RECEIVED by MSC 2/8/2022 5:38:14 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

CARRIE PUEBLO,

Plaintiff-Appellant,

Supreme Court Case No. _____

Court of Appeals Case No. 357577

v

Lower Court Case No. 2020-6382-DC

RACHEL HAAS,

Defendant-Appellee.

Reh Starks (P76689)
STARKS LAW, PLC
Attorney for Plaintiff-Appellant
119 North Church Street, Suite 202
Kalamazoo, MI 49007
Ph: (269) 216-6006

George T. Perrett (P42751)
BUTLER, TOWESON & PAYSENO, PLLC
Attorneys for Defendant
202 North Riverview Drive
Parchment, MI 49004
Ph: (269) 349-7686

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 2/8/2022 5:38:14 PM

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii
JURISDICTIONAL STATEMENT v
STATEMENT OF QUESTIONS vi
STATEMENT OF FACTS 1
STANDARD OF REVIEW 8
GROUNDS FOR SUPREME COURT APPEAL 9
LAW AND ARGUMENT 10
I. THIS ISSUE INVOLVES A LEGAL PRINCIPLE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE. 10
A. BUT FOR MICHIGAN LAW PREVIOUSLY UNCONSTITUTIONALLY PROHIBITING SAME-SEX MARRIAGE, THE PARTIES WOULD HAVE BEEN MARRIED, THE PARTIES' MINOR CHILD WOULD HAVE BEEN BORN IN WEDLOCK, AND THE EQUITABLE-PARENT DOCTRINE WOULD APPLY. 10
APPLICABLE LAW 10
ANALYSIS 11
1. Proffered Remedy 16
II. THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE. 16
B. MS. PUEBLO HAS STANDING BECAUSE THE PARTIES' COMMITMENT CEREMONY CREATED AN EQUITABLE/DE FACTO MARRIAGE RISING TO THE LEVEL OF A LEGAL MARRIAGE, THEREBY FORMING GROUNDS FOR MS. PUEBLO TO BE LEGALLY RECOGNIZED AS THE MINOR CHILD'S FATHER/PARENT BY THE EQUITABLE-PARENT DOCTRINE. 16
APPLICABLE LAW 17
ANALYSIS 18
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. 18
2. The husband desires to have the rights afforded to a parent. 19
3. The husband is willing to take on the responsibility of paying child support. 19
4. Proffered Remedy 19
C. MS. PUEBLO HAS STANDING BECAUSE SHE IS A "NATURAL PARENT" AS DEFINED BY MCL 722.22(i), OF THE CHILD CUSTODY ACT AND AS DEFINED IN LEFEVER V MATTHEWS, 2021 MICH. APP. LEXIS 2109; 2021 WL 1232747 (FOR PUBLICATION) 21

1. Child Custody Act of 1970 21
APPLICABLE LAW 21
a. MCR 2.116(C)(5) 21
i. Child Custody Act of 1970 21
ANALYSIS 22
2. LeFever v Matthews 22
APPLICABLE LAW 22
ANALYSIS 24
D. MS. PUEBLO'S GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY DISMISSAL OF HER CASE AND BY THE FINDING THAT A PHYSICAL OR BIOLOGICAL TIE MUST EXIST FOR MS. PUEBLO TO MAKE A CLAIM FOR PARENTING TIME. 27
APPLICABLE LAW 27
ANALYSIS 28
CONCLUSION AND RELIEF REQUESTED 31

