courtroom, said something inflammatory, possibly derogatory, to another attorney sitting in the room. Then she asked if we could step into the conference room and speak, which I did. When we stepped into that conference room, I had to tell opposing counsel that unless you're going to be polite and respectful to me, I'm

going to leave, and I did. Her conduct was unacceptable. I stepped out of the conference room, she followed me into the hall and said, can we speak. And I said, we can speak if you're going to be professional and respectful, but I won't otherwise. And then we had a meaningful discussion about the possibility of mediation and an attempt to resolve this short of asking for relief today. So to say that somehow there was a threat, is not in perspective. I was actually perceiving the threat to my client that we will report her for abuse or neglect of these children. I pointed out to opposing counsel that there is a statute that includes criminal liability, up to four years' incarceration and a $2,000 fine as the maximum penalty for a false report to CPS. I encouraged her to review the definition of child abuse or neglect under the Neglect/Abuse Code.

That's what's swirling around this thing. It all comes back to this, your Honor. There is controlling authority in the form of *Van v. Zahorik*. The facts are not distinguishable from *Van* in this case. Summary disposition is required, your Honor.

THE COURT: Very good. Ms. Yared?

MS. YARED: Thank you, your Honor. First I want to address -- and I guess I would like for Mr. Kaplan to be able to address *Van,* and I won't talk about that. What I want to address is separate from *Van* -- the other argument. It is

that the Child Custody Act applies very clearly to parents. And I'm arguing that my client is a parent and that if need be, the Court can hold an evidentiary hearing to determine whether she is a parent.

The equitable parent is a separate route. Equitable parent -- all of the cases that I've read are about situations where there's three different people involved, and different kinds of facts. In this case, very specifically, my client was the only other parent. Emersen and Ellery only have two parents, and so I think that that's a separate issue from the issue of being deemed an equitable parent. And I'm stopping if the Court wanted me to stop while you're looking something up.

THE COURT: No, that's fine. Because, you keep referring to her as a parent, but under 722.22(h), it talks about a parent being a natural or adoptive parent of the child. And I haven't seen a case that anyone has cited to me that someone in your client's perspective is to be deemed, at this point in time in the State in the Michigan, a natural parent.

MS. YARED: And my argument on that is that to look at what a natural parent is. We would have to look at how that's being applied day-to-day throughout the state. And my argument there is that there are heterosexual couples, married and unmarried, who have children using donor eggs, donor

insemination, donor embryos. They are not a natural parent, if a natural parent means having -- having sexual intercourse and using the DNA from those two people. So the Court never in those cases -- I don't mean this Court -- I mean, I haven't seen any cases where those people are challenged to say that -- that they're not natural parents. The Court accepts the fact that if the parties come forward in those cases and says, this is -- these are the two parents -- the courts accept it. They don't require anything more than their word that these kids have two parents.

THE COURT: But that's only in a marriage context.

MS. YARED: Not necessarily. There's people --

THE COURT: I can tell you, I've never had a DP, DC, or DS case -- paternity, custody or support case -- with someone in a situation like that --

MS. YARED: Okay.

THE COURT: -- in the fact situation that you're presenting to me.

MS. YARED: Okay.

THE COURT: I've had it in the marriage context --

MS. YARED: Okay.

THE COURT: I think that's the big issue here.

MS. YARED: Okay. So -- and -- and I, you know -- then this Court hasn't, I guess. It doesn't mean that other courts haven't.

THE COURT: I agree completely.

MS. YARED: Okay. And -- and then -- yeah. And the marriage -- the marriage issue is important in this respect. The argument in these marriage cases -- it's incredibly significant that Michigan said we won't recognize other marriages. So to say that somehow, that they should now bar people, like my client, does not make sense. And there's no other area of the law I can think of where the State of Michigan tells people, if you want to get rights in the State of Michigan, you should have travelled to forty-nine other states, or you should've gone to Canada, or you should've shopped around and tried to maneuver the law and see what other states say about this issue, and see if you can get better benefits by going and travelling to another state, and spending that money, investigating with lawyers there, with the hope that someday, in the future, it'll maneuver this Court, this state, to do something. So I find that argument troubling.

But the other point that I really want to emphasize, is this is about the children. And the children -- what the affidavits say and there was no response. There was no counter-affidavits to my affidavits. No counter-affidavit to my client's affidavits. These facts are -- are established that -- that Ellery has been getting into trouble for -- and crying because she wants to see her mother. That she wakes up

and goes to sleep asking if she can call to talk to her mother, and that her other mother tells her at night, no, you can do it in the morning. In the morning she says, no, you can do it at night. That Emersen, who's ten today -- this is the first birthday that Emersen has not had with both of her mothers -- that Emersen, after our last court hearing at a soccer game -- when she first time she saw my client since that court hearing said very troubling things. I told you not to go to court mom. If you go to court two more times you're going to lose your house. These are -- this is evidence of parental alienation, evidence of abuse. And my point on raising the whole issue of protective services is that the effect of shutting down both of these avenues is that these kids have -- have nothing. And these kids do have two parents and this is the family law court that has jurisdiction over kids, and that's critical.

And then finally -- and I do have a motion in front of the Court on that other issue -- you know, Mr. Sherlund -- it's very low for him to come in and bring in facts in oral argument when he didn't prepare any kind of response to give me notice of this. He's indicating things. He did not point something out to me. He raised his voice in a threatening manner, and I disagree with how he's laid out of the facts.

But this shouldn't be about me and Mr. Sherlund; it's about the kids. It's totally about the kids. And so I

don't care if Mr. Sherlund wants to -- wants to say negative things about me. I don't care because I'm here about the kids. And I'm asking this Court, as the family law court that has jurisdiction over the kids, to not close their eyes when these kids are not being able to see one of their parents. And when there's been evidence, in an affidavit that's not been countered, that shows that they're under trauma.

THE COURT: I must just -- Mr. Sherlund, I'm assuming -- and I never like to assume -- that because it's a (C)(8) motion, you did not feel the need to respond.

MR. SHERLUND: Well, the (C)(8) motion -- the law is very clear that the Court doesn't consider the merits of the plaintiff's factual allegations.

THE COURT: So --

MS. YARED: I filed another motion. So he was -- in his oral argument, he just mixed in the two. I have a motion before the Court. So I felt like he was mixing that in. Maybe he wasn't.

THE COURT: Did you serve that --

MS. YARED: Yes.

THE COURT: -- in a timely fashion?

MS. YARED: Yes.

MR. SHERLUND: The motion is second in time to the (C)(8) motion, your Honor.

THE COURT: And that's what I thought, as well.

Mr. Kaplan, did you want to say anything with respect to the *Van* case, sir?

MR. KAPLAN: Yes, your Honor. A couple of cases ago, you said very eloquently to parents that were standing there that you hope that everybody's here for the best interest of the child, and that that's this function of this court. And the best interest of the child is the overriding factor that has to be looked at here.

