STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CARRIE PUEBLO,

Appellant,

v.

RACHEL HAAS,

Appellee.

Supreme Court Case No. 164046

Court of Appeals File No. 357577

Lower Court File No. 2020-6382-DC

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DEFENDANT-APPELLEE RACHEL HAAS' SUPPLEMENTAL BRIEF ON APPEAL

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF BASIS FOR JURISDICTION

Appellant, Carrie Pueblo, has brought this Appeal by Application, from the unpublished ruling of the Michigan Court of Appeals, dated December 28, 2021, affirming the trial court's decision that granted Defendant-Appellee's Motion for Summary Disposition, pursuant to MCR 2.116(c)(5) and (c)(8). Appellant's Application was GRANTED by this Court on or about September 23, 2022.

On or about January 20, 2023, this Honorable Court GRANTED the Appellant's Motion to Extend Time for Filing Supplemental Brief to February 17, 2023. This Supplemental Brief is timely filed.

This Honorable Court has jurisdiction over this granted application under MCR 7.305(H)(1) and (4).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Whether in light of Obergefell v Hodges, 576 U.S. 644 (2015), the equitable parent doctrine should be extended to provide standing to persons such as the plaintiff who, at the time of the parties same-sex relationship, was not permitted by Michigan law to legally marry the defendant.

Trial Court Answers:	No.
Court of Appeals Answers:	No.
Appellant Carrie Pueblo Answers:	Yes.
Appellee Rachel Haas Answers:	No.

II. If the equitable parent doctrine is extended, what should be the parameters of such extension be under applicable Michigan law?

Trial Court and Appellate Court Answers:	Did not consider this question.
Appellant Carrie Pueblo Answers:	As outlined in filed brief.
Appellee Rachel Haas Answers:	As outlined in filed brief.

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COUNTER-STATEMENT OF FACTS

The Trial Court considered and relied upon the following facts -- and no additional facts were provided to the Court of Appeals to supplement the record -- all sworn to in the form of an Affidavit of Rachel Haas (App. 25a-26a) and which facts are not in dispute.

1. Rachel Haas is the named Defendant, now Appellee, in this action.

2. Rachel Haas is the legal and biological parent of the minor child subject to this action.

3. These parties, i.e., Appellant and Appellee, were in a romantic relationship that ended in or about the year 2012.

4. While still in a romantic relationship, Appellee gave birth to a child, to-wit: Jack Paul Haas-Pueblo ("the minor child"), DOB: 11/02/2008, via in-vitro fertilization.

5. At the time the minor child was born, the Appellant and the Appellee were not married; nor did they ever get married after the United States Supreme Court decision in Obergefell v Hodges, 576 U.S.644 (2015). [1]

6. After the minor child was born, the Appellant did not adopt the minor child.

7. The Appellant is not identified as a parent on the minor child's birth certificate.

In view of the Michigan Court of Appeals' decision in Lefever v Matthews, 366 Mich.App. 651, 971 N.W.2d 672 (2021), it is also noted that the Appellant has not alleged,

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1 The Appellant bases much of her argument on speculation as to the critical point of "marriage." Specifically, the Appellant argues that "[b]ut for Michigan law previously unconstitutionally prohibiting same-sex marriage" these parties "would have been married and their child" would have been born in wedlock, thereby rendering the Equitable Parent doctrine applicable.

The parties were never married, before or after Obergefell. And there is nothing in the appellate record to establish that "but for Michigan law previously unconstitutionally prohibiting same-sex marriage" that these parties would have been married.

nor would she be able to factually establish, that she contributed genetic material to the fetus carried by the Appellee. In short, there is no genetic, nor birth connection between the Appellant and the minor child.

There are several statements made by this Appellant in her Statement of Facts that are either untrue or constitute unsupported argument. These contradictions are:

1. Contrary to the Appellant's assertion, these parties were never married, nor "equitably married" – or *de facto* married -- whatever the Appellant means by those terms.

2. The information concerning the parties' actions in the period leading up to the birth of the minor child, while perhaps interesting, is not factually relevant to the issues before this Court.

3. From the date the child was born, the Appellant was not the child's legal or putative "father," as relevant for purposes of this proceeding, nor was she ever the Appellee's "husband," notwithstanding notations made on the hospital information card.

4. The parties' relationship terminated in or about 2012, not 2014.

5. At no point prior to or after 2012 did the Appellant initiate any adoption proceeding to be declared the adoptive parent of the minor child.

ARGUMENT

I. THE EQUITABLE PARENT DOCTRINE SHOULD NOT BE EXTENDED TO PROVIDE APPELLANT CARRIE PUEBLO WITH STANDING TO INITIATE HER COMPLAINT FOR CUSTODY AND PARENTING TIME, NOTWITHSTANDING OBERGEFELL V. HODGES, 576 U.S. 644 (2015), AND HER CLAIMED INABILITY TO BE MARRIED UNDER MICHIGAN LAW UNTIL AFTER THE U.S. SUPREME COURT DECISION.

Standard of Review

As a general proposition, "[t]he standard of review is *de novo* with regard to questions of law." People v Stevens, 460 Mich. 626, 631; 597 NW2d 53 (1999); Cunningham v Cunningham, 289 Mich App 195, 200; 795 NW2d 826 (2010); El-Khalil v Oakwood Healthcare, Inc., 504 Mich. 152, 159; 934 N.W.2d 665 (2019). The Trial Court dismissed the Appellant's complaint, for lack of standing, under MCR 2.116(c)(5) and (c)(8).

In the case at bar, the Court of Appeals correctly notes that the issues of standing and legal capacity are distinct legal concepts. "See Flint Cold Storage v Dep't of Treasury, 285 Mich.App. 483, 502; 776 N.W.2d 387 (2009), citing Michigan Chiropractic Council v Comm'r of Office of Fin and Ins Services, 475 Mich. 363, 374, n. 25; 716 N.W.2d 561 (2006) (opinion by Young, J.) (admonishing Michigan courts to not conflate the two concepts for purposes of motions under MCR 2.116(c)(5)), overruled on other grounds by Lansing Schs Educ. Ass'n v Lansing Bd of Educ, 487 Mich. 349, 352, 371, & n 18; 792 N.W.2d 686 (2010)." Pueblo v Haas, unpublished order per curiam of the Court of Appeals decided December 28, 2021 (Docket No. 357577).

To the extent that there has been any conflation in prior argument between the concepts of standing and capacity to sue, Appellee Rachel Haas focuses her position on the Appellant Carrie Pueblo's lack of standing to bring the action. Appellee Rachel Haas would, further, assert that this Court is within its discretion to review an issue of

prospective dismissal of an action, *de novo*, under what it deems is the appropriate court rule, irrespective of the court rule applied by the trial court in this matter.

