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State of Michigan
Supreme Court

Appeal from the Court of Appeals
Gadola, P.J., and Swartzle and Cameron, JJ.

CARRIE PUEBLO,
Plaintiff-Appellant,
v.
RACHEL HAAS,
Defendant-Appellee.

MSC Case No. 164046
COA Case No. 357577
Lower Court Case No. 2020-6382-DC

Brief Amicus Curiae on Behalf of Michigan Chapter of American Academy of Matrimonial Lawyers (AAML)

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March 24, 2023

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Statement of Jurisdiction

This case is before the Court on an order granting leave to appeal dated September 23, 2022.

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Statement of Questions Presented

A. Whether, in light of *Obergefell v Hodges*, 576 US 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?

AAML Michigan Chapter answers "Yes."

B. If so, what should the parameters of that extension be?

AAML Michigan Chapter answers that the equitable parent doctrine should be extended to include persons in marriage-like relationships where the law at the time of that relationship did not permit the parties to legally marry.

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Statement of Interest of Amicus Curiae, Michigan Chapter of AAML[1]

The Michigan Chapter of the American Academy of Matrimonial Lawyers (AAML) consists of 40 leading family law attorneys in Michigan. The purpose of the AAML is "Provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law." The AAML is a national organization headquartered in Chicago, IL. There are nearly 1500 "Fellows" of the AAML nationwide, with Fellows in all 50 states and the District of Columbia.

The Michigan Chapter of the AAML is governed by a Board of Managers. The Board sets policy for the Chapter. With input from the general Chapter membership, the Board of Managers approved filing an amicus brief supporting limited expansion of the equitable parent doctrine to persons such as plaintiff who could not legally marry defendant at the time they jointly decided to conceive and raise a child together. Same sex marriage became legal in Michigan only after their relationship ended. Because the doctrine is equitable in nature, designed to fill a gap in the law that would bar the family court from considering and acting in the best interests of the child, it must be flexible enough to cover this situation.

The Michigan Chapter of the AAML is particularly interested in this case and any case involving the equitable parent doctrine given the central role its members, as both advocates and jurists, played in the creation of the doctrine.

[1] No counsel for a party authored this brief for this amicus curiae, in whole or in part, and no person other than the amicus curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

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Statement of Facts

Commencing in the early 2000's, Carrie Pueblo and Rachel Haas were partners in a long-term exclusive same-sex relationship. Their relationship was as similar to marriage as it could be given Michigan law at that time precluding same-sex marriage. As evidence of the marriage-like nature of their relationship, in 2007 they went through a commitment ceremony presided over by a member of the clergy.

The parties chose to have a child together via in vitro fertilization. They decided defendant, Rachel Haas, would be the partner to carry the child. Both parties participated in prenatal care.

When the child was born in November 2008, same-sex couples were still prohibited from marrying in Michigan. Both parties were present at birth. The hospital did not permit Ms. Pueblo to be named as "father" on the birth certificate. Ms. Haas completed a personal information card listing Ms. Pueblo as the child's father.

The relationship between Ms. Pueblo and Ms. Haas ended in 2014 before the United States Supreme Court held in *Obergefell v Hodges*, 576 US 644 (2015), that Michigan's law barring marriage by same-sex couples was unconstitutional. Until their relationship ended in 2014, Ms. Pueblo and Ms. Haas equally shared parental responsibilities for the child.

Even after the parties' relationship ended, Ms. Pueblo continued to informally participate in the child's parenting. Her parental role continued after the child suffered a disabling stroke in 2016. In March of 2017, Ms. Haas insisted Ms. Pueblo have no further contact with the child.

After efforts to continue her relationship with the child were thwarted by Ms. Haas, in 2020 Ms. Pueblo filed a complaint for custody in the family division of the Kalamazoo County Circuit Court. The complaint alleged facts that would satisfy the requirements to have Ms. Pueblo declared the child's equitable parent but for the law that prevented them from marrying during the period their relationship was intact. Ms. Pueblo sought joint custody and parenting time.

Ms. Haas answered challenging Ms. Pueblo's legal standing to file a custody action concerning the child. The trial court agreed with Ms. Haas and granted summary

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disposition dismissing Ms. Pueblo's custody complaint. The trial court's decision was based on the lack of a "legal" marriage between the parties. Therefore, one of the required elements for application of the equitable parent doctrine was missing.