With regards to the concept of equitable parenthood, that was set forth in the case of *Atkinson v. Atkinson;* 1987 case. And there was certain factors that were addressed, that where the child and the adult mutually acknowledged a parent-child relationship that was supported by the other parent at that time, where the -- where the parent is -- is willing to provide financial support for those children. *Atkinson* never said that we're only limiting the concept of equitable parenthood to the context of a legal marriage. That was done in the *Van v. Zahorik* case, but we can't disregard how flawed that case was in the sense that it totally ignored even looking at what was in the best interest of the child. And if we were to allow that result, we would say to children of parents who are unmarried, through no fault of their own, that now entitled to the same presumption under Michigan family law, that it's usually in the best interest of a child to have continued contact with both parents.

There's a long line of cases that we've provided in our amicus brief that demonstrate when you treat children who are considered to be illegitimate differently than children of a marriage for purposes of having a family relationship, that the highest court -- the United States Supreme Court -- has declared that to be unconstitutional.

I -- I disagree with what Mr. Sherlund was saying with regards to the facts of *Van*. It's not the same situation. Those parties could've gotten married. It was legal in Michigan; they had the option. And the Chief Justice in that case seemed to be very upset with the fact that they didn't afford themselves of the marriage. This was not available to these parties. And for them to go out of state, and to come back to Michigan, their marriage would've meant absolutely nothing. For years Michigan law has ignored the existence of same-sex relationships and their families. And that only has started to change since June.

And I don't think this Court can ignore the development in the *Obergefell* case, and the significance that it has. How can you say to -- not you -- how can law say to parties, you can't be an equitable parent because you're not married because we didn't allow you to get married. And now, we didn't allow you that because of an unconstitutional law. And that's why the Michigan Supreme Court has vacated the *Stankevich v. Milliron* case, which relied on *Van*, and they're

asking the Court of Appeals to look at this decision in light of the marriage equality decision. And it's not because these parties got married in Canada. Their marriage was meaningless during their relationship. Michigan law ignores their relationship. The constitution at that time said, we afford you no significance. And as Ms. Yared said, it shouldn't be up to these parties to have to second guess ten years ago if they could've gone out of state. That maybe, there would've been a Supreme Court decision that said now that same-sex couples can get married.

So just in closing, I believe that the Court can make a decision in regards to parenthood based on the best interest of the child, which is the -- which should be the overriding consideration. Clearly from the facts, these children have had a parent-child relationship with Ms. Phillips throughout the years. We can't ignore that. And to rely on flawed law, to rely on law that relied on unconstitutional law, to erase the existence of Ms. Phillips in this child's life due to the whims of the -- of the biological and legal parent is not in the best interest of the child.

THE COURT: Very good. Mr. Sherlund, any response?

MR. SHERLUND: Plaintiffs are making an appellate argument, your Honor. We have controlling authority. We really have no choice but to follow the authority. The facts

are not distinguishable. *Van* applies. *Van* remains the law that is controlling in this case. The (C)(8) motion is appropriate, your Honor.

THE COURT: When we look at a request for granting summary disposition under MCR 2.116(C)(8), it tests the "legal sufficiency of the complaint and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-moving party. A motion should only be granted where the claims are so clearly enforceable as a matter of law, that no factual development could possibly justify recovery." And I'm citing to the -- I believe this is *Maiden v. Redwood*(sic) case. It's a 461 Mich 109. It's a 1999 case. The same factual statements are contained, I believe -- yeah, it's *Maiden v. Rozwood*, R-o-z-w-o-o-d. And I think that that's very clear. Although, it's understandable that the court, I believe in the *People v. Johnson* case, it talks about the courts generally will not address the constitutional questions. The case can be resolved on other grounds.

What I think here -- that there is -- there's kind of the situation that the arguments here, the outrage over parents being, I guess, separated from their children -- we have to -- we have to look at it on constitutional grounds as well. I believe that the equal protection ground that was raised in the ACLU brief, for me, is a fairly compelling one.

I understand that the Supreme Court in *Van* made their determination years ago that marriage was a requirement for equitable parentage. And equitable parentage is the only door that, right now, Ms. Phillips has into the Child Custody Act. Without that, there is no analysis for the best interest of the children. The fact that individuals in these couples' position would have to seek assistance elsewhere -- we can't do it in Michigan, but you can go someplace else, I think cuts to the very heart of equal -- equal protection.

This almost reminds me of situations where we might be in a criminal case, and someone wants to play a 9-1-1 tape, and the objection from the defendant comes in. Well, it violates their confrontation clause rights. There might be hearsay objections that come along with that. There might be other objections to relevance. But if a confrontation clause objection is made, that trumps everything. We then have to look at whether or not the requirements for permitting that sort of testimony to come in have been met. But it's a constitutional analysis. It's not a hearsay analysis. It's not a relevance analysis. It's not a 404(b) sort of thing.

And so I feel like I'm in the same sort of situation here. We have a (C)(8) motion, and we have the *Van* case, but I'm also acknowledging that in *Milliron* -- and I know that's defendant's name but it's the easier one for me to pronounce -- in the *Milliron* case, the Supreme Court has said

in light of *Obergefell* that they're sending it back to the Court of Appeals. I think if this were as cut and dry as we might think it would be, the Supreme Court -- they knew about their *Van* case. They could've just as easily said, we're ruling on *Milliron* because the trial court already spoke. They granted the (C)(8) motion. The Court of Appeals upheld that in *Milliron*, and then it goes up to the Supreme Court. And the Supreme Court could've just said, we apply *Van*, here we go, everything else. But I think now, and maybe -- I can't assume anything -- why they sent it back down. I just can't.

But I believe that in light of the equal protection argument that the Court cannot, at this point in time, grant the (C)(8) request. We need more information. There might be a possibility for a (C)(10), but I think we're not ready for that at this point in time, as well.

We still need a compelling legal argument, however, to grant the request that you and your client have requested all along. The case still stands where it is right now. Ms. Phillips has no legal right in the State of Michigan to claim parenting time or anything else with respect to these children. I don't know if your plans include filing a request for injunctive relief pursuant to 3.310, but that's something that the Court will have to entertain at that point in time.

So again, like I said, outrage is really no

substitute for a compelling legal argument, and we need compelling legal arguments be able to kind of rule the day. I believe, however, that we need to have some development with respect to the rational basis behind the question here, and if we want to set that up for an evidentiary hearing, we can do that.

MS. YARED: We would like that, your Honor.

MR. SHERLUND: What would the scope of the evidentiary hearing be, your Honor?

THE COURT: What I'm trying to figure out is whether or not there is a rational basis to support the proposition that the marriage that these parties were denied in Michigan is going to withhold them from being able to assert their parental rights, essentially. I think that Mr. Kaplan's brief on page -- let's see -- nine I think states it more eloquently. We have a situation where we need to determine whether or not the State's decision to deny them and their children equal protection under the law is one that there's a rational basis by the State to do. And I think that that would help us a bit in this. Hopefully, by the time we have the evidentiary hearing, we can go ahead and have the benefit of the *Milliron* decision. Hopefully that'll be coming down fairly soon.

MR. SHERLUND: Your Honor, the issue remains though on how the plaintiff is before this Court. We know that

standing is not equitable in nature. We know that standing is not something that can be stipulated to. The reality is that the case isn't properly even before the Court at this point. I don't know that this was started as a civil rights action or anything along those lines.