In this Supplemental Brief, the parties have been asked to address the question of whether the equitable parent doctrine should be extended to provide standing to this Appellant Carrie Pueblo to initiate an action for custody, parenting time, and child support under Michigan's Child Custody Act, MCL 722.21 et seq. Generally stated, "[w]hether a party has legal standing to assert a claim constitutes a question of law. . ." Heltzel v Heltzel, 248 Mich.App. 1, 28; 638 N.W.2d 12 (2001). Like other questions of law, this means that the question of whether a party has legal standing to initiate a particular action is reviewed *de novo*. Barclae v Zarb, 300 Mich.App. 455, 467; 834 N.W.2d 100 (2013). Whether a party has sufficient basis to assert parental rights under the equitable-parent doctrine is a question of law that is reviewed *de novo*, as well. Lake v Putnam, 316 Mich.App. 247, 250; 894 N.W.2d 62 (2016). [2]

INTRODUCTION

No legal decision in recent memory has been viewed as monumental and consequential from all sides of the same-sex marriage debate, as Obergefell v Hodges, 576 U.S. 644, (2015). Obergefell is now the settled law of the land. "Although the parties in this case disagree about many issues, they do agree about at least one thing, which is the central role that marriage plays in American society. It is a defining rite of passage and one of the most important events in the lives of millions of people, if not *the* most important for some. Of course, countless government benefits are tied to marriage, as are

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[2] Appellee Rachel Haas focuses this Supplemental Brief on the questions directed by this Honorable Court and will not repeat prior argument set forth in her Answer to the Application, although she reserves such argument, and it would be her intention to argue such matters before this Honorable Court at Oral Argument time permitting.

many responsibilities, but these practical concerns are only one part of the reason that marriage is exalted as a privileged civic status. Marriage is tied to our sense of self, personal autonomy, and public dignity. And perhaps more than any other endeavor, we view marriage as essential to the pursuit of happiness, one of the inalienable rights in our Declaration of Independence." Wolf v Walker, 986 F.Supp.2d 982, 987 (W.D. Wis. 2014).

Writing for the Obergefell majority, Justice Kennedy emphasized that marriage "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 liberty." Obergefell, 576 U.S. at 675. "As such, '[s]ame-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them." In Re J.B., (N.J. Super. 2020), quoting Obergefell, 576 U.S. at 675.

"The right to personal choice regarding marriage is inherent in the concept of individual autonomy." Obergefell, 576 U.S. at 665. In the context of the case at bar, this may be the most important single statement made by Justice Kennedy in a remarkable opinion of firsts. Concomitant with the notion of protecting an individual's autonomy and personal choice *to marry* is protecting an individual's autonomy and personal choice *not to marry*.

Appellee Rachel Haas chose not to marry the Appellant Carrie Pueblo. That was her right and that was her choice. For reasons discussed below, this Honorable Court should not impose a marriage where none existed.

Appellee Rachel Haas is asking this Honorable Court to go beyond merely analyzing the impact of Michigan law, pre-Obergefell, upon the Appellant and the question of equitable parenthood. To so limit the analysis will not protect Appellee Rachel

Haas' fundamental rights as the biological parent 3 and would disregard the import of

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[3] "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' Washington v Glucksburg, 521 U.S. 702, 719 [string citation omitted] (1997). The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' 521 U.S. at 720; see also Rene v Flores, 507 U.S. 292 [string citation omitted] (1993).

"The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court."

Troxel et vir. v Granville, 530 U.S. 57 (2000). See also, Stanley v Illinois, 405 U.S. 645 (1972).

Michigan's constitution in Art. 1, Section 17 provides for comparable due process protection:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . ."

Michigan courts, like in Troxel and Stanley, have repeatedly held that a parent's right to direct the care, custody, and control of his children is a fundamental right that due process protects from undue burden and inappropriate interference from the state. See In Re Brock, 442 Mich. 101, 108; 499 N.W.2d 752 (1993); In Re JK, 468 Mich. 202, 210; 661 N.W.2d 216 (2003); and, In Re Sanders, 495 Mich. 394; 852 N.W.2d 524 (2014).

For a good discussion of due process rights in the area of child custody, see In Michael H. v Gerald D., 491 U.S. 110 (1989). This case involved a claimed putative father (which blood tests had confirmed had a 98.07% probability of paternity), who had an established parental relationship with the minor child, filed a filiation action in Los Angeles Superior Court to establish paternity and his rights to visitation. The minor child's mother was married to another man at the time of her child's birth. The mother had previously had an adulterous affair with the claimed putative father.

In ruling on a motion for summary judgment, brought by the mother's husband, the Los Angeles Superior Court dismissed the filiation complaint because California law provides, in part, "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Cal.Evid.Code Ann. §621(a). In short, this presumption may only be rebutted by the husband or the wife, with blood tests, but only if a motion for such tests is made within two years from the child's birthdate, either by the husband, or if the natural father filed an affidavit acknowledging paternity. Cal.Evid.Code Ann. §621(c) and (d). The Court of Appeal affirmed the dismissal and

denied petitions for rehearing.

The California Supreme Court declined discretionary review and appeal was made to the U.S. Supreme Court, alleging, between the putative father and child, various violations of the Due Process Clause and Equal Protection Clause. The U.S. Supreme Court, in a plurality opinion, found no violations of either the Due Process Clause or the Equal Protection Clause (as to the minor child only) and the judgment was affirmed.

Writing for the plurality of the Court, Justice Scalia opined:

"It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint . . . In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to ranked as fundamental.' Snyder v Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed 674 (1934) (Cardozo, J.)

". . . Thus, the legal issue in the present case reduces to whether the relationship between person in the situation of Michael and Victoria [his alleged biological daughter] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family against the sort of claim Michael asserts.

"The presumption of legitimacy was a fundamental principal of the common law. H. Nicholas, Adulterine Bastardy 1 (1836). Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had no access to his wife during the relevant period. Id., at 9-10 [citations omitted] . . .

". . . We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case. But the evidence shows that even in modern times – when, as we have noted, the rigid protection of the marital family has in other respects been relaxed – the ability of a person in Michael's position to claim paternity has not been generally acknowledged. . .

". . . Moreover, even if it were clear that one in Michael's position generally possesses, and has generally always possessed, standing to challenge the marital child's legitimacy, that would still not establish Michael's case. As noted earlier, what is at issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael. It is no conceivable denial of constitutional right for a State to decline to declare facts unless some

Justice Kennedy's poignant description of what *should have been* the autonomy and personal choice to marry reserved to all citizens, irrespective of sexual orientation, either before or after Obergefell. Appellee Rachel Haas deserves the same very basic equal protection and due process rights that Obergefell established for *all* same-sex partners contemplating marriage, including the right and choice not to marry. Indeed, this case is about much more than just those persons, like the Appellant, who would now have this Court believe that they would have made different choices regarding marriage.

Application of Obergefell to the facts of the case at bar draws out and highlights three very important points, directly relevant to the questions put to these parties by this Honorable Court. First, notwithstanding the Appellant's inclusion of the commitment ceremony program among the appeal record, a commitment ceremony is not the same as a marriage. If it were, there would have been no Obergefell. There is no fundamental liberty right to a commitment ceremony.

Second, this Honorable Court should be careful not to assume that those same-sex couples, who participated in commitment ceremonies, including this Appellant and Appellee, would necessarily have been married, if given the opportunity earlier. This result assumes facts not in the record in this case.

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legal consequence hinges upon the requested declaration. What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. . .

". . . What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made." Michael H., 491 U.S. 121-127. [Emphasis added].