RECEIVED by MSC 2/8/2022 5:38:14 PM

RECEIVED by MSC 2/8/2022 5:38:14 PM

INDEX OF AUTHORITIES

Page

Cases

Atkinson v Atkinson, 160 Mich App 601; 408 NW2d 516 (1987) 12, 17

Barnes v Jeudevine, 477 Mich 1201, 720 NW 2d 748 (2006) 13

Bowie v Arder, 190 Mich App 571 (1992) 12

Carey v Population Serv Int'l, 431 US 678, 685 (1977) 27

DMT v TMH, 129 So 3d 320, 338 (FLA 2013) 27

Eisenstadt, Sheriff v Baird, 405 US 438, 453 (1972) 27

Heltzel v Heltzel, 248 Mich App 1, 28; 638 NW2d 123 (2001) 8

In Re Anjoski, 283 Mich App 41, 770 NW 2d 1 (2009) 13

Lake v Putnam, 316 Mich App 247, 260; 894 NW2d 62 (2016) ..... passim

LeFever v Matthews, 2021 Mich App LEXIS 2109; 2021 WL 1232747 ..... passim

Mabry v Mabry, 499 Mich 997; 882 NW 2d 539 (2016) 10, 14, 31, 32

Michael H v Gerald D, 491 US 110, 109 S Ct 2333 (1989) 12

MLB v SLJ, 519 US 102 (1996) 28

Obergefell v Hodges, 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015) ..... passim

Planned Parenthood of SE Pennsylvania v Casey, 505 US 833, 851 (1992) 27

Porter v Overton, 214 Mich App 95 (1995) 12

Quillion v Walcott, 434 US 246, 255 (1978) 28

Sheardown v Guastella, 324 Mich App 251, 920 NW 2d 172 (2018) 13

Snyder v Mass., 291 U.S. 97 (1934) 12

Stankevich v Milliron, 313 Mich App 233; 882 NW2d 194 (2016) 13, 17

Terry v Alfum, 233 Mich App 498, 501; 592 NW2d 791 (1999) 8

Van v Zahorik, 460 Mich 320, 330-331; 597 N.W. 2d 15 (1999) 13

York v Morofsky, 225 Mich App 333, 571 NW 2d 524 (1997) 13

Zablocki v Redhail, 434 US 374, 381-390 (1978) 28

Statutes

MCL 700.2114(1)(a) 22

MCL 722.22(i) ..... v, 21, 22

MCL 722.25(1) 21, 22

MCL 722.26(1) 21

Rules

MCR 2.116(C)(5) ..... v, 7, 21

MCR 2.116(C)(8) ..... v, 7

MCR 7.303(B)(1) v

MCR 7.305(B) 9

MCR 7.305(B)(3) 9

MCR 7.305(B)(5)(a) 9

MCR 7.305(C)(2) v

RECEIVED by MSC 2/8/2022 5:38:14 PM

RECEIVED by MSC 2/8/2022 5:38:14 PM

JURISDICTIONAL STATEMENT

This is an Application for Leave to Appeal from the Court of Appeals *unpublished* Order 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 MCR 2.116(C)(8).

This Honorable Court has jurisdiction pursuant to MCR 7.303(B)(1); This Application for Leave to Appeal is timely filed pursuant to MCR 7.305(C)(2).

RECEIVED by MSC 2/8/2022 5:38:14 PM

STATEMENT OF QUESTIONS

1. But for Michigan law previously unconstitutionally prohibiting same-sex marriage, would the parties have been married and their child have been born in wedlock, therefore rendering the Equitable-Parent Doctrine applicable?

Trial Court and Appellate Court answered: No.

Ms. Pueblo answers: Yes.

2. Did the parties' commitment ceremony create an equitable marriage rising to the level of a de facto legal marriage, thereby forming grounds for Ms. Pueblo to be legally recognized as an equitable parent thus giving Ms. Pueblo standing to file for custody and parenting time?

Trial Court and Appellate Court answered: No.

Ms. Pueblo answers: Yes.

3. Is Ms. Pueblo a "natural parent" as defined by MCL 722.22(i) of the Child Custody Act and as defined in *LeFever v Matthews*, 2021 Mich App LEXIS 2109; 2021 WL 1232747 (for publication), thereby giving Ms. Pueblo standing to file for custody and parenting time?

Trial Court and Appellate Court answered: No.

Ms. Pueblo answers: Yes.

4. Were Ms. Pueblo's guarantees of due process and equal protection violated by the Trial Court's and Court of Appeals' finding that a physical, biological, or genetic tie must exist for Ms. Pueblo to make a claim for parenting time?

Trial Court answered: Failed to answer.

Appellate Court answered: No.

Ms. Pueblo answers: Yes.