THE COURT: Well, and I think that that might be something that I would ask both parties to brief for me, at least within the next 14 days so I can take a look at that. I'm only -- I'm only attacking the case with the questions before me, and I'm trying not to get too far ahead of us.

One of the questions I also want the parties to brief is the issue with respect to Emersen's father. He is a known quantity, and I have seen nothing that says he shouldn't be standing up here right now. It's my understanding that there was a contract of sorts drafted between the mothers, and I think that there were two potential fathers, or one father, or something along those lines. And if there was some acknowledgement that one of two individuals, or one individual agreed that he had provided the genetic material for the child's birth and that he wouldn't claim custody, and the mothers wouldn't claim child support or anything else like that, I have a huge question as to whether or not that sort of contract is violative of public policy and unenforceable.

MR. SHERLUND: That contract doesn't exist, your Honor. It was drafted; it was not executed by both parties.

THE COURT: All right. So, if nothing else though --

MS. YARED: I --

THE COURT: Then, essentially, you should be going after this gentleman, and he could have standing. Do you see what I'm saying? I -- I'm trying to take this as it comes. So we first have her motion. I said no, I can't do that. You filed your motion for summary disposition, I said, no, we can't do that. I want briefs with respect to the need to explore further what's going to be going on, especially, given the fact that we have an equal protection problem here. And I understand it wasn't filed as a civil rights action.

MR. SHERLUND: It wasn't even pled, your Honor. There was no equal protection pleading in the complaint.

THE COURT: Then, perhaps, that then --

MS. YARED: Motion for leave to amend -- the amend should really be granted. I would like that opportunity. I -- I have -- I have raised it in my brief. I know that.

MR. SHERLUND: It's not part of the complaint, your Honor.

MS. YARED: I -- I don't know that that's true. I would have to look at that.

THE COURT: I'd take a look at it again but, of course, your file is missing.

MR. SHERLUND: We heard that.

THE COURT: I know. That kind of complicates things.

MR. SHERLUND: Given how this is pled, your Honor, the (C)(8) would be appropriate.

THE COURT: At this point in time, I'm not going to grant the (C)(8).

MR. SHERLUND: Okay.

THE COURT: I've already stated that, because I believe that constitutional issues of this magnitude trump issues. And I have to be able to, as a matter of law -- as a matter of law, I can't say that this is constitutional then I have a problem there. So that's kind of what it comes down to.

MR. SHERLUND: Your Honor, the equal protection argument has been dealt with in Michigan case law. Unfortunately, like many of our -- our appellate cases in the family arena, it's unpublished. I'm happy to brief it for you, but we've already had case law -- recent case law, frankly, that has addressed the equal protection argument, your Honor.

THE COURT: I would appreciate having that brief within the next 14 days.

MR. SHERLUND: Fourteen days?

MS. YARED: Thank you, your Honor. Thank you, very much.

THE COURT: Then she can go ahead and do what they need to do.

MR. SHERLUND: Your Honor, there was the other motion before the Court.

THE COURT: I don't think I can enter a declaratory judgment. There was no -- there were no grounds stated in the motion with respect to that. I know -- I know it's a court of equity, but sometimes it's nice to know that, yeah, here's the court rule, or the statute that permits you to enter a declaratory judgment, and I really didn't kind of see that.

MS. YARED: I thought I cited the court rule, but --

MR. SHERLUND: Without beating -- without beating this into the ground, your Honor, that's the problem here. This is all equitable relief. The standing issue in this case is inequitable, your Honor.

THE COURT: I understand completely. And I understand that we are kind of -- I feel like *Star Trek* -- we're kind of in worlds unknown, and we're going to different places. And that's why the Court is trying to be methodical in how we're going about this.

MS. YARED: We appreciate that.

THE COURT: I want to make sure that we're covering all of our bases. Go ahead.

MS. YARED: That's what I said -- the custody act is equitable in nature, by statute.

THE COURT: Yes.

MR. SHERLUND: But standing is not.

THE COURT: I agree completely, Mr. Sherlund. And that's kind of where we find ourselves here. But with respect to the declaratory judgment, she did cite 2.605 -- and I just don't -- I just don't see that this is a situation where the Court can enter a declaratory judgment, especially under the certain facts.

MR. SHERLUND: So is the (C)(8) denied, or held in abeyance?

THE COURT: The (C)(8), at this point in time, is denied. Because, like I said --

MR. SHERLUND: Okay. That doesn't preclude me from re-filing the motion after the development that the Court's discussing, correct? Or anticipating --

THE COURT: Correct. Or to change it to a (C)(10).

MR. SHERLUND: All right. Of course by -- by the time we do a (C)(10), then we're talking discovery, depositions, extensive costs here --

THE COURT: I understand.

MR. SHERLUND: And we're dealing with a case, frankly, where the parties aren't before the Court on a legal basis, other than this backdoor or boot-strapped constitutional claim that wasn't pled.

THE COURT: Well --

MS. YARED: I'd hate to think of the constitution as being the backdoor.

THE COURT: I usually like it right in the front.

MR. SHERLUND: Yeah, well usually -- usually we like to plead it, right? I think I heard counsel claiming that I didn't give her proper notice in my pleadings. So maybe she should've pled it.

THE COURT: I hear you. And like I said, if I had the file I would flip open to see it, and I just -- I don't have it, so I feel I'm really at a kind of a loss here today.

MS. YARED: Thank you very much, your Honor.

THE COURT: I appreciate it though.

MR. SHERLUND: All right. So 14 days to brief, your Honor?

THE COURT: Yes. Thank you so much.

(At 10:22 a.m., proceedings concluded)

STATE OF MICHIGAN)

COUNTY OF KENT)

I certify that this transcript, consisting of 27 pages, is a complete, true, and correct transcript to the best of my ability of the proceedings and testimony taken in this case on November 20, 2015.

11/23/15
Date

Elizabeth Shearer, CER 8971
Certified Electronic Recorder
180 Ottawa Avenue NW, Suite 10200-A
Grand Rapids, Michigan 49503
(616)632-5086

EXHIBIT K

STATE OF MICHIGAN

17TH JUDICIAL CIRCUIT COURT (KENT COUNTY)

LAURA STILES,

Plaintiff,

V File No. 13-06970-DC

CHERYL FLOWERS,

Defendant.
_____/

DOMESTIC RELATIONS PROCEEDINGS

EVIDENTIARY HEARING

BEFORE THE HONORABLE G. PATRICK HILLARY, PROBATE JUDGE

Grand Rapids, Michigan - Thursday, October 9, 2014

APPEARANCES:

For the Plaintiff:	MS. CHRISTINE YARED P37472 Christine Yared, Attorney & Counselor At Law 2503 Mason Ridge Court, N.E. Grand Rapids, Michigan 49525 (616) 363-9041
Defendant - In Pro Per:	MS. CHERYL FLOWERS 5640 Far Hill Drive, S.E. Grand Rapids, Michigan 49546 (517) 490-4306
Guardian Ad Litem:	MR. SCOTT M. SHERLUND P54861 Sherlund, Faber & VanMeter, PLLC 80 Ottawa Avenue, N.W. Suite 301 Grand Rapids, Michigan 49503 (616) 774-3020

For the ACLU:	MR. JAY KAPLAN P38197 American Civil Liberties Union Fund of Michigan 2966 Woodward Avenue Detroit, Michigan 48201 (313) 578-6812
RECORDED AND TRANSCRIBED BY:	Nicole L. Ludge (CER 6690) Certified Court Reporter (616)632-5080

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Grand Rapids, Michigan

Thursday, October 9, 2014 - 2:02 p.m.