Third, by either account of the Appellant or the Appellee, their relationship lasted past 2011. By the time same-sex marriage was legalized in New York in June 2011, seven (7) states allowed for same-sex marriage, some with residency requirements and some without. Those states were Massachusetts, California, Connecticut, Iowa, Vermont, New Hampshire, and New York. Notwithstanding Appellant's present argument that the Appellant and Appellee would have been married if they could, they didn't get married in any of the seven (7) states that afforded them that right prior to the termination of their relationship in 2012. Appellee Rachel Haas, again, chose not to get married.

A. Appellant Carrie Pueblo Is Not A Natural Parent Of The Minor Child, Where She Is Neither Related By Blood, Nor By Birth. [4]

The Michigan Child Custody Act defines a parent as "the natural or adoptive parent of the child." MCL 722.21(i) [5]. The Child Custody Act does not define what constitutes a "natural parent," but the Michigan Court of Appeals has defined the term to mean a person that is related to a child by "blood," rather than by adoption. See Stankevich v Milliron (on remand), 313 Mich.App.233, 236; 882 N.W.2d 194 (2015). Appellant is not related by blood to the minor child. Accordingly, she does not qualify as a "natural parent" under this criterion.

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[4] Appellee is not restating her argument in this Supplemental Brief regarding the specifics of the Michigan Child Custody Act, MCL 722.21 et seq., previously set forth in her Answer and Brief in Support of Answer to Application. She incorporates and relies on prior written argument relative to the broader question of Appellee's status as an "adoptive parent" or a "third person" entitled to standing under such Act.

[5] "The legislative purpose behind the Child Custody Act is to 'promote the best interests and welfare of children. Fletcher v Fletcher, 447 Mich. 871, 877, 526 N.W.2d 889 (1994)." Frame v Nehls, 452 Mich. 171, 176, 550 N.W.2d 739 (1996). "The Child Custody Act does not create substantive rights of entitlement to custody of a child . . ." Ruppel v Lesner, 421 Mich. 559, 565, n.6, 364 N.W.2d 665 (1984).

In 2021, the Michigan Court of Appeals expanded the meaning of "natural parent" to include a parent related to a child "by birth," regardless of genetic connection." See Lefever v Matthews, 366 Mich.App. 651, 971 N.W.2d 672 (2021) (including in the definition of "natural parent" a woman who gives birth to a child as a surrogate.) [6] Appellant, however, is not related by birth to the minor child, irrespective of a genetic connection. Accordingly, she does not qualify as a "natural parent" under this criterion. As a matter of law, where there is no legal standing to initiate this child custody complaint, the decision of the Court of Appeals should be affirmed.

B. Appellant Carrie Pueblo Is Not a Natural Parent of the Minor Child, Under the Equitable Parent Doctrine, Where She Was Not Married To The Appellee Rachel Haas.

Having failed to establish that the Appellant is the natural parent by genetic or biological basis, the adoptive parent, or a third person entitled to legal standing under the Michigan Child Custody Act, Appellant argues that she is equitably entitled to standing to bring this complaint for custody as an "equitable parent" of the minor child under Michigan's Equitable Parent Doctrine.

Atkinson v Atkinson, 160 Mich.App. 601, 408 N.W.2d 516 (1987) outlines Michigan's Equitable Parent Doctrine, stating:

> ". . . 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

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[6] Aside from the specifics of the equitable parent doctrine and notwithstanding the clear language in Michigan's statutes relative to designation as a "natural parent," Appellant has previously briefed her argument to this Court regarding her belief that Lefever v Matthews provides her client with an avenue of relief. For reasons set forth in her prior Answer and Brief in Support of Answer to Application, Appellee views such argument as misplaced, without any factual or legal foundation, and that it grossly mischaracterizes the Lefever opinion. Her argument is not restated in this Supplemental Brief.

> 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 a 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 608-609.

Appellant argues that Atkinson creates an equitable window for her to obtain standing necessary to bring a custody complaint. [7]

"Generally, a party has standing so long as he or she 'has some real interest in the cause of action' or its subject matter. Anjoski, 283 Mich.App. 41, 50 [partial citation omitted]. 'However, 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." Lake v Putnam, 316 Mich.App. 247; 894 N.W.2d 62, 65 (2016).

In Lake, the Plaintiff and Defendant were in a same-sex romantic relationship from 2001 to 2014. They were not married and never did marry, post-Obergefell. During their relationship, the Defendant was artificially inseminated and gave birth to the minor child at issue in the case. There was no biological relationship, birth relationship, or adoptive relationship between the Plaintiff and the minor child. Shortly thereafter, the parties' relationship ended. Defendant denied the Plaintiff's requests to spend time with

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[7] In making this argument, Appellant cites the case of Stankevich v Milliron, 313 Mich.App. 233; 882 N.W.2d 194 (2016), in support of her proposition that she is entitled to "equitable parent" status. It is no small coincidence that many, if not all, the alleged facts that Appellant claims to establish her close relationship with both the Appellee and the minor child are set forth in the Stankevich decision, *cf.*, Appellant's Statement of Facts, pp. 5-12, with Stankevich, 313 Mich.App. at 241.

The parties in Stankevich were married in Canada in 2007 at a time when Canada recognized same-sex marriage. Under principles of comity, Michigan has historically recognized marriages solemnized in foreign countries. The Court of Appeals, against the backdrop of the Obergefell decision invalidating Michigan's prohibition against same-sex marriage, remanded the case back to the trial court for a decision about the validity of the Canadian marriage and, if valid, for consideration relative to the imposition of the equitable parent doctrine.

minor child.

The Plaintiff filed a lawsuit seeking parenting time with the minor child, arguing that she had standing to bring the suit because she "asserted a right to custody and parenting time . . . under Michigan's equitable-parent doctrine." Id. at 252.

"Under the equitable-parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock may, nevertheless, be considered that child's natural father if three requirements are satisfied: (1) the husband and the child must mutually acknowledge their father-child relationship, or the child's mother must have cooperated in the development of that father-child relationship before the divorce proceedings commenced, (2) the husband must express a desire to have parental rights to the child, and (3) the husband must be willing to accept the responsibility of paying child support. Van v Zahorik, 460 Mich. 320, 330; 597 N.W.2d 15 (1999); Atkinson v Atkinson, 160 Mich.App. 601, 608-609; 408 N.W.2d 516 (1987). 'Once it is determined that a party is an equitable parent, that party becomes endowed with both the rights and responsibilities of a parent.' York v Morofsky, 225 Mich.App. 333, 337; 571 N.W.2d 524 (1997)." Lake, 316 Mich.App. at 252.

In Lake, the Plaintiff claimed that because she satisfied the three requirements in Van and Atkinson, she was the minor child's equitable parent. In a very succinct response, the Court of Appeals held, "[s]he is incorrect." Id. Holding oneself out as a child's parent, alone is insufficient to be considered that child's parent under the equitable parent doctrine. Id., citing Van, 460 Mich. at 330-331, 597 N.W.2d 15 (1999).