Ms. Pueblo appealed to the Michigan Court of Appeals. The Court of Appeals affirmed the trial court's grant of summary disposition, agreeing with the trial court the lack of a marriage between the parties rendered the equitable parent doctrine inapplicable. The appellate panel held, "Michigan's equitable-parent doctrine applies only to married couples. * * * [B]ecause the parties were never married, plaintiff's argument that she is an equitable parent fails." *Pueblo v Haas*, COA No. 357577, decided 12/28/21, Slip Opinion, p 5 [Citations omitted].

Ms. Pueblo sought leave to appeal to this Court. Leave was granted on September 23, 2022.

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Argument

Introduction: This case involves application and possible expansion of the equitable parent doctrine. The doctrine originated with two AAML Michigan Chapter members, Michael A. Robbins and Richard S. Victor. Mr. Robbins and Mr. Victor represented a client, Jim Atkinson, in a divorce action in Oakland County in the mid-1980's. The equitable parent doctrine arose out of their advocacy on behalf of Mr. Atkinson

Origination of the Equitable Parent Doctrine: A child was born to Jim and Terri Atkinson during their marriage. They raised the child together. Jim believed he was the child's biological father. Terri permitted and encouraged Jim's relationship with the child during the marriage.

The marriage broke down when the child was three and a half years old. Jim filed for divorce and sought custody and visitation rights. Terri responded to Jim's request by alleging he was not the child's biological father and therefore had no parental rights to the child.

At Terri's request, the trial court ordered blood tests to determine the child's paternity. The test results excluded Jim as the child's father. Because Jim was not the child's biological parent, the trial court denied him custody and visitation (as parenting time was called at the time) with the child.

Jim appealed and Mr. Robbins and Mr. Victor proposed adoption of the equitable parent doctrine. The Court of Appeals characterized the request as follows:

> Plaintiff's third argument is that the trial court erred in treating him as a third party because of the absence of a biological relationship between Baird and himself, rather than treating him as a parent due to the close father-son relationship the two shared, in deciding custody and visitation. In making this argument, plaintiff asks us to adopt the doctrine of equitable parent. This is a novel request.

Atkinson v Atkinson, 160 Mich App 601, at 608 (1987).

In support of their novel request, Mr. Robbins and Mr. Victor argued that the Child Custody Act "is equitable in nature" and its provisions must be liberally construed. MCL 722.26. They also noted that the typical nexus between biological parentage and the

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assertion of parental rights has exceptions. There were cases where a husband held himself out as father of a child during the marriage, but attempted to shirk parental responsibilities upon divorce, claiming the child was not biologically his. In those cases, our courts have held that husband is estopped by his conduct from denying paternity of the child. *Johnson v Johnson*, 93 Mich App 415 (1979), and *Nygard v Nygard*, 156 Mich App 94 (1986).

Robbins and Victor also argued that the doctrine of equitable adoption supported their request to recognize an equitable parent doctrine. Michigan has long recognized, and later codified, the doctrine of equitable adoption in intestate succession cases. Under this doctrine, an implied contract to adopt is found when a close relationship, similar to parent-child, exists between a child and the deceased. *Wright v Wright*, 99 Mich 170 (1894); MCL 700.111 (subsequently replaced by EPIC, 700.1101 et seq). As a result, the child has a right to share in the deceased's estate.

Under the equitable adoption doctrine, the child would be Jim's heir. Therefore, it would be logical that a person recognized as a parent in death should have the same recognition in life. Jim's parent-child relationship with the child he raised as his own is similar to that found in equitable adoption situations.

Finally, Robbins and Victor argued that the best interests of the child was the paramount concern under the Child Custody Act. *Hackley v Hackley*, 426 Mich 582, 597 (1986). Jim was married to the child's mother when the child was conceived and born. He had been a father to the child in all respects. Therefore, cutting Jim out of the child's life because of the lack of a biological relationship is unlikely to be in the child's best interests.

Despite recognizing the novelty of the request to create a new equitable doctrine, the Court of Appeals found "ample support" for the proposed equitable parent doctrine, stating:

> [W]e adopt the doctrine 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

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> support. We hold that the husband may be considered the equitable parent under these circumstances and remand this case in order to allow the circuit court to reevaluate custody and visitation, treating plaintiff as a natural parent of Baird.

Atkinson v Atkinson, 160 Mich App 601, at 608-609 (1987).