RECEIVED by MSC 2/8/2022 5:38:14 PM

STATEMENT OF FACTS

Ms. Pueblo and the Defendant-Appellee were involved in a long-term, same-sex relationship beginning near the early 2000s. (App p 12a). On or about June 30, 2007, the parties participated in a Commitment Ceremony in Lansing, Michigan.[1] Reverend Kent Lederer of Unity of Greater Lansing presided over the ceremony. This ceremony was witnessed by Amber Gonzales and her wife, Mandy Costello. Reverend Lederer called this a holy union ceremony. That ceremony would roughly go as follows:

Unity of Greater Lansing
Holy Union Ceremony
MICHIGAN GAY PRIDE
(2007-2013)

Opening/Processional Song:

Minister: *(Invocation)* We're now in the presence of pure Being, and immersed in the Holy Spirit of life, love and wisdom. Divine Love flows through all of us—as we come together in this place today—to bless and celebrate the joining of these persons in Holy Union.

Minister: *(Charge to the Congregation)* *To those of you in attendance today:* True commitment is more than the joining of two people. In its right relation, it's the uniting of two souls who are already attuned to each other. Today, we come together to bear witness of the entry into a closer relationship of these loved and special friends standing before us.

Minister: *(Charge to Couple)* *To each couple who stands before me:* The two of you are entering upon an act of pure faith in which you give of yourself to the utmost, in which you may lose the only self you've ever known, for the one that is to be when you have called if forth through the thousand thoughts and words and acts of love that your commitment means. You must never forget or deny the vision you now see; you must resolve that it never be blurred by the commonplace experience of life. Be unmoved in your devotion to each other.

Remain confident and hopeful. Grasp firm the love you now share.

Minister: *Please turn and face your partner, as you now affirm your intent:* Do you take the person beside you as your life-partner-- to love them, to encourage them, and to inspire them to their highest good in all times? *And the answer is:* "I do."

Couples: I do.

Minister: *(Ring Exchange)* *If you have rings, please bring them forward. If you do not have rings, then please repeat the vows as you will hear it shortly.*

These rings represent the endless spiritual love that links you together, spirit to spirit and soul to soul. They represent in their circle, your unity and your oneness. Let them always be a reminder of your commitment made this day to one another.