The Court of Appeals points out that the Plaintiff "'ignores one crucial, and dispositive, requirement for the equitable-parent doctrine to apply – the child must be born in wedlock.' Van, 460 Mich. at 330, 597 N.W.2d 15." Lake, 316 Mich.App. at 252.

"The child at issue in this case was not born or conceived during a marriage. In fact, it is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply." Id. To eliminate any confusion regarding the impact of Obergefell on this analysis, the Court of Appeals goes further to state that it is not within the court's discretion, considering Obergefell, "to retroactively transform an unmarried couple's past relationship into marriage for the purpose of custody proceedings. Stated differently, it is, in our view, improper for a court to impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so." Id. at 253.

In the case at bar, like the Plaintiff in Lake, Appellant has no legal standing to establish custodial or parenting time rights to the minor child; nor can she successfully establish that she is the equitable parent of the minor child and thereby assert standing. As a matter of law, where there is no legal standing to initiate this child custody complaint, the decision of the Court of Appeals should be affirmed.

C. Appellant Carrie Pueblo's "But For" Argument – That the Appellant and the Appellee Would Have Been Married "But For" Michigan's Unconstitutional Ban On Same-Sex Marriage - Is Legally Insufficient To Warrant Expansion of Michigan's Equitable Parent Doctrine.

Having failed to establish standing under the current iteration of Michigan's equitable parent doctrine, Appellant next argues for a change to the facts and to the equitable parent doctrine, in her *but for* argument to this Court, to wit: *but for* Michigan's unconstitutional ban on same-sex marriage, corrected by Obergefell, these parties would have been married. Accordingly, she asserts that standing under Michigan's equitable parent doctrine should be conferred to the Appellant to initiate a custody proceeding, as a "natural parent" under Michigan's Child Custody statutes. Appellant has not been shy in her call for the creation of an *equitable marriage*, by a retroactive application of

Obergefell to same-sex couples. [8] Among many infirmities in this argument, there are two glaring, obvious problems with the Appellant's position.

First, it changes the facts of the case and assumes facts "not in the record." Second, it engages a slippery slope, a legal principle that implies or suggests that case outcomes could and/or should be retroactively affected by subsequent changes in the law.

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[8] While the Court of Appeals viewed Appellant's argument regarding imposition of an equitable marriage as creative and thought-provoking, considering Lake, the Court of Appeals recognized this as a "bridge too far."

> "As discussed, a person is only a natural parent under the equitable-parent doctrine if he or she was married to the child's mother at the time of the child's conception or birth, and the other requirements of the doctrine are met. Relying upon the reasoning of the concurring opinion in Lake, however, plaintiff asserts that the parties were "equitably married" because, although at the time of their relationship same-sex marriages were not permitted under Michigan law, the fact that the parties participated in a commitment ceremony in 2007 demonstrates that the parties would have married had they been permitted to do so in Michigan. But in contrast to the view advocated by the concurring opinion in Lake, the majority opinion in that case declined to extend the equitable-parent doctrine by imposing the status of marriage upon a couple who had never married. This Court explained:
>
> "It is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply. Had the parties married in another jurisdiction, our conclusion might be different. See, e.g., Stankevich v Milliron (On Remand), 313 Mich.App. 233, 240-241; 882 N.W.2d 194 (2015). While we acknowledge that the issue presented in this case is complex, we simply do not believe it is within the courts' discretion to, at the request of one party and in light of the United States Supreme Court's decision in Obergefell v Hodges, 576 U.S. ___; 135 S.Ct. 2584; 192 L.Ed.2d 609 (2015), retroactively transform an unmarried couple's past relationship into marriage for the purpose of custody proceedings. Stated differently, it is, in our view, improper for a court to impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so. [Lake, 316 Mich.App. at 252-253]."

Pueblo v Haas, unpublished order per curiam of the Court of Appeals decided December 28, 2021 (Docket No. 357577). The Court of Appeals was correct in its conclusion.

In theory, cases would never be "final." [9]

In making her argument for an expansion of *equitable parenthood* and implicitly

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[9] It is long and well-settled law in Michigan that the public policy of this state favors finality of judgments. See by example, Rose v Rose, 289 Mich.App. 45; 795 N.W.2d 611 (2010); Gillespie v Detroit Housing Comm. Bd. Of Tenant Affairs, 145 Mich.App.424; 377 N.W.2d 864 (1985); Sumner v Gen. Motors Corp. (On Remand), 245 Mich.App. 653; 633 N.W.2d 1 (2001).

This principle is even more important in family law. "There is no area of law more requiring finality and stability than family law." Hackley v Hackley, 426 Mich. 582; 395 N.W.2d 906 (1986).

This longstanding public policy supports and is based on two tenets – admittedly, in somewhat of a legally enforceable bootstrapped argument – first, that a judgment on the merits should be entered to prevent reassertion of the same claim – the very notion that undergirds the term "with prejudice" and the legal principle of "res judicata."

Michigan's Supreme Court has held, premised on a decision of the United States Supreme Court, that "'[n]ew legal principles, even when applied retroactively, do not apply to cases already closed.'" People v Maxson, 482 Mich. 385, 387; 759 N.W.2d 817 (2008), quoting Reynoldsville Casket Co. v Hyde, 514 U.S. 749, 758; 115 S.Ct. 1745, 131 L.Ed.2d 820 (1995). The basis for this longstanding rule is that 'at some point, 'the rights of the parties should be considered frozen' . . .' Reynoldsville Casket, 514 U.S. at 758, 115 S.Ct. 1745, quoting United States v Donnelly Estate, 397 U.S. 286, 296, 90 S.Ct. 1033, 25 L.Ed.2d 312 (1970) (Harlan, J., concurring)." King v McPherson Hosp., 290 Mich.App. 299, 305-306; 810 N.W.2d 594 (2010).

Second, courts should not avoid entry of a judgment on the merits and with prejudice because of a possibility of a subsequent change in the law. As to this latter point, Appellant's legal argument at the trial court against entry of an order, with prejudice, based on a "possible change in law," if adopted, would mean there should never be a dismissal in a civil matter "with prejudice" because there can always be a change in the civil law.

In looking at this issue from a post-judgment perspective, the Michigan Court of Appeals for much the same reasoning concluded that "[a]n intervening change in law is not an appropriate basis for granting relief from a judgment; indeed, if it were, 'it is not clear why all judgments rendered on the basis of the particular interpretation of law should not opened when the interpretation is substantially changed.' 2 Restatement Judgments, 2d, §73, illustration 4, p. 200. [Sumner v Gen. Motors Corp., 212 Mich.App. 694, 538 N.W.2d 112 (1995)]". King v McPherson Hosp., 290 Mich.App. 299; 810 N.W.2d 594 (2010). [emphasis added].

an *equitable marriage*, Appellant will undoubtedly rely upon former Chief Justice McCormack's dissent in Mabry v Mabry, 499 Mich. 997; 882 N.W.2d 539 (Mem) (2016). In her dissent, Chief Justice McCormack argued: 1) that Michigan "might fashion a rule to ensure that the plaintiff's and the children's constitutional rights are protected without opening the doctrine to any third party seeking parental rights." Id. at 1000.; and, 2) "that the denial of the equitable parent doctrine in same-sex cases where a non-biological parent was unconstitutionally prohibited from marrying the biological parent "perpetuates the troubling effect of this state's unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in Obergefell." Id., at 997.