The Equitable Parent Doctrine Since *Atkinson*: In the 36 years since *Atkinson*, much has changed in the way courts and society view marriage and the family. *Atkinson* involved a traditional heterosexual couple. For that reason, the original definition of the doctrine was written from the perspective of a husband seeking parental rights to a child born *during* the marriage but not *of* the marriage. With societal changes, it makes no sense to limit the doctrine's application to traditional heterosexual couples. Indeed, our courts have recognized custody standing as an equitable parent extends to same-sex married couples. *Stankevich v Milliron*, 313 Mich App 233 (2015). Generally, the definition of parent applies equally to same-sex and opposite-sex couples. *Sheardown v Guastella*, 324 Mich App 251 (2018).

But the requirement that the child be conceived or born during a marriage, whether same-sex or opposite-sex, seems to remain. Or does it? Although unpublished and therefore not binding precedent, the Michigan Court of Appeals has recognized an exception to the requirement that the child be conceived or born during the marriage.

This writer represented Ray Washburn in his divorce case in Macomb County in the late-90's. Ray and Wendy Washburn raised "their" son together for nine years. Although Ray and Wendy were married shortly after the child was born, the child was neither conceived nor born during their marriage. The marriage broke down and Ray filed for divorce. He sought joint custody and visitation.

Wendy countered by alleging that Ray lacked standing to seek custody or visitation because he was not the child's biological father even though the parties signed an affidavit of parentage in the probate court shortly after the child was born and an amended birth certificate was issued listing Ray as the child's father. Blood tests ordered during the divorce case excluded Ray as the biological father, so he claimed equitable parent status.

Wendy argued that the equitable parent doctrine did not apply because the child

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was not conceived or born during the marriage as seemingly required by the language of the *Atkinson* decision. The trial court rejected Wendy's argument and refused her request to terminate Ray's parental rights to the child. This was largely because both parties agreed Ray and the child always had a mutually acknowledged relationship as father and son and Wendy fostered that relationship during the nine years since the child was born. Wendy appealed.

In a 2-1 decision, the Court of Appeals affirmed the trial court, noting that Ray and Wendy did marry after the child was born, but also emphasized that the parties did what they could to establish Ray as the child's father by signing a sworn affidavit of parentage[2] and having a new birth certificate[3] issued naming Ray as the father. *Washburn v Washburn*, COA No. 204047, decided 6/15/99, majority and dissenting opinions attached as **Appendix 1** and **2**, respectively. The majority and dissenting opinions in *Washburn* are attached. The presiding judge on the COA panel, and a vote to affirm the trial court, was the late Hon. Martin M. Doctoroff, an AAML Fellow and member of the Michigan Chapter.

It is worth noting that those options have always been available to heterosexual couples. However, it would have been impossible under Michigan law for a same-sex couple pre-*Obergefell* to sign an affidavit of paternity (now called an acknowledgement of parentage) or have an amended birth certificate issued identifying one of them as their child's "father." These options were not available to Ms. Pueblo and Ms. Haas solely because of their sexual orientation under then-existing Michigan law.

Ms. Pueblo Should Be Recognized as the Child's Equitable Parent: The trial court dismissed Ms. Pueblo's custody action on summary disposition for lack of standing. For that reason, there is no evidentiary record to cite. However, because it was a decision on summary disposition, the facts should be viewed in the manner most favorable to Ms. Pueblo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019).

There is no reasonable dispute that Ms. Pueblo, like Ray Washburn before her,

[2] Under prior MCL 700.111(4)(a), now called an "Acknowledgement of Parentage under MCL 722.1001 et seq.
[3] Under former MCL 700.111(4)(b), now MCL 722.1005(3).

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satisfies each of the *Atkinson* equitable parent doctrine requirements - except that in neither case was the child was conceived and born during a valid marriage to the child's mother. As a heterosexual man, there was no legal impediment to Ray taking the steps needed to establish and preserve his parental rights. He could join with Wendy and sign an affidavit of paternity. He and Wendy could also request an amended birth certificate listing Ray as the child's father. Because there was no legal impediment to doing these things, Ray was able to continue being a parent to a child he helped raise for the nine years since the child's birth.

Ms. Pueblo, on the other hand, could not do these things under the law that existed during her relationship with Ms. Haas. Nor could she have married Ms. Haas during their relationship, even if it was after the child's birth as happened in *Washburn*. Instead, the parties did what they could to make their relationship with one another and to the child apparent to the world. They underwent a commitment ceremony before the child was conceived and born to make their marriage-like relationship apparent to friends, family, and others. When the child was born, they complete what forms they could to list Ms. Pueblo as one of the child's two parents.