* * * * *

THE CLERK: All rise.

THE COURT: Thank you. Please be seated.

THE CLERK: Your Honor, this is case number 14-06719-DC, Stiles versus Flowers. Both parties are present in the courtroom along with attorney Christine Yared representing the Plaintiff, attorney Scott Sherlund, attorney Jay Kaplan, and other interested parties.

THE COURT: Thank you. I'm here to give my opinion in this case before the Court. Unless there's an objection from the parties, I'm going to admit the exhibits that were admitted in our previous case that was dismissed. And it was already agreed by the parties that this case be brought again, that the previous orders and the facts of the case would remain the same. Exhibits One, Two and Three; therefore, unless there's an objection, will be received into evidence again for this case as there were for the last case.

MS. YARED: No objections, your Honor.

THE COURT: Thank you. Hearing no objection, those are received.

(At 2:03 p.m., EX#1-3 marked and admitted.)

THE COURT: This Court also recognized all previously submitted briefs of the parties and the LGAL, and

the ACLU who has also provided a brief.

Plaintiff Laura Stiles and Defendant Cheryl Flowers were in a long-term committed same-gender relationship since 2004. The couple's commitment ceremony was held in August 2005.

It was the intent of the couple to raise children together as a family and they made a joint decision to have two children. They decided that Cheryl would be the biological mother and that they would use an anonymous sperm donor arranged by their doctor's office. It was further determined that the couple -- by the couple that their children would share both of their last names using a hyphenated name of Flowers-Stiles. The two children were born during their relationship; Chloe Flowers-Stiles, she was born April 28, 2007, and Henry Flowers-Stiles, he was born August 13, 2010.

In addition to securing legal documents that stated their intent to be equal co-parents to their children, those would be Exhibits Two and Three, Laura was able to legally adopt Chloe, that would be Exhibit One, through a second parent adoption with Cheryl in Shiawassee County, Michigan. The parties also wanted to jointly adopt Henry, but at the time of the second parent adoption -- by the time that was to come about, it was no longer allowed in Michigan and I will refer to the Attorney General opinion 7160, September 9 --

September 14, 2004, and that is cited as 2004 Westlaw 2096457.

That Attorney General opinion talked about the Michigan Adoption Code, and it provides in Section 24 that adoption shall be by a person or a married couple, citing MCL 710.24. It goes on to indicate the Michigan Court of Appeals confirmed that -- I'm quoting the Michigan Court of Appeals;

> "It has been held inconsistent with the general scope and purpose of adoption statutes to allow two unmarried persons to make a joint adoption."

And they are quoting from *In re Adams*, that's 189 Mich App 540, it's a 1991 case.

And then the opinion goes on to say;

> "It is my opinion, therefore, in answer to your second question, that couples of the same sex who marry in a state that recognizes some-sex marriages as valid are not legally authorized to adopt children in Michigan as a couple; one member of a same-sex couple may adopt a child in Michigan as a single person."

Therefore, the parties could not follow through on their intent for Ms. Stiles to adopt Henry because of the AG opinion.

The parties ended their relationship in January 2012, and Cheryl -- and I hope the parties don't mind me using first names in -- and I'm kind of using them back and forth, first names with last names. Cheryl moved out of the home in

May 12th, 2012. During that time, Laura and Cheryl lived together and since their separation, they continued to co-parent both of the children. Laura is claiming she's the equitable parent to Henry based upon the fact that she, with the knowledge and consent and Cheryl, has co-parented Henry since his birth, sharing parenting decisions, providing financial support for Henry and being involved in his day-to-day activities. Cheryl has asked this Court to conclude that Laura cannot be an equitable parent to Henry because of the Michigan Supreme Court's 1999 decision in the case of *Van versus Zahorik*, that's 460 Mich 320 (1999).

As already stated, there was a previous case filed in this case, and that was dismissed and this case was re-brought. The Court made suggestions on the record as that -- during the first case that -- I made my suggestions on the record and it agreed that the parties would come back with additional written arguments. And, in fact, I think even suggested we that, perhaps, we consider talking to the ACLU or someone of that nature to get everyone's opinion.

The previous case was dismissed and it was stipulated that this case would be reinstated with the same facts and orders in place as I've already indicated.

Now, this Court understands that the primary controlling case applicable to the facts of this case is *Van versus Zahorik*, and, again, that's cited as 460 Mich 320

(1999), and I'm going to refer to it as the *Van* case. I'm going to distinguish *Van* from the current case before the Court. And my big concern in giving my opinion is that when I'm done talking about or quoting the *Van* case, that you know that I'm interjecting my own thoughts of this Court. So I'm going to try to distinguish and be repetitive in saying this Court is distinguishing, and I'll probably just call it Henry's case, from the *Van* case. Otherwise, my opinion might run together where you're not going to know whether I'm quoting from *Van*, talking about *Van*, or giving my own opinion. So I'll try to do that the best I can, but I've got a lot of facts that I think distinguishes this case from *Van*.

And the *Van* case basically -- there was the plaintiff, Scott Van, and defendant, Mary Zahorik, they cohabited from 1986 to 1991, and they were never married. Mr. Van claims that he and Ms. Zahorik continued their relationship for several years after they stopped living together. Ms. Zahorik had two children in the course of the relationship; one in 1989 and the other was 1993. Mr. Van alleged that Ms. Zahorik informed him that he was the father of the children. And he believed that he was named as the father on the birth certificates of both children. He claims that he cared for and financially supported the children both during and after the relationship with Ms. Zahorik.

The Court, in Henry's case, I want to distinguish

right up front here, that the Plaintiff in our case signed a contract. The Plaintiff did support and care for Henry. Also, Ms. Stiles, from the beginning, took every action to be recognized as a parent of Henry. *Van* didn't. Ms. Stiles immediately became the parent of Chloe and it was intended that she would also adopt Henry. Unlike *Van*, who had a child in 1989, did nothing, and then he had a child in 1993, did nothing and then later, the case came about. That's the first distinguishing facts -- distinguishing factor that is different than *Van*.