This Honorable Court's grant of the Application for Leave to Appeal seemingly wants to explore this expansion of the *equitable parent* doctrine to protect the Appellant and the child's constitutional rights. [10] Appellee strongly disagrees with such expansion and urges great caution.

Assuredly, Appellant will argue, as did the Mabry dissent, that this change to the *equitable parent* doctrine would only apply to a "small group of same-sex couples who were unconstitutionally prohibited from marrying but separated before the Supreme Court's decision in Obergefell and have a custody dispute." Id. at 1001, n 3. To implement this change, in her Application, Appellant urged this Court to develop a "test" to "determine whether or not same-sex couples engaged in a custody dispute would have

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[10] Interestingly, there is nothing in this Honorable Court's Order granting application that directs the parties to comment upon a prospective elimination of the marriage requirement for the application of the equitable parent doctrine that is imposed by Atkinson. For reasons set forth below, *infra* at _____, an alternative to eliminating the marriage requirement for equitable parent status would be expanding the definition of "third party," who are entitled to initiate a custody complaint under MCL 722.26c(1)(a) and (b).

been married but for Michigan unconstitutionally prohibiting same-sex marriage." (Application, p 16.)

Appellant now urges this Court to adopt the "test" set forth in the New York case, Matter of Brooke S.B. v Elizabeth A.C.C., 28 N.Y.3d 1; 61 N.E.3d 488 (2016), which relies upon the fact of a *pre-conception* agreement to conceive and raise a child as co-parents as sufficient to confer standing to file a custody complaint. [11] Because the Appellant spends little to no time discussing how she would propose that this Court implement such a test, it remains unclear whether such a test is dependent on the creation of an *equitable marriage* or not. It's equally unclear how such a test would interface with existing third-party status to initiate a custody complaint where the biological mother may be married to another individual, whether it is a same-sex marriage or different sex marriage. Let us suppose a man and woman, estranged from current spouses and engaged in an extramarital affair, engaged in regular sexual activity and agree to raise any resulting child as co-parents and, in fact, do raise the child together as co-parents for a few years. Then, assume the relationship falls apart and the mother keeps the child from the biological father. See Barnes v Jeudevine, 475 Mich. 696; 718 N.W.2d 311 (2006), reh'g den. 477 Mich. 1201, 720 N.W.2d 748 (2006); *cert. den.* Barnes v Jeudevine, 127 S.Ct. 1494, 167 L.Ed.2d 229 (U.S.Mich. Mar. 05, 2007) (No. 06-911).

Now, under these Barnes facts, would Appellant propose to apply the same Brooke S.B. standing test to a custody complaint involving this heterosexual couple? Under these Barnes facts, where does the Michigan's long-held adherence to the *presumption of*

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[11] In a case in which allegations were made that there was a *pre-conception agreement* to conceive and raise a child as co-parents, Brooke S.B. held that if such allegations were proven by clear and convincing evidence this would be sufficient to confer standing to file a custody complaint. Matter of Brooke, S.B., 28 N.Y.3d at 27.

legitimacy interface with this Brooke S.B. test for standing? How should the Court reconcile this flimsy burden for standing involving same-sex couples, with the evidentiary burden underlying Michigan's statutory scheme for third-party standing of a putative father under Michigan's Paternity Act, MCL 722.711 et seq.? (Not coincidentally, as this Court is certainly aware, this statutory scheme legislatively evolved after this Court's narrow ruling in Barnes.) Is the Appellant suggesting that this Court adopt or promote one set of standing rules applicable to same-sex couples (with one partner unrelated biologically or by birth to the minor child) and a different standard for third parties, who are involved in heterosexual relationships, whether married or not, under Michigan's Child Custody Act, MCL 722.26c(1)(a) et seq.? These questions, and many more, demonstrate that adoption of the "test" pronounced by Matter of Brooke, S.B. would be exactly the kind of hurried and shortsighted resolution that borrows trouble and gives rise to terrible public policy.

This Honorable Court takes a more muted approach, simply inquiring as under what parameters the *equitable parent* doctrine might be extended, considering Obergefell. This Honorable Court, previously, has specifically declined to extend the equitable parent doctrine to non-marital relationships. Van v Zahorik, 460 Mich. 320, 331; 597 N.W.2d 15 (1999). Clearly, without an expansion of the *equitable parent* doctrine, the Appellant is not the natural parent of the minor child in this case and has no standing under the Michigan Child Custody Act as a "natural parent." [12]

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[12] As this Honorable Court considers the "natural parent" implication of such equitable parent status, a quick summary of basic facts regarding the Appellant's connection to the minor child may be informative. The following are uncontroverted facts: 1) the Appellant did not contribute genetic material to the ovum that was fertilized in the Appellee by way of in vitro fertilization; 2) the Appellant has no genetic, or "blood," relation with the minor child; 3) the Appellant did not give birth to the minor child; 4) the

While posited differently, both suggestions entertain a *carve out* to apply to same-sex couples on *the singular issue of child custody, seemingly motivated and/or based on the summary predicate that but for the legal prohibition on same-sex marriage, it can be factually and legally assumed that these parties would have married. And, accordingly, now, we should retroactively apply* Obergefell *to create a marriage and rights where none existed previously.* Such a factual and legal predicate is without foundation and borrows legal trouble where none be had.

Appellee submits that such a ruling will create a morass of otherwise avoidable constitutional equal protection and due process litigation in child custody matters. [13] On

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Appellant is not the adoptive parent of the minor child, nor did the Appellant ever commence adoption proceedings for the minor child; 5) the Appellant is not identified as a parent of the minor child on the birth certificate, nor has she ever been judicially established as a parent of the minor child in any prior proceeding; and, 6) the Appellant and the Appellee never married, even after Obergefell.

[13] "Equal protection of the law is guaranteed by the federal and state constitutions. The Michigan and federal Equal Protection Clauses offer similar protection. Doe v Dep't of Social Services, 439 Mich. 650, 670-671; 487 N.W.2d 166 (1992). See U.S. Const., Am. XIV; Const.1963, art. 1, § 2. Constitutional guarantees of equal protection require that persons in similar circumstances be treated alike. El Souri v Dep't. of Social Services, 429 Mich. 203, 207; 414 N.W.2d 670 (1987). When a legislative classification is challenged as being violative of equal protection, the standard utilized to determine validity depends on the type of classification and the nature of the interest affected. Dep't of Civil Rights ex rel. Forton v Waterford Twp., 425 Mich. 173, 190; 387 N.W.2d 821 (1986)." Frame v Nehls, 452 Mich. 171, 183; 550 N.W.2d 739 (1996).

"Unless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate government purpose. Id. at 662; 487 N.W.2d 166. When determining the constitutionality of a statute, a court must not be "'guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy . . .'" Gomez v United States, 490 U.S. 858, 864 [citations omitted] (1989)." Id. Undergirding the entirety of Supreme Court jurisprudence on state or federal statutes that affect parents and children is the Court's inviolate principle that ". . . the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v East Cleveland, 431 U.S. 494 (1977).

its face, presumptively creating a *carve out* (based on the erroneous assumption that a marriage would have existed) for one putative spouse to the detriment of the other putative spouse will invariably favor the rights and personal autonomy of one litigant over another; *cf.*, Obergefell, and Justice Kennedy's defense of the personal autonomy reflected in the decision to marry the person of your choice, *supra* at 3.