It is illustrative that the *Atkinson* panel found it equitably necessary to reverse the trial court and recognize Jim Atkinson's parental rights "under these circumstances and remand this case in order to allow the circuit court to reevaluate custody and visitation, treating plaintiff as a natural parent…." *Atkinson v Atkinson*, 160 Mich App 601, 609 (1987). In its sound discretion, a court may grant equitable relief where a legal remedy is not available. *Tkachik v Mandeville*, 487 Mich 38, 45 (2010). Equity molds its decrees to "do justice amid all the vicissitudes and intricacies of life." *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151, 163 (1959).

Under the circumstances of this case, the trial court and Court of Appeals should be reversed, Ms. Pueblo should be granted equitable parent status, and the custody issue should be remanded to the trial court as it was in *Atkinson* to "reevaluate custody and visitation, treating plaintiff as a natural parent…." Both parties will then have the opportunity to present evidence as to what custody and parenting time arrangement is in

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the best interests of their child.

The Parameters of Expansion of the Equitable Parent Doctrine Should Be Guided by the Facts and Circumstances of Each Case: In the AAML Michigan Chapter's discussion of the position to take as amicus in this case, several members advocated to expand so-called "third party" standing in child custody cases. Others believed the marriage requirement in *Atkinson* should be struck altogether. And there was a contingent who argued that marriage remains the foundation of society and if entering into a marriage was legally possible for persons seeking equitable parent status, as it was not in this case, the requirement should stand subject to legislative action to codify or expand the doctrine or provide for third party standing beyond what currently exists in the Child Custody Act.

However, in the end, the consensus was that we should keep our focus narrowly on the facts of each case. Expansion of an equitable doctrine should be based on the equities of the particular case to which the doctrine is applied. In other words, we should honor the "under these circumstances" language of the *Atkinson* decision. It was agreed by our members that the circumstances ***of this case*** compel a finding that Ms. Pueblo is the child's equitable parent and that she should have the same rights as the child's natural parent.

This particular fact-pattern may resolve itself over time as the universe of Michigan same-sex couples with children unable to marry pre-*Obergefell* shrinks and ultimately disappears. While we sympathize and don't necessarily disagree with the broader policy arguments made by other amici, we opted to focus on the origins and purpose of the equitable parent doctrine itself and not stray too far afield. That is especially true given the AAML Michigan Chapter's central role in creating the doctrine by our members, both as advocates and as jurists.

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Conclusion/Relief Requested

We urge the Court to recognize and honor the original intent of the equitable parent doctrine to do justice under the circumstances of each case and apply the doctrine to this case so that plaintiff-appellant is granted legal standing as an equitable parent. On remand to the trial court, she and defendant-appellee may present evidence on the child's best interests and the trial court may then fashion a custody and parenting time arrangement that best suits the needs and welfare of this child.



By:_____ Dated: March 24, 2023

Scott Bassett (33231)
Attorney for Amicus Curiae, Michigan Chapter of AAML

The countable words in this brief are 3363 and the brief otherwise complies with the applicable court rules.

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Appendix to Brief Amicus Curiae on Behalf of Michigan Chapter of American Academy of Matrimonial Lawyers (AAML)

1. *Washburn v Washburn*, COA No. 204047, Majority (Unpublished) 1
2. *Washburn v Washburn*, COA No. 204047, Dissent (Unpublished) 5

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STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND CHARLES WASHBURN,

Plaintiff-Appellee,

v

WENDY RENEE WASHBURN,

Defendant-Appellant.

UNPUBLISHED
June 15, 1999

No. 204047
Macomb Circuit Court
LC No. 94-002327 DM

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by leave granted from a judgment of divorce declaring that plaintiff is the equitable parent of nine-year-old Justin and thereby allowing plaintiff visitation with the child. We affirm.

Defendant gave birth to Justin on April 19, 1990. The first birth certificate, issued shortly after Justin's birth, did not name the father. However, the parties married on May 18, 1990, and a second birth certificate was issued naming plaintiff as the father. The parties also filed an affidavit of parentage in the probate court acknowledging that plaintiff was Justin's father.

During the divorce proceedings, blood tests established that plaintiff is not Justin's biological father. Defendant conceded that plaintiff and Justin had always had a mutually acknowledged relationship as father and son and that she had fostered this relationship. Nevertheless, defendant requested that plaintiff's parental rights be terminated because he was not a "good role model" in that he had been abusive toward her and had stolen from employers. Plaintiff argued that his parental rights should not be terminated, claiming parentage under the "equitable parent doctrine" established in *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987).