Van goes on, and I should cite the pages, on page 3, it talks about -- this is quoted from *Van*, or talking about *Van*;

> "On August 22, 1996, Ms. Zahorik filed a motion for summary disposition under MCR 2.116(C)(8), in which she argued that Mr. Van was not the biological father of either child and could not be an 'equitable parent' to them because Mr. Van and Ms. Zahorik were never married. In response, Mr. Van conceded that blood testing showed that he was not the biological father but argued that he was an equitable parent and that Ms. Zahorik was equitably estopped from denying that he is the father. The trial court granted Ms. Zahorik's motion for summary disposition. The trial court indicated that its ruling turned on two factors:

Number one; that Mr. Van apparently was not the biological father of the children, and number two; that Mr. Van and Ms. Zahorik were never married. The court noted that Michigan's public policy favored marriage and concluded that the doctrines of equitable estoppel, equitable parenthood, and equitable adoption require marriage."

Again, distinguishing Henry's case from *Van*, there's no bio dad in existence in this case as there was in *Van*. *Van* had two bio dads, unlike our situation. And in *Van*, in fact, the footnote indicated -- I think that's the footnote on the bottom of page three of *Van*, that said that DNA test dated September 1996 and January 1997 indicate two other men are the biological fathers of the two children at issue. Orders of filiation and support were entered with respect to the biological fathers in February 1997 and in August of 1997.

Again, in Henry's case, that can't occur. There's an anonymous donor in this case.

Van goes on to indicate -- on page four *Van* indicates;

"Because of the magnitude of the policy considerations involved in extending application of the doctrine" -- doctrine -- we all know the doctrine we're talking about of equitable parent doctrine -- "outside such circumstances and the presence of a

complex statutory scheme dealing with such issues, we defer to the Legislature and decline to accord plaintiff equitable parent status."

I'm distinguishing in Henry's case the following; our case is not complicated because there's an anonymous sperm donor here. There's not another identified father. The possible difficult, complicated, competing issues arising from this Court determining that an equitable parent has rights, and having those rights be at odds with the bio parent simply do not exist. To the contrary, this case is rather simplified and does not place the Court in the situation of placing an equitable parent in competition with a bio parent. Rather, this Court simply needs to determine if Henry can maintain his relationship with his parent, especially given the fact that there is not, nor will there ever be identified a second parent of Henry, other than Ms. Stiles, i.e., there's no third parent. Ms. Stiles is the only other parent Henry has ever known and there is no other person who could assert that he ors she is the other parent to Henry, based upon the unique set of facts of this case that this Court finds are applicable in the equitable parent determination.

Van goes on on page five to indicate that as a general rule, making social -- making social policy is a job for the Legislature, not the courts. And then it quotes *In re Kurzyniec Estate*, 207 Mich App 531, it's a 1994 case.

I'm distinguishing Henry's case in that I'm indicating I'm -- this Court isn't here to make social policy. I'm not making social policy. I'm looking at the best interests of a child. It's been this Court's duty for years. This duty permeates almost every finding that I make as a family court judge, whether it be a custody case, I'm looking at best interests, whether it's a divorce case, I'm looking at best interests, whether it's a paternity case, I'm looking best interests. If it's a neglect case, I'm looking at best interests all of children. If it's a delinquency case, I'm looking at the best interests of that minor. Most people don't know that.

Our delinquency court is a quasi criminal court, it's not a criminal court, and this Court looks at two things -- it looks at a number of things, but the statute indicates that this Court is to look at the -- protecting the public and the best interests of the minor. This is the delinquent who is in this court who has been adjudicated, is not convicted because it's not a criminal case, this minor has been adjudicated of committing a crime, whatever that crime is; assault and battery, felonious assault, whatever, this Court is still charged with looking at the best interests of that minor. Every single thing this Court does, everything that I do as a family court judge, I look at the best interests of a minor. I'm not setting public policy.

Page five of the *Van* opinion, they're telling judges to stay within the Child Custody Act and that technically they're indicating this wouldn't -- well, here's what *Van* says about staying within the Child Custody Act. *Van* says;

> "The Child Custody Act is the exclusive means for pursuing such rights" -- the rights of a party, -- "seeking custody or parenting time. In addition to addressing child custody disputes between the parents and between a parent and a state agency, the Child Custody Act specifically addresses the rights of certain other parties, for instance, legal guardians or grandparents."

The statute's cited. And then it says in the *Van* case;

> "However, none of these specific provisions cover Mr. Van's circumstance."

I'm distinguishing in Henry's case, unlike Mr. Van who did nothing to perfect parentage, the Plaintiff did everything she could and it worked for Chloe. But then the results of the AG opinion 7160 of 2004 indicated she could not adopt, that it was improper to go ahead and adopt Henry as she did Chloe. That's very distinct from the *Van* case, in my opinion.

The *Van* case goes on to indicate for -- on page five still;

"For purposes of the Child Custody Act, Mr. Van is a third person." The statute's cited. And that *Van* indicates they define a "third person" as "any individual other than a parent."

"And by his own admission, Mr. Van is not a biological parent of the children at issue. Apparently because he believed himself to be the biological father until shortly before he filed the present action, he has" -- I'm noting, this is important, -- "he has not pursued other means to become legal parent, i.e. adoption."

And *Van* goes on to indicate;

"Because he is neither a biological not legal parent, Mr. Van is a third person under the Child Custody Act."

Citing the statute. And it says;

"It articulates circumstances under which a third person may bring an action for custody of a child. The present matter clearly does not fit within these parameters. According, under the terms of the Child Custody, Mr. Van, a third person, is ineligible to bring an action to pursue parental rights here."

Again, distinguishing Henry's case, because she was prohibited from adopting, we have a party who is in a unique situation compared to *Van*. She wasn't allowed to adopt. I'd

like to further indicate that Ms. Stiles took, again as I've said, every action she could have to be recognized as an equitable parent. And I'm going to discuss the equitable parent doctrine a little more in depth in a little bit.

But, again, the opinion of the Attorney General from 2004, stopped the adoption here although Ms. Stiles still did everything that she could.

Van in paragraph -- or excuse me, page six goes on to indicate;

> "Further, because Mr. Van is neither a biological parent nor a legal parent of the children at issue, his claim is essentially based on the fact that the children lived with him. This court has repeatedly held that a third party does not gain standing to proceed under the Child Custody Act by virtue of the child having resided with the third party." And the *Van* then court quotes *Bowie* at 490 NW2d 568 and *In Re Clausen* at 442 Mich 648 (1993).

Again, in Henry's case to distinguish from the *Van* case, this couple actually did much more than *Van*. They adopted Chloe. They've got documents -- Exhibit One shows the adoption of Chloe, the couple entered into contracts. None of this was done in *Van*.

I'd also like to talk about some other factors, and I'll talk about these a little bit later in my opinion here,

the case I'm going to talk about later is the case of -- a Washington case of *Parentage of LB*, it's 155 Wash 2d 679 (2009). And I think the Court has to consider that case. I want to distinguish, that case talks about factors for equitable parent, the equitable parent factors. Because otherwise if we look at what was just said in *Van* and we just have a blind test of living together, well that could be anybody in board -- a boarding house, a flop house, or any party could then come in and claim parentage if they just happen to be living in the house with that child. So I think there has to be more to that. There has to be some factors that you look at.

And the Washington case has some factors and I'll talk about that in a minute. But being a family court, I see everyday situations whereby somebody other than the parent is living in the house with the child. What this Court randomly sees is a case with a specific set of facts that are applicable as in this case. And, again, I'm indicating the facts in this case are unique.