Such emphasis on the rights of one same-sex partner, while disregarding the rights of the other, will sacrifice the very equal protection and fundamental liberty interests that were so beautifully articulated by Justice Kennedy on the altar of hurried and ill-conceived public policy. At its core, Obergefell was about enhancing lives and liberty – it shouldn't now be used to produce the opposite. It cannot be assumed, as this *carve out* requires, that the ONLY reason that these same-sex couples didn't get married, pre-Obergefell, was because they legally couldn't.

On a more practical level, if such a *carve out* were contemplated on the issue of child custody, imposing an *equitable marriage*, and expanding the notion of *equitable parent* status, litigation will be complicated by facts that are no longer discoverable. How would litigants deal with the destruction of evidence and records that may have been relevant at the time, but which are now irretrievable? Do you create retroactively applied relief based on what could have been and should have been awarded at the time of the same-sex couple's break-up? Where do the equities support imposition of equitable relief and where do they discourage relief?

And, beyond the unintended consequences in child custody cases, this special *carve out* would create an equal protection and due process nightmare for those same-sex couples who may not have had children, but who were denied the same access to legal rights and the courts, pre-Obergefell, as different sex married couples, on issues of

property division, spousal support, and any of the other traditional areas of domestic relations law that occasion a divorce. Are those typical, non-children related "marital dissolution" issues to a same-sex couple any less deserving of the law's equal protection and due process?

The U.S. Supreme Court has already said "no." They are every bit as deserving – and, in a nutshell, this is what makes the expansion of the *equitable parent* doctrine so problematic. In a post-Obergefell case, Pavan v Smith, 517 U.S. ___ (2017), reviewed an Arkansas Supreme Court determination that Arkansas need not place the name of the mother's same-sex spouse on the child's birth certificate, despite a state law that required the name of the mother's male spouse to appear on the child's birth certificate, even if there was no biological connection. By plurality opinion, Pavan reversed the Arkansas Supreme Court "[b]ecause that differential treatment infringes Obergefell's commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" Id., at ___ (slip op., at 17). [14]

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[14] "[W]hen a party who comes before the court is not part of a marital relationship, as in this case and Hawkins, he or she is not entitled to the 'constellation of benefits' referred to in Obergefell. Thus, plaintiff's marital status is highly relevant to the legal issues presented, and not to any other social or economic matter." Sheardown v Guastalla, 324 Mich.App. 251; 920 N.W.2d 172 (2018).

In Sheardown , the Michigan Court of Appeals considered the case of an unmarried same-sex couple, who entered a contract with a sperm donor to assist the defendant with getting pregnant. The couple broke up, prior to Obergefell, and then the defendant's child, MEG, was born as a result of the insemination/sperm donor agreement. Plaintiff and defendant never got married, nor did the plaintiff seek to adopt MEG, even post-Obergefell. The plaintiff initiated a custody action which was dismissed by the trial court for lack of standing.

On appeal, after a trial court determination on remand that MCL 722.22(i) was unconstitutional in light of Obergefell, the plaintiff argued that she should be considered a parent due to the sperm donation agreement that contained statements that plaintiff and defendant "intend[ed] to be legal parents of any child born as a result of [the]

In fact, an argument can be easily made that such individuals, arguing for economic parity among same-sex couples, are more deserving of legal protection than this

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inseminations" and that "they will file a petition for [plaintiff] to adopt the child as soon as possible after its birth." Accordingly, she argued that the agreement conferred standing and that the fundamental right to parent, recognized in Troxel v Granville, 530 U.S. 57 (2000), was violated by the trial court's refusal to allow her to seek custody of MEG. Sheardown, 324 Mich. at 254.

In reversing the trial court's ruling that MCL 722.22(i) was unconstitutional, the Court of Appeals noted that Obergefell dealt with the fundamental right to marry and that the plaintiff did not argue that *but for* the constitutional prohibition on same-sex marriage, the parties would have been married. Undoubtedly, Appellant will seize on this distinction, arguing that the Appellant and the Appellee would have been married and that she does want this Court to impose an equitable marriage in the case at bar. This would be a helpful distinction, if Sheardown hadn't also offered the following:

> "But the parties were never married. They had the option to marry in several different states while they were in a relationship, but for whatever reason (and they offer conflicting ones), they did not. Nor did plaintiff ever seek to adopt MEG, even though the legal right existed after Obergefell was decided, see Mabry v Mabry, 499 Mich. 997, 998-999; 882 N.W.2d 539 (2016) (McCormack, J., dissenting), most likely because the parties' relationship had ended years earlier. Consequently, plaintiff is not in a position to argue that she was denied a benefit granted to a heterosexual married person, because she was never married to defendant.
>
> "As a result, the liberty interest in the right to marry that was extended to same-sex couples in Obergefell simply does not come into play."

Sheardown, 324 Mich.App. at 260.

Hawkins v Grese, 68 Va.App. 462; 809 S.E.2d 441 (2018), while largely addressing alleged due process and equal protection claims of a same-sex partner in a post-Obergefell setting, Hawkins pointed out the following regarding Virginia's definition of parentage:

> "In sum, the entire basis of the holding of Obergefell is the significance and importance of marriage as an institution that should not be withheld from same-sex couples. Barring procreation or adoption, pre-Obergefell, different sex marriages did not automatically result in the spouses becoming legal parents of each other's children and the analysis of the Obergefell majority opinion does not compel a different conclusion with respect to same-sex marriages, far less unmarried couples of any sexual orientation." Id., at 476-477.

Appellant. At least in those instances, there may have been joint assets that were built and contributed to by both parties, unlike the complete absence of any biological or birth connection, or adoptive connection, between the Appellant and this minor child.

Beyond domestic relations law, retroactive application of Obergefell would also implicate Michigan tort law in terms of consortium damages [15], intestate succession and spousal election [16], and employee benefits and coordination law [17]. How do you reconcile a *carve out* that favors the retroactive application of Obergefell to same-sex couples on the issue of child custody with the case of a same-sex domestic partner who was excluded from recovery of loss of consortium damages granted to a spouse in a wrongful death action? Should a domestic partner, excluded from recovery because of a statutory limitation of recoverable monetary damages reserved to spouses, receive disparate treatment from the Appellant's custody complaint? Does a Court's fact-based inquiry regarding the circumstances of the relationship and whether marriage should be imposed, as the Appellant argues, in fact have the effect of reversing prohibitions on Michigan's 65-year-old abolition of common-law marriage? [18] Practically speaking, how far back do you go to analyze the status of that relationship?

These questions are not just academic or theoretical query. The following cases are illustrative of other state appellate review of these issues on matters unrelated to child

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[15] Montgomery v Stephan, 359 Mich. 33; 101 N.W.2d 227 (1960), providing for recovery of consortium damages by either spouse.