On appeal, defendant contends that the trial court abused its discretion when it declared that plaintiff is Justin's equitable parent. We disagree. When reviewing a child custody matter, this Court must affirm the decision of the trial court unless its factual findings are against the great weight of the evidence, its discretionary rulings demonstrate a palpable abuse of discretion, or it has made a clear legal error with regard to a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571

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NW2d 524 (1997); *Soumis v Soumis*, 218 Mich App 27, 33; 553 NW2d 619 (1996). Accordingly, this Court must not substitute its judgment for that of the trial court 'unless the evidence 'clearly preponderate[s] in the opposite direction.' " *Fletcher*, *supra* at 879, quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959).

Under the "equitable parent doctrine" as promulgated by this Court in *Atkinson*, *supra* at 608-609:

> 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.

Defendant first contends that the equitable parent doctrine is not applicable because plaintiff knew that he was not Justin's father from the time that defendant notified him of the pregnancy, an allegation which is disputed by plaintiff. However, whether or not plaintiff knew that he was not Justin's father is irrelevant to the determination of equitable parent status. "There is no additional factor in the *Atkinson* test requiring that the husband have no knowledge of the fact that his paternity may be in question." *Soumis*, *supra* at 33. Therefore, the fact that plaintiff arguably knew that he was not Justin's father all along does not prevent application of the equitable parent doctrine.

We note that this Court has recently declined to apply the equitable parent doctrine in a situation in which the child was not born or conceived during marriage, as is true in the case at bar. *Van v Zahorik*, 227 Mich App 90; 575 NW2d 566 (1997), lv gtd 458 Mich 865 (1998). However, the *Van* Court based its decision on the fact that the parties had never married, emphasizing the lack of a "legally recognized relationship" between the child's mother and the putative father and noting its concern that "multiple third parties" with "no legal relationship to the mother or child" might flood the courts asking for equitable parent status. *Id.* at 97-99. On the contrary, in the instant case, the parties were married from the time Justin was one month old until he was four years old. Additionally, unlike the parties in *Van*, here the parties executed a sworn affidavit of parentage, as well as a birth certificate, declaring that plaintiff is Justin's father. Therefore, because *Van* is factually distinguishable from the case at bar, we find that this Court is not required by MCR 7.215(H) to apply its holding in this matter to deny plaintiff the benefit of the equitable parent doctrine.

Defendant next contends that the trial court erred in considering plaintiff's actions before the divorce action commenced as a factor in its decision that plaintiff "is willing to take on the responsibility of paying child support," the third *Atkinson* requirement. In so finding, the trial court stated that plaintiff's poor child support payment record during the two years following the institution of divorce proceedings must be weighed against his provision of support for the four previous years. In *York*,

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supra, this Court held that the trial court had "misapplied the test" for determining equitable parent status and erred in rejecting the defendant's equitable parent claim when it "focused only on defendant's actions *after* the filing of the divorce action" and "ignored defendant's role in supporting the child for the first four years of his life, before plaintiff filed for divorce . . . ." *Id*. at 335-336. Pursuant to *York*, therefore, the trial court did not err in considering, and, indeed, was required to consider, plaintiff's actions in providing support for Justin during the years prior to the filing of the divorce action.

Defendant also asserts that the trial court erred in considering plaintiff's payment of child support after trial commenced as sufficient evidence of fulfillment of the third *Atkinson* factor. However, defendant fails to provide any support for this position, and it is not apparent that the court clearly erred in considering the fact that plaintiff had paid nearly all of the child support he was charged during 1996. While the trial court conceded that the payments were largely made after plaintiff sought equitable parent status, it apparently believed that plaintiff's recent payment record, combined with the support he provided Justin during the parties' marriage, provided sufficient proof that he was willing to take on the responsibility of paying child support.

Next, defendant contends that the court erred in finding that plaintiff had met the second *Atkinson* requirement; that is, that he "desires to have the rights afforded to a parent." Defendant contends that the evidence of plaintiff's bizarre behavior and manipulation of the truth shows that, aside from visitation rights, he does not desire to have any other rights of a parent, such as that of a role model, friend, advisor, and source of security. The trial court found that the defense witnesses' testimony "seriously attacked the [credibility] of the plaintiff" and stated its belief that "plaintiff is not a reputable person of good character." The trial court found, however, that

> despite all of that testimony, it was clear to this Court that the plaintiff father has expressed and acted upon his desire to be the parent of Justin. At the time of the birth, he visited the child at the hospital, [sic] the parties lived together as husband and wife and parents of Justin for approximately four years with mutual sharing of parental responsibilities. The plaintiff has continued to request his rights as a parent for visitation with Justin. Regardless of his credibility on the issues presented to the Referee and to this Court, his credibility on this issue by his actions and statements establish [sic] his desire to have the rights afforded to a parent.