Van goes on to indicate on page seven of their opinion, quoting from *Van* again;

> "There is, in this case, no active custody dispute between Ms. Zahorik and the biological fathers of the children. Thus, the Child Custody Act is not implicated on the basis of ongoing litigation.

Moreover, Mr. Van is unable to create a child custody dispute under the Child Custody Act himself, because the act includes no provision that, even if 'liberally construed' as the dissents suggest, would recognize Mr. Van as a parent eligible to dispute custody and pursue parental rights there under."

Again, in this case, Henry's case, I'll distinguish that there can be no case with the biological dad in this case because there is none. We have an anonymous donor. Laura is the only other parent for Henry.

Van, on page seven again, there -- they talk about their ruling on the Child Custody Act and they say the marriage policy is secondary, although they don't seem to act like it's secondary although they're saying it's secondary. And quoting from *Van*, it says;

"Throughout this opinion, we state that the primary barrier to Mr. Van's claim is that the Child Custody Act, which occupies the field of child custody, does not recognize equitable parenthood or parenthood by estoppel. The fact that Mr. Van and Ms. Zahorik never married has no bearing on this rationale. We specifically note that the present case does not raise the issue of the viability of these doctrines in the context of marriage and that we accordingly leave that issue for another day. Our

discussion about Michigan's public policy favoring marriage is simply a secondary rationale in response to the argument that these common-law doctrines shall be extended outside the scope of marriage."

Van goes on to indicate;

"Further, taking a doctrine rooted in marriage and extending it to persons who were never married would have repercussions on the institution of marriage. Michigan's public policy favors marriage."

Again, distinguishing Henry's case, this Court will indicate, we already have a person here who adopted Henry's sister, Chloe. Didn't marry the bio parent then. Normally, the bio father, for instance, would be able to come forward as the other parent, or if a single parent adoption, no other parent would be introduced into the child's life unless there was later a step-parent adoption, which would only occur if shown the non-custodial bio parent was not involved and the parent's rights were terminated. But here, there's no fault of either party and certainly no fault to Henry, that the adoption of Henry by Ms. Stiles was not allowed.

And I'll again indicate that in the *Van* case, in distinguishing this case from *Van*, he didn't try to adopt. He started bringing things up afterwards. Ms. Stiles did immediately. They signed the contracts, she was moving ahead and she was stopped.

Then *Van* makes a lot of statements on page eight and I'll try to distinguish these statements. *Van* first says;

> "There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships."

This Court, in Henry's case, will indicate that I've delineated specifics that make the equitable parent doctrine applicable for this case and under these facts. And I'll explain that more fully in a bit.

The *Van* case goes on to say;

> "Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage."

Although, of course, they just said they weren't really focusing on that much, but then they go on to say;

> "Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?"

Well, this Court, in Henry's case, I've been distinguishing *Van*, now I have to just say I've got a big disagreement here and I'll tell you why. Henry is representative of a population of children who will be hurt by decisions like that in *Van*. I have 40 to 70 motions, these are hearings for the non-attorneys here, every other Friday morning where I'm deciding how the couple can proceed in pursuing their divorce. We decide cars, we decide money, insurance, assets, house, medical, et cetera. And inevitably, in a large majority, there is already someone else, a significant other involved in the lives of these children, not to mention the large number of cases whereby one parent has proof of sexting that the other parent has done with the significant other.

Many times the parents are using the children to spy on the other parent or to deliver messages to the other parent and in a huge number of cases, one or both parents are informing the child of specifics about the divorce, which sometimes includes telling the children not to mention that mommy or daddy is seeing another person, the significant other. In fact, we usually have to enter orders in these divorce cases and these orders -- we're telling the parents they shouldn't have a significant other around the child. Many cases the child has already been introduced to the significant other while the couple is still divorced (sic)

this is their divorce, they've been marriage -- they're married and the significant other has already been introduced to the child. Then when the divorce is done and the parties move on to another relationship, sometimes married, sometimes not, the children have yet another person brought into their life either as a step-parent or a significant other, not to mention the cases I have where parents are getting divorced a second or third time.

And these are just the divorce cases that I hear. I see many abuse and neglect cases per year, married couples where one parent's significant other has physically or sexually abused the child and the biological parent is protecting them. In any event, the children are abused and in the middle. And many of my delinquency cases, married couples coming in and the delinquent is in my court, the child's fighting with the new person who's been introduced into the home because now they're divorced, they got a significant other, or the divorce was separated (sic) and they've got a significant other in there, and -- so the child's arguing with the new person, the significant other or the step-parent, which results usually being AWOL, running away from home because the child can't live in the house with the new parent figure. I especially see this with young men, when another man comes in the house. I could go on ad nauseum with examples of issues illustrative of the blemishes on the

pristine coat of the institution of marriage.

I think the best interest of Henry and the best interest of children in situations like Henry's outweighs the possible concern of the impact upon our society and the institution of marriage. I can list countless examples of the failing of the institution of marriage. I've just listed a few, which unfortunately, I see in my court on a daily basis. However, in this case, and in most cases like it, little Henry has failed no one.

Going on looking at *Van*, still on page eight, they go on to say that;

> "In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation? And still more importantly, what of the children born of such relationships? What other support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of an environment?"

My response in Henry's case are what are the psychological effects of ripping Henry's mother from his life?

Van goes on to indicate that;

> "Here, the Court of Appeals correctly observed that a relationship that does not constitute a legal

marriage does not give rise to property rights between the parties, and, similarly, that a court should not be unmindful of the role of our Legislature concerning access to children on the periphery of such relationships."

It opined;

"If this Court" -- and it's talking about *Carnes*, -- "was struck by the magnitude of the public policy questions arising from property disputes in cohabitations situations, there can be no doubt that questions pertaining to the best interests of children in cohabitation situations should be left to the legislative process, especially if one of the cohabitants seeking custody or visitation is not biologically related to the child."

Again, Henry's case I'll distinguish, we have a sperm donor. Under the facts of this case, Ms. Stile is -- Ms. Stiles is the only other parent to Henry.

Van goes on, on page eight, with marriage rationale, and I disagree with the rationale. *Van* indicates that;

"Finally, we note that the strongest rationales undergirding the equitable parenthood doctrine within marriage relate to reinforcement of the importance of marriage and legitimacy."

I've already talked a little bit about what I see

every other Friday morning, what's going on in the marriages I see. This Court's opinion, in Henry's case, is -- and this is already mentioned in the *Van* case, what if there is -- what if the biological parent passes? In this situation with Henry, if the biological mother passes, Ms. Stiles out of the picture. Henry's orphaned and for what reason? There's no other parent ever to come forward. There's no bio dad, nor will there be. She can, perhaps, attempt to come back -- she could attempt to come into Henry's life after being determined at this point, to be a stranger to him and then attempt to adopt him later and this would, perhaps, be more damaging if Ms. Stiles was not permitted to be in Henry's life for a long period of time and then all of the sudden reappeared again.