[16] See MCL 700.2202.

[17] See by example, MCL 550.253 (Coordination of Insurance Benefits, Relative to Spouse/Dependent health care, vision care, and dependent life insurance options).

[18] Common law marriage was abolished in Michigan, effective January 1, 1957.

custody.

1. *Tort Claims for Consortium Damages* - Philip Morris U.S., Inc. v Rintoul, 342 So.3d 656 (Fla.App. 2022).

Philip Morris U.S., Inc. v Rintoul, 342 So.3d 656 (Fla.App. 2022) involved a wrongful death case against Philip Morris and R.J. Reynolds, awarding substantial compensatory damages to the surviving spouse and punitive damages against both defendants. Among other rulings on appeal, the Florida Court of Appeals, 4th District, reversed the holding on the award of non-economic damages, based upon Kelly v Georgia-Pacific, LLC, 211 So.3d 34 (Fla. 4th DCA 2017), to the Plaintiff because he was not married to the decedent at the time that the tobacco-related illness manifested. The appeals court rejected "the trial court's exception to Kelly for a same-sex couple based upon Obergefell v Hodges, 576 U.S. 644 (2015)."

"Rintoul contended that the Supreme Court's holding in Obergefell – that same-sex couples can no longer be denied the right to marry – should be applied retroactively to establish a marriage at a time before this partner's (later spouse) manifestation of injury. Second, he asserted that this suggested retroactivity of Obergefell should be extended to him for the purpose of allowing him to claim consortium damages because he would have been married before his partner's onset of illness but for Florida's prior unconstitutional prohibition of same-sex marriage. Third, Rintoul argues that the trial court did not err in submitting this issue to the jury as a finding of fact or in ultimately holding that he was entitled to bring his loss of consortium claim." Philip Morris, 342 So.3d at 665.

In reversing the Trial Court and disagreeing with each of Rintoul's arguments on this point, the Florida Court of Appeals held:

> "However, regardless of Florida's recognition of same-sex marriage in 2015, the state's law on common law marriage remained unaffected. A common law marriage is defined as "[a] marriage that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple. Black's Law Dictionary (11th ed. 2019). When common law marriages were recognized in Florida, they were given the 'same dignity and recognition' as was accorded to ceremonial marriages. Budd v J.Y. Gooch Co., 157 Fla. 716, 27 So.2d 72, 74 (1946) . . . Florida ceased to recognize common law marriages in 1968 by enacting section 741.211, Florida Statutes (1968) . . .
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> . . . "In Obergefell, the Court did not compel states to convert all same-sex relationships predating that decision into formally recognized marriages, 576 U.S. at 68, 135 S.Ct. 2584. Obergefell's holding required a state to recognize a same-sex marriage that was lawful in another state; it did not directly address the rights of same-sex couples who entered into some other arrangement or agreement, regardless of whether it took the form of an informal understanding or something more formal, such as a civil union or domestic partnership. Id. In fact, at not time before the 2015 Obergefell ruling, or since, has the Florida Legislature acted to formally recognize such arrangements retroactively.
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> . . . "Under Florida law, it is axiomatic that marriage is an essential element of a loss of marital consortium claim. A cause of action for this type of loss of consortium, being incident to the marriage relationship, cannot exist without it. Absent such a relationship, the right does not exist, and thus no recovery may be had for loss thereof. Submitting the issue of Rintoul and Caprio's relationship to the jury under these circumstances was an indirect attempt to improperly give retroactive legal recognition to what was, for all intents and purposes, a common law marriage. . . Even assuming without deciding that Obergefell might have retroactive effect in certain limited circumstances, Florida law does not permit courts to create a 'marriage by jury.'"

Philip Morris, 342 So.3d at 666-667. Florida's appeals court is not alone in this observation that retroactive application of Obergefell, where couples have demonstrated cohabitation, etc., would be tantamount to judicial restoration of common law marriage that has been outlawed in many states.

2. *Claims for Surviving Spouse Benefits under Retirement Plans* – Anderson v South Dakota Ret. Sys., 924 N.W.2d 146 (S.D. 2019).

In Anderson v South Dakota Ret. Sys., 924 N.W.2d 146 (S.D. 2019), a same-sex

couple were long-term committed domestic partners, who each worked for the Rapid City Police Department. One of the women retired from the department in 2012 and the parties married on July 19, 2015, in the immediate aftermath of the Obergefell decision. The retired spouse died in 2017 and her wife applied for survivor spouse benefits under the South Dakota Retirement System (the "SDRS".)

The SDRS denied Anderson's application because it found that Anderson and Cady were not married at the time of Cady's retirement and that Anderson did not meet the definition of a "spouse" needed to qualify for survivor benefits. After successive appeals, the case wound its way to the South Dakota Supreme Court to consider Anderson's argument that Obergefell should be applied retroactively in order to establish her status as a surviving spouse entitled to retirement benefits. Id.

As to the issue of Obergefell's retroactive application, the surviving spouse first relies upon Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510 2517, 125 L.Ed.2d 74 (1993) for the prospective application of retroactivity to Supreme Court decisions on federal law. Harper held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. ... [W]e now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law to shift and spring" according to "the particular equities of individual parties' claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. Id. at 97, 113 S. Ct. at 2517 (citations omitted).

Without contesting any particular aspect Anderson's argument for Obergefell's retroactive application, the South Dakota Supreme Court noted that "the only question in this case is whether Anderson or this Court may 'create a marriage post hoc despite the

fact that Anderson and Ms. Cady never availed themselves of the marriage laws in another state that recognized same-sex marriage.'" Anderson, 924 N.W.2d at 150.

The Anderson court further noted that in "other jurisdictions where retroactivity has been recognized, the retroactive ruling only affects same-sex marriages that were already solemnized in any manner or if the state recognizes common-law marriages. See generally, Schuett v. FedEx Corp., 119 F.Supp.3d 1155 (N.D. Cal. 2016) (solemnized marriage); Hard v. Attorney Gen., 648 Fed. Appx. 853 (11th Cir. 2016) (solemnized marriage); Dewling, 223 F.Supp.3d 613 (common-law marriage). The OHE reasoned that in order for Obergefell to apply retroactively, there must have been a previously unrecognized marriage between the couple that would have been recognized but for the law against same-sex marriages."

The South Dakota Supreme Court seemingly agreed. "In cases cited by Anderson, those courts only applied Obergefell retroactively to a solemnized marriage or to a common-law marriage recognized under state law. Here, assuming without deciding that Obergefell applies retroactively, there was no marriage, act of solemnization, or common-law marriage to refer back to." Anderson, 924 N.W.2d at 150.

Notwithstanding Anderson's argument that *but for* South Dakota's prohibition against same-sex marriage that she and the decedent would have been married earlier,

> "Because Anderson and Cady made no attempt to marry one other, and because South Dakota does not recognize common-law marriage, the issue in this case is resolved as a matter of statutory interpretation. SDCL 3-12-94 provides that only a "spouse" is eligible to receive survivor benefits, and SDCL 3-12-47(80) defines a spouse as "a person who was married to the member at the time of the death of the member and whose marriage was both before the member's retirement and more than twelve months before the death of the member." (Emphasis added.) Under these statutes, Anderson cannot meet the definition of spouse, and therefore, is not entitled to Cady's survivor benefits under South Dakota law."