The evidence of plaintiff's unsavory behavior, while substantial, does not "clearly preponderate" against the trial court's finding that plaintiff desires to have the rights afforded to a parent. *Fletcher*, *supra* at 879.

Defendant next contends that plaintiff is precluded under MCL 722.26c; MSA 25.312(6c) from having standing to claim parental rights in this case. However, defendant's reliance on this statute is misplaced for a number of reasons. Contrary to her assertion, this provision does not introduce "new restrictions" into the Child Custody Act. Rather, it "expand[s] the class of persons eligible to bring a custody action." *In re Ramon*, 208 Mich App 610, 612; 528 NW2d 831 (1995). Furthermore, it is wholly inapplicable to the case at bar. First of all, the statute applies to third persons who wish to "bring an action for custody of a child." Plaintiff did not "bring an action for custody." Rather, he filed

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for divorce, and, pursuant to MCL 552.16; MSA 25.96, the trial court was authorized upon entering a judgment of divorce to enter such orders as it considered just and proper concerning the custody of the parties' minor children. *Sirovey v Campbell*, 223 Mich App 59, 76; 565 NW2d 857 (1997). Moreover, custody was not even at issue in the case at bar. Rather, it was stipulated prior to trial that defendant would have sole legal and physical custody of Justin.

Finally, defendant contends that it is not in Justin's best interest to allow plaintiff to have visitation. The child's best interests are of major concern in determining whether a party is an equitable parent. *York*, *supra* at 338. While the trial court stated its belief that plaintiff was not a "reputable person of good character," it further stated that "factors such as this are present in every marriage resulting in a breakdown and divorce and parents are not deprived of parenthood of minor children because of such actions." Defendant conceded that Justin had never come to any harm when in the care of plaintiff. Plaintiff's testimony and actions in fighting for equitable parent status show that he is committed to fatherhood. Defendant is the only father Justin has known. It cannot be said that terminating plaintiff's parental rights at this point—after he has had a father-child relationship with Justin for over eight years—could be in the child's best interest. For these reasons, we agree with the trial court's determination that plaintiff is Justin's equitable parent.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski

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COURT OF APPEALS

RAYMOND CHARLES WASHBURN,

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Defendant-Appellant.

UNPUBLISHED
June 15, 1999

No. 204047
Macomb Circuit Court
LC No. 94-002327 DM

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

WHITBECK, J. (*dissenting*).

I very reluctantly dissent. While I believe that the result reached by the majority in affirming the trial court's recognition of plaintiff as an equitable parent of Justin is clearly preferable, both as a matter of abstract justice and concretely in terms of Justin's best interests, I nevertheless conclude that this result is barred by application of the prior controlling decision in *Van v Zahorik*, 227 Mich App 90; 575 NW2d 566 (1997), lv granted 458 Mich 865 (1998).[1] Thus, I would reluctantly reverse the trial court's holding that plaintiff is entitled to equitable parent status.[2]

I. The Applicability of *Van*

I cannot join my colleagues' determination that *Van*, *supra*, is not controlling in this case as I believe that they read *Van* too narrowly. As part of its dispositive reasoning, the *Van* panel stated:

> Consequently, because *Hawkins* [*v Murphy*, 222 Mich App 64; 565 NW2d 674 (1997)] did not establish a rule of law on the issue before us, there is no authority requiring us to extend the equitable parent doctrine to a situation where the person seeking to assert the doctrine was not married to the natural parent of the child *at the time the child was born or conceived*, and we think that public policy and judicial restraint prevent us from doing so. [*Van*, *supra* at 95 (emphasis added).][3]

Thus, in my view, the *Van* panel held as a matter of law, based on public policy and judicial restraint, that the equitable parent doctrine is not to be applied with regard to a child where the person seeking to invoke the doctrine was not married to a biological parent of the child *at the time of the child's*

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conception or birth. The *Van* panel also made some comments about the lack of "a legally recognized relationship" between the plaintiff man and defendant woman in that case that fit the particular facts of *Van* more easily than the case at hand because the parties in *Van* never married, see *Van, supra* at 97-98. However, that does not change the holding in *Van* that a claim by a party to equitable parent status to a child will not be recognized where the party was not married to a biological parent of the child *at the time of the child's conception or birth.* In this case, it is undisputed that the parties were not married at the time of Justin's conception or birth. Accordingly, I conclude that, under *Van*, plaintiff may not be recognized as an equitable parent to Justin.[4]

It is true, as emphasized by the majority, that this case is "factually distinguishable" from *Van*, particularly because the parties at hand married when Justin was about one-month-old, while the parties in *Van* never married. See *Van, supra* at 92. However, *any two cases* will differ factually on various bases. If the mere presence of factual differences is enough to justify failing to apply established precedent, the concept of binding precedent central to our jurisprudence would be rendered meaningless. MCR 7.215(H)(1) provides:

> A panel of the Court of Appeals must follow *the rule of law* established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule. [Emphasis added.]