I want to talk about what the dissent said back in the 1990's case of *Van*, most of which I agree with. Page 11, the dissent indicates;

> "The majority's approach is particularly inadequate, as it devalues the importance of the children's personal relationship with their putative father. Rather, this Court's focus should be on the innocent victims in this case, and many others like them: the children of dissolving non-marital relationships. The issue is the best interests of these children and the role of the court in protecting them."

I agree with that. The dissent in *Van* also indicates on page 11;

"The deficiency in the majority opinion of the Court's utilization of an adult-centered approach to resolve a dispute that primarily affects the lives and development of the children. Because children do not participate in the formation of their biological or legal child-parent relationships, they are wholly blameless for the shortcomings of their relatives-legal, biological, or otherwise. By placing an artificial restriction on the definition of 'parent,' the majority absolves itself from addressing, as mandated by the Legislature, the organizing principle of the Child Custody Act: the best interests of the child."

I agree with that. I've already indicated everything I do as a family court judge, I'm looking at the best interests of the child and that's what I'm doing in Henry's case.

The dissent also indicates on page 11;

"Moreover, the best interests factors set forth in Section 23 not only represent an equitable standard providing courts great latitude in protecting children, but Section 25 clearly articulates a policy directing a court to consider the matters before it

from the child's perspective."

I agree with that. The dissent also indicates on page 12;

"The majority also finds, without further explanation, that Michigan's public policy favoring the institution of marriage trumps the Legislature's express directive that the 'best interests' of the child control. Examined from the standpoint of the child, whom the Legislature deems most important, I cannot agree with the majority's elevation of marriage as the sole relevant consideration. Such a formulations penalizes children for a decision by two unmarried adults to live together without the formality of marriage."

I agree with that. The dissent goes on, on page 12 of the *Van* opinion to say;

"The equitable parenthood doctrine best serves the child's interests by focusing on two criteria: the 'non-biological parent's' actual performance" -- those two are important -- "actual performance of parenting functions and the child's view of that adult as a parent."

I agree with that, and I find that when a parent has acted as a parent, as Ms. Stiles has, and that person meets the unique criteria in this case, that the equitable parent

doctrine is going to apply.

The dissent goes on to indicate on page 13;

"The majority states that, with the promulgation of the Child Custody Act, the judiciary is not the proper entity to create new rights or extend theories to reach new situations. However, the act explicitly provides that it is 'equitable in nature' and its provisions are to be liberally construed. A liberal construction of it supports a finding that this Court is well within its power to expand the equitable parenthood doctrine to a situation such as it presented here."

I agree completely with that, and there are a unique set of facts in this case. I've used the word unique many, many times and I'll explain that in a minute.

The dissent goes on to say;

"The doctrine of equitable parenthood allows the court to decide who is a 'parent' for purposes of the act. Thus, should this Court decide that Mr. Van is an equitable parent, he would be accorded 'parental' status and fall within the provisions allowing him to seek custody of the children. Moreover, the statute specifically provides even third parties the opportunity to seek reasonable parenting time."

And then in the *Van* dissent, they cite MCL 722.27,

and that talk about the child -- a child custody dispute and it goes on to say;

> "If a child custody dispute has been submitted to the circuit court as an original actions under the act" -- and this is important -- "or has arisen incidentally from another actions in the circuit court or an order of judgment of the circuit court, for the best interest of the child the court may do one or more of the following."

And then it goes on to indicate what the court can do.

The dissent also cites the child custody best interests on page 13, and 14 of the *Van* opinion. It indicates that citing the Child Custody Act 722.23;

> "A trial court is given extremely broad latitude in determining what is in the best interests of the child. The plain language of two provisions, in conjunction with the wording in MCL 722.26, demonstrates that the Legislature fully recognized the courts of Michigan as necessary to defining the process."

And then they quote (d) under the factors, which is the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. And they quote (l) any other factor considered by

the court to be relevant to the particular child custody dispute.

The dissent goes on to say;

"The Legislature is ill-equipped to deal with the myriad situations in which children find themselves. It has long been a foundational tenet of American jurisprudence that, when legal remedies prove inadequate to solve a problem, society looks to the doctrine of equity and the courts."

I agree completely. The *Van* dissent also indicates on page 15;

"Admittedly, concerns regarding the sanctity of marriage could be tangentially affected by an extension of the equitable parenthood doctrine to situations arising outside a marriage. However, when child custody or visitation is at issue, the Legislature had decreed that the overriding concern is not the ultimate preservation by the state of the institution of marriage. It is, instead, the attainment of the best interest of the children. Keeping that overriding interest firmly in mind, I would expand the doctrine of equitable parenthood to cover the circumstances in this case."

Now, I will talk about the equitable parent doctrine in just a minute, but first I want to -- I want to quote from

another case and this is talking about the legal -- they're referring to the legal parent in this particular case. And this is *Aaron Grimes versus Shawnita Van-Hook-Williams*, 302 Mich App 521 (2013). And the reason I want to talk about this is because they talk about if Henry, for instance, were to bring the action, how would he have the right to? And in this particular case it's -- the final issue I'm getting to will be relevant that the first part of the facts are different. This is a paternity action, the Plaintiff appealed by right to the circuit court's order granting summary disposition in favor of the Defendant dismissing the Plaintiff's claim. The Plaintiff sought to have himself named as the father under the Revocation of Paternity Act although the Defendant was married at the time of the birth of the child.

Now, in this *Grimes* case, I bring this up not to discuss the merits of the *Grimes* case, but rather to say that the *Grimes* court indicated first that they did not address, because it wasn't pled, and the Supreme Court has not addressed the child's constitutional rights, a 2013 case, they're still saying they haven't addressed the child's constitutional rights. But then *Grimes* says that if the child does have a constitutional right, this is to make an argument pertaining to custody or paternity, it only pertains to the, quote, legal, end of quote, parent. And it's at this point that we get into what I referred to before at the first

hearing we had with this case before this Court, I referred to the chicken or the egg scenario.

To me it's counterintuitive to disallow the constitutional argument of a child to the equitable parent doctrine based upon the fact that the child has no filial relationship or even to -- anyone to make the equitable parent doctrine argument on behalf of the child, but to say that they can't because the child has no filial relationship because the proposed equitable parent is not a legal parent. Well, of course, they're not a legal parent, they're the equitable parent. And ironically, the proposed equitable parent will not be treated as a legal parent because they've not been deemed the equitable parent and they'll never be able to be the equitable parent because the child has no right to argue that fact because they can't argue that fact because they don't have the -- that only pertains to legal parents. If somebody can figure that out, they've got a better brain than I do. I think it's counterintuitive.

Technically, if the equitable parent had to be legal parent before the child could ever argue the application of equitable parent doctrine then that doctrine would never be applied. As one would already need the equitable parent finding from this Court in order to obtain a ruling on the finding itself.

I want to talk about the case of Washington -- two

cases; Washington, and they quote a Wisconsin case. The Washington case is the primary case that quotes within a Wisconsin case. The Supreme Court of Washington 155 Wash 2d 679 (2005), *In re the Matter of PARENTAGE OF L.B.*, Sue Ellen ("Mian") M-I-A-N, Carvin, Respondent versus Page Britian, Petitioner. This was argued February 15, 2005, and decided November 3, 2005. Background on this case; a woman brought an action against a biological mother of the minor seeking to establish her co-parentage of the minor who was conceived by artificial insemination during the woman's 12-year intimate domestic relationship with the mother. Similar facts.