Anderson, 924 N.W.2d at 151.

3. *Application of Statutory Language to Disqualify Former Spouse as Executor and Beneficiary of Decedent's Estate* – Latore v Hunter (In Re Estate of Leyton), 135 A.D.3d 418, 22 N.Y.S.3d 422 (N.Y.App.Div. 2016).

In Leyton, a family member brought an action to remove the decedent's former same-sex partner as executor and to disqualify him as a beneficiary of the estate under a provision of New York domestic law applicable to former spouses. The petitioner argued that Obergefell should be retroactively applied in light of a commitment ceremony held by the parties in 2002, in order that the statutory language would require the executor's removal and his inability to receive a testate share of the estate.

In upholding the dismissal of the petition, Leyton held that:

> The Supreme Court's recognition of same-sex couples' fundamental right to marry in Obergefell v. Hodges, ___U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) does not compel a retroactive declaration that the "Commitment Ceremony" entered into by decedent and Hunter in 2002, when same-sex marriage was not recognized under New York law, was a legally valid marriage for purposes of the "former spouse" provisions of EPTL § 5–1.4.

Latorre v. Hunter (In re Estate of Leyton), 135 A.D.3d 418, 22 N.Y.S.3d 422 (N.Y. App. Div. 2016).

SUMMARY

Carving out a narrow exception on issues of just child custody for pre-Obergefell same-sex couples will create a constitutional nightmare for our courts to resolve, both at the trial court level and then at the appellate level. Carving out a broader exception, akin to revisiting all marital dissolution issues, for pre-Obergefell same-sex couples will create a logistical nightmare and, frankly, an impossible situation for the trial courts to handle in a fair and equitable way.

This Court should not expand Obergefell's protection of same-sex marriage to

confer custodial rights to unmarried couples, on a theory of an expanded *equitable parent* status derived from a contrived retroactive application of Obergefell. "[O]bergefell did not grant same-sex couples anything more than the right to have states recognize their marriage (not an insignificant right, no doubt) and to treat those marriages the same as one between heterosexuals." Sheardown, 324 Mich.App. at 262.

A *but for* argument could be made in nearly every area of the law to create redress to individuals, or a class of individuals, for which prior iterations of the law did not provide relief – irrespective of whether the law was valid and constitutional and subsequently changed or the law was flawed and unconstitutional and successfully challenged. To revisit all those cases or many or some selectively will create the logistical and constitutional chaos that an ordered democracy and constitutional legal system cannot invite, nor survive.

As a matter of law, where there is no legal standing to initiate this child custody complaint and no basis upon which this Honorable Court should expand the definition of equitable parent, post-Obergefell, the Court of Appeals should be affirmed.

II. MICHIGAN'S LEGISLATURE SHOULD BE ENGAGED TO ADDRESS THE ISSUE OF THIRD PARTY STANDING TO INITIATE CUSTODY PROCEEDINGS IN UNIQUE CIRCUMSTANCES LIKE THE CASE AT BAR, AS OPPOSED TO JUDICIAL CREATION OF PARAMETERS FOR EXPANSION OF THE EQUITABLE PARENT DOCTRINE WHICH REQUIRES MARRIAGE UNDER EXISTING MICHIGAN LAW.

For reasons set forth above, expansion of the equitable parent doctrine is not a viable solution to the issues which Appellant Carrie Pueblo presents this Court. Appellee Rachel Haas, accordingly, does not offer any parameters under which such an expansion should be considered.

Anticipating a question from this Honorable Court, directed to Appellee's Counsel

– to wit: "Counsel, are you telling this Court that Appellant Carrie Pueblo is without any remedy, legal or equitable? She should just pack up her bags and go home?"

It is not Appellee's position to fashion a remedy for the Appellant that, on the facts and in her opinion, does not serve her child's best interests. That said, however, her counsel has some experience with how an appropriate remedy might come about. Counsel argued Barnes v Jeudevine, *supra* at 15, before this Court. It produced a narrow legal victory for Ms. Jeudevine, but it also prompted the Michigan legislature to re-examine the statutory parameters for a putative father to file a paternity complaint and adopt changes that have now been in use for more than ten years.

Appellee would submit that the Michigan legislature should be similarly engaged to address this issue, not by creating a marriage where none existed, but by re-examining the bases upon which a third party or third person, unrelated by marriage, might initiate a custody complaint under the provisions of MCL 722.26c.

Under the Michigan Child Custody Act, a "third party" or "third person" means an "individual other than a parent." MCL 722.22k. Clearly, Appellant is a "third person" within the meaning of the Michigan Child Custody Act, as she is neither the natural parent, nor the adoptive parent of the minor child.

Pursuant to MCL 722.26c(1)(a), a third party may file such a complaint if both of the following conditions are met: 1) the child was placed for adoption with a third person under the laws of the adoption laws of the state of Michigan or another state and the placement order is still in effect when the action is filed; and (2) since the placement, the child has resided with the person for at least six (6) months.

Pursuant to MCL 722.26c(1)(b), a third party, or third person, has standing to initiate a complaint for custody if all three (3) of the following conditions are met: 1) the

child's biological parents have never been married to one another; 2) the child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under a court order; and, 3) the third person is related to the child within the fifth degree of consanguinity by virtue of marriage, blood or adoption.

Clearly, this statutory construction is designed to serve, first, the fundamental liberty interest that the biological parent has in raising his or her child. See Troxel, *supra* at 4, fn. 3. But notwithstanding that important objective, deliberate legislative action to consider alternate standards or criteria by which a third person might initiate a custody complaint could also be analyzed and enacted.

Recognizing there are unique circumstances that arise from a third party's actual care for the minor child, to address the rights of third parties, of all places, "[i]n Texas, any third party 'who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition' has standing to seek custody or visitation. Tex. Fam. Code §102.003." Ferrand v Ferrand, 221 So.3d 909, 936 (La.App. 2016).

Now, admittedly, "the Texas circuit courts are divided as to whether the biological or legal parent must first relinquish his or her parental rights in order for a third party to prove 'actual care, control, and possession of the child' under [this] statute." Id. But it does represent a signal to this Court that legislatures will take up these important issues, like the Michigan legislature did with the assistance of our State Bar Family Law Section, after the Barnes decision.

What would such legislation look like? Appellee doesn't know. As indicated above, legislation must meet the fundamental liberty interest of the biological parent. See Troxel, *supra* at 4, fn. 3. But, like Texas, Michigan legislation could also contemplate contextual

analysis by courts regarding recent contact (of some designated duration or exposure) between the third person and the minor child. This is a complicated and delicate issue, but one which people of good conscience and intention can solve. And, at the end of the day, effective and sound public policy will be established without disturbing the fundamental liberties guaranteed to and affirmed by Troxel and Obergefell for both parties in a same-sex relationship, including the right to raise one's child and the personal autonomy not to marry.

CONCLUSION

For the reasons set forth herein, Appellee Rachel Haas hereby respectfully requests that this Court affirm the decision of the Michigan Court of Appeals.

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