Despite the important and remarkable factual differences between this case and *Van*, "the rule of law" enunciated in *Van* that a person who was not married to a biological parent of a child at the time of the child's conception or birth cannot be recognized as an equitable parent of the child is applicable to this case. Because *Van* was a published opinion issued after November 1, 1990, this panel is bound by *Van*.

II. My Disagreement With the Controlling Portion of *Van*

I believe that the majority errs legally by failing to apply *Van, supra*, which absolutely limits the availability of a claim of equitable parent status to a party who was married to a biological parent of the involved child at the time of the child's conception or birth. However, were I in the majority, I would follow the pertinent holding of *Van* in an opinion for publication only because I believe that result is required by MCR 7.215(H)(1). Thus, I would invoke the "conflicting opinion" procedure of MCR 7.215(H)(2)-(3). Accordingly, I explain below my rationale for disagreeing with the pertinent holding in *Van*.

A. The Overarching Concern - The Best Interests of the Child

As then Judge Corrigan wrote for the unanimous panel of this Court in *Heid v AAASulewski*, 209 Mich App 587, 595; 532 NW2d 205 (1995), "[i]n any custody dispute, our overriding concern and the overwhelmingly predominant factor is the welfare of the child." The majority in *Van* stated "the overriding concern must be the best interest of the child," *Van, supra* at 98. However, the holding in *Van*, by categorically precluding a recognition of equitable parent status in favor of a person who is not

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married to a biological parent of the child at the time of the child's conception or birth, fails to serve the best interest of children. Using the facts of this case as a reference, Justin was only about one-month-old when the parties married. As my colleagues so rightly point out, plaintiff is the only father that Justin had ever known. While there *may* be some reason for concern about this particular plaintiff's parenting abilities in light of aspects of his past conduct,[5] the presence or absence of such concerns is immaterial to the holding in *Van*. One may easily imagine a circumstance in which a woman and man married about a month after she bore a child fathered by a different man and after which the husband acted as an excellent parental figure to that child and was treated by the mother and child as the child's father, while the biological father played no role in raising the child. By the time the child was nine-years-old (Justin's current age), that child would almost certainly – and rightly – regard the man who participated in raising him, and who was for practically as long as the child could remember the legal husband of the child's mother, as his father. Failing to recognize this would deny the reality of emotional bonds as they typically form between human beings, in particular between parents and children. I believe that it is utterly inconsistent with concern for the best interests of the child to allow a biological mother in such circumstances to destroy unilaterally the emotional bond between the child and the man who, despite biology and legal formality, has been in practical terms the child's father.

Further, recognition of the equitable parent doctrine as extending to some circumstances in which the party claiming equitable parent status was not married to a biological parent of the child at the time of the child's conception or birth is consistent with concerns that led this Court to adopt the equitable parent doctrine in *Atkinson v Atkinson*, 160 Mich App 601, 608-612; 408 NW2d 516 (1987). The unanimous panel in *Atkinson* referred to this Court's earlier decision in *Johnson v Johnson*, 93 Mich App 415, 419-420; 286 NW2d 886 (1979), in which this Court held that a man who married his wife knowing that she was pregnant with a child who may or may not have been fathered by him and who thereafter held himself out as the father and supporter of the child for several years was estopped from denying paternity of the child. *Atkinson, supra* at 609-610. The *Atkinson* panel further stated:

> It is the logical extension of *Johnson* to recognize that, under certain circumstances, a person who is not the biological father of a child 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. Such circumstances are present here. Baird was conceived and born during the parties' marriage. Plaintiff and Baird have always had a close and affectionate father-son relationship. *Plaintiff is the only father Baird has ever known and is active in Baird's life. He desires to have the relationship continued and to have the rights accorded to a father, along with the responsibility of supporting the child. Defendant acknowledged at trial that plaintiff related to Baird as a father* and that she waited until answering a question in interrogatories filed by plaintiff in the instant divorce action before asserting that plaintiff was not Baird's biological father. Under this set of facts, plaintiff is clearly entitled to be treated as a natural father under the doctrine of equitable parent. [*Id.* at 610-611 (emphasis added).]