The court indicates;

"In a matter of first impression, common law claim of de facto parentage existed such that woman had standing to petition for rights and responsibilities of shared parentage and...child custody and visitation orders may be established by reliance on the courts' equity powers and the common law."

It indicates;

"To establish standing as a de facto parent with rights and obligations in parity with those of a biological or adoptive parent, the prospective parent must prove (1) the nature (sic) or legal parent" -- excuse me -- " the natural or legal parent consented

to and focused (sic) the parent-like relationship."

This Court will indicate that's identical as the case here with Henry.

Number two;

"The prospective parent and child lived together in the same household."

This Court will indicate that's exactly the same as this case with Henry.

Number three;

"The prospective parent assumed obligations of parenthood without expectation of financial compensation."

And this Court will indicate that's identical to the case with Henry.

Number four;

"The prospective parent had been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."

Again, this Court would indicate that it's identical to the case with Henry.

This Washington court goes on to say;

"A de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise. Recognition of a person as a child's de

facto parent necessarily authorizes a court to consider an award of parental rights and responsibilities based on its determination of the best interest of the child. The criteria for determining the best interests of the child in custody disputes are varied and highly dependent on the facts and circumstances of the case at hand, but continuity of established relationships is a key consideration."

Again, in Henry's case, I quoted the dissent before that talked about the continuity, the necessity of the continuity, the same as this Washington court. The Washington court cites many other cases and facts similar to this case to Henry's case whereby the court determined a de facto parent existed with applying principles of equity while considering the best interests of the child. And, again, I'm going to -- the same things the dissent said in the *Van* case.

This Washington case goes on to include a 1995 case of *In re Custody of H.S.H.-K.* This is one of our neighboring states, 193 Wis. 2d 659 (1995). The Washington case also recognized the American Law Institute's recommendation supporting de facto parents in situations like the case at bar.

This Court finds the facts of those cases to be almost identical to the case at bar, except in this case the Attorney General prohibited the anticipated adopted of Henry

by Ms. Stiles. I don't even think the other cases had that. As I've said several times already, the case before this Court is distinguished from the *Van* case. This case is more unique in many ways than the *Van* case. This is a specific set of facts. With this particular fact pattern, I saying -- I'm not saying, I should say, the *Van* case is not applicable. I am distinguishing this in saying that Henry has a right to an equitable parent when these specific and unique factors are present. And I've already indicated that -- the areas where I just disagree with *Van*, but I'm also saying that we're unique from *Van*.

Because of the necessity of this Court to rule on the equitable parent doctrine, I'm ruling the Petitioner, Laura Stiles, has a right to bring forth this action and Henry has a right to bring this action.

Now whether or not one concludes that Ms. Stiles has a right to the ruling that she is an equitable parent, particularly, after entering what the court in *Van* indicates was commonly referred to, and this is *Van's* quote, not mine, an "illicit or meretricious" relationship. It's this Court's opinion that it cannot be denied that four, almost four-and-a-half-year-old Henry, let me say that again, four-and-a-half-year-old Henry, you can't say he doesn't have a right to an equitable parent. He has a right not to lose Ms. Stiles as the only other parent he's ever known and he has a right to a

ruling from this Court that Ms. Stiles is his equitable parent.

Now for 13 years this Court has painstakingly researched the underlying case law to enter a ruling in compliance with the existing appellate courts previous rulings. I have attempted to delineate the distinguishing aspects of this case as compared to the other cases such as *Van*. This Court has doggedly protected the best interests of children with each and every decision from the bench. It's this Courts opinion that this court -- the case is unique -- it's unique enough when compared to the *Van* case that the ruling is not contrary to the ruling in *Van*, although I still stand by my -- not only distinguishing this from *Van*, but my disagreements with many of the rulings in *Van*.

When I'm applying the principles of equity and protecting the best interests of a child, it is this Court's ruling that Ms. Stiles must be recognized as a parent to Henry. If an appellate court makes the determination that Ms. Stiles can arrive at Henry and Chloe's home, walk past Henry like a stranger, pick up Chloe and take her for visitation, then so be it. However, I'm not going to make that ruling. Moreover, when considering, as previously stated, the equity and the best interests of Henry, this Court cannot make that ruling.

It's the opinion of this Court, when considering all

the factors of this case and the equity of this case along with the best interests of Henry, this child, and Ms. Stiles as the equitable parent to Henry, she is Henry's mother. This Court will also note that it's the opinion of this Court that this ruling is also in the best interests of his sister, Chloe. Thank you.

MS. YARED: Thank you very much, your Honor. Your Honor, could I approach the Court --

THE COURT: Yes.

MS. YARED: -- with a -- this is a stipulation and order that the parties have all signed regarding the details that they had worked out at the last conference regarding everything from parenting time to health care. It addresses everything except the custody question that we --

THE COURT: Great.

MS. YARED: -- knew this Court would address.

THE COURT: Do you want me to sign that now?

MS. YARED: Yes, your Honor, if you would.

THE COURT: Any objections?

(No response.)

THE COURT: I've got a black pen somehow in my hand here.

MS. YARED: And, your Honor, I'd like to put on the record one other thing the parties have agreed on.

THE COURT: Yes.

MS. YARED: They each have -- my client has photographs of the children and Ms. Flowers has -- I'm sorry. Ms. Flowers has the photographs, my client has videos. They've agreed in the next to exchange those, give each other one month to make copies and then return them to the person who had them originally.

THE COURT: Great.

MS. YARED: Thank you very much, your Honor.

THE COURT: Thank you. Thanks for the amicus brief.

MS. KAPLAN: Thank you, your Honor. Appreciate the opportunity to weigh in.

MR. SHERLUND: Your Honor? Given that the Court has ruled and the parties have resolved, may I be discharged?

THE COURT: Yes. Thank you. Thank you very much for your involvement. Are we still on the record here?

THE COURT REPORTER: Yes, we are.

THE COURT: Okay. We're still on the record. I want to thank very much, Mr. Sherlund for his involvement here and I think long ago he started cutting his bill away. And one of the reasons I chose him was because I just knew that he would really have his heart in it, as he does all of his work, and that he would stick with it. So I'd like to thank and excuse Mr. Sherlund here.

MR. SHERLUND: Thank you, your Honor.

THE COURT: Thank you.

MS. YARED: Thank you, your Honor.

(At 2:53 p.m., proceedings concluded.)

STATE OF MICHIGAN)

COUNTY OF KENT)

I certify that this transcript, consisting of 40 pages, is a complete, true, and correct transcript to the best of my ability, of the proceedings and testimony taken in this case on Thursday, October 9, 2014.

11-24-17

Date

Nicole L. Ludge (CER 6690)
17th Circuit Court
180 Ottawa, N.W., Suite 9200A
Grand Rapids, Michigan 49503
(616) 632-5080