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Similarly, in the case at hand, plaintiff was the only father that Justin knew and continues to seek to have the legal rights – and responsibilities – attendant to being recognized as a legal parent to Justin. Also, defendant acknowledged below that plaintiff acted as Justin's father since Justin's birth, that she encouraged such a relationship, and that Justin considered plaintiff to be his father. In my view, there can be no serious question but that, aside from legal formalities and despite plaintiff's human frailties, plaintiff is Justin's "father." I find it self-evident that it is insignificant to this father-child relationship that the parties married each other about one month after Justin's birth, rather than one day before Justin's birth.

In light of the foregoing considerations, were this panel free to properly do so, I would recognize the equitable parent doctrine as extending at least to circumstances where, as here, a man claiming equitable parent status has married the biological mother of the involved minor child shortly after the child's birth and the man fulfills the three pronged test of *Adkinson, supra* at 608-609. I would recognize this extension, even though the man was not married to the biological mother of the child when the child was conceived or born.

B. Deference to the Legislature

The *Van* majority stressed the principle of deference to the Legislature. I strongly agree with the general principle of deference to the Legislature where it has spoken through duly enacted statutes. However, the Legislature has *not* spoken as to the scope of the equitable parent doctrine. This Court first adopted the equitable parent doctrine in *Atkinson, supra,* in 1987. Since that time, the Legislature has not acted to override the equitable parent doctrine or otherwise define the scope of situations in which equitable parent status may be recognized, despite having made various amendments to the Child Custody Act, MCL 722.21 *et seq.;* MSA 25.312(1) *et seq.* "[W]here legislation has been authoritatively construed by the courts, then retained by the Legislature, we will find legislative concurrence." *Rogers v Detroit,* 457 Mich 125, 140; 579 NW2d 840 (1998). Quite similarly, despite making various amendments to the Child Custody Act since this Court first recognized the equitable parent doctrine, the Legislature has not acted to define the scope of the doctrine or to abolish equitable parenthood.

III. Conclusion

I conclude that a proper application of *Van, supra,* would, regrettably, require a holding that defendant lacks a cognizable legal claim to be an equitable parent of Justin. This conclusion is entirely based on the fact that the parties were not married to each other at the time of Justin's conception or birth. Under the pertinent holding of *Van,* there is a flat ban on recognizing a claim of equitable parent status advanced by a person who was not married to a biological parent of the involved minor child at the time of the child's conception or birth. Unless *Van* is overruled in pertinent part by the Michigan Supreme Court after release of this opinion but before consideration of an application for leave in this case, I urge the Michigan Supreme Court to consider this case, if leave to appeal is sought, but to *affirm* the result of the majority opinion by taking the step that we cannot: overruling the pertinent portion of *Van* and holding that, at least in circumstances like those present in this case, the equitable

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parent doctrine may be applied even though the party claiming equitable parent status was not married to a biological parent of the involved child when the child was conceived or born.

While I concur with much of the sentiment of my colleagues, I respectfully and reluctantly dissent from their opinion.

/s/ William C. Whitbeck

[1] I note that the Michigan Supreme Court, which granted leave to appeal from this Court's decision in *Van*, heard oral argument in that case on March 9, 1999 (ironically the same date that this panel heard oral argument in the present case). Thus, whether the pertinent holding of this Court in *Van* will continue to remain good law for much longer is an open question. However, at this point, the holdings in *Van* remains in full force. "[A] Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2).

[2] I note that the trial court's decision in this case was rendered before this Court released its decision in *Van, supra*. Given that I believe *Van* was wrongly decided at least with regard to its pertinent holding, I obviously do not believe the trial court should be criticized for reaching what appears to me to have been the right decision at the time that it was made.

[3] Similarly, the *Van* panel stated later in its opinion:

> In sum, the equitable parent doctrine has previously been applied only in situations where a child was born or conceived during a marriage, to convey equitable parenting status on a husband who was not the biological father of the child. Because of the magnitude of the policy considerations involved in extending application of the 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. [*Van, supra* at 99.]

[4] While not reached by the majority, I would also reject plaintiff's alternative argument based on equitable estoppel. Under *Van, supra* at 100-102, equitable estoppel may not be invoked by a so-called "third party" against a biological parent of a child to obtain visitation rights to the child.

[5] Nevertheless, the fact that plaintiff sought and obtained equitable parent status below and is defending that status in this appeal is, as suggested by my colleagues, a strong indication of his love and concern for Justin.