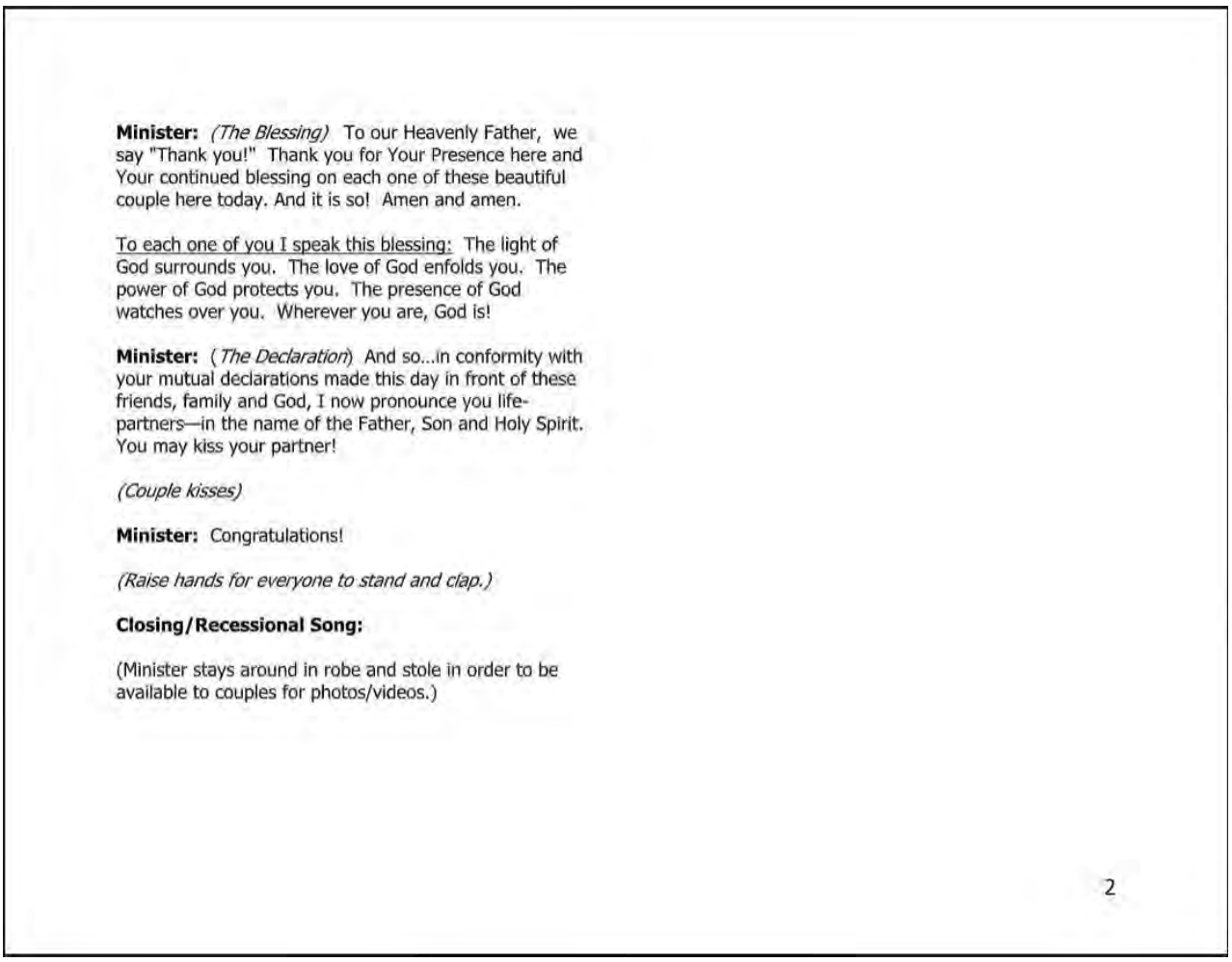
Minister: *Please place a ring on the finger of your partner's hand. First one Partner, then the other.*

And then...in unison and together...please look at your partner and speak their first name: ------ As you hold hands and look at one another...please repeat these words after me. (Speak them directly to your partner and not to me.) *Together:* "With my soul... I will honor... uplift... support... encourage... and love you... with all of my mind... and my heart."

1

[1] Same-sex marriage was not legal in Michigan until the *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015) ruling came down from our SCOTUS on June 26, 2015. Nonetheless, the parties did everything legally in their power in 2007 to commit as lifelong partners.

RECEIVED by MSC 2/8/2022 5:38:14 PM



Minister: *(The Blessing)* To our Heavenly Father, we say "Thank you!" Thank you for Your Presence here and Your continued blessing on each one of these beautiful couple here today. And it is so! Amen and amen.

To each one of you I speak this blessing: The light of God surrounds you. The love of God enfolds you. The power of God protects you. The presence of God watches over you. Wherever you are, God is!

Minister: (*The Declaration*) And so...in conformity with your mutual declarations made this day in front of these friends, family and God, I now pronounce you life-partners—in the name of the Father, Son and Holy Spirit. You may kiss your partner!

(Couple kisses)

Minister: Congratulations!

(Raise hands for everyone to stand and clap.)

Closing/Recessional Song:

(Minister stays around in robe and stole in order to be available to couples for photos/videos.)

2

(Id p 13a)

For all intents and purposes, from June 30, 2007, to present day, the parties were equitably, or de facto, married; it was the parties' intent to be and portray themselves as a wedded couple. The parties wore wedding bands, lived together, paid bills together, and—most importantly—chose **together** to become pregnant via in vitro fertilization ("IVF") and rear that child in the course of their equitable, de facto marriage (Id p 14a).

After much thought and debate, the parties agreed that Defendant-Appellee would undergo IVF. An excerpt from Appellee's Answer to Plaintiff's Summons & Complaint states as follows:

> 3. The parties were in a long-term committed relationship when they decided to use in-vitro fertilization so as to conceive a child.

RECEIVED by MSC 2/8/2022 5:38:14 PM

> ANSWER: Plaintiff lacks legal standing to file this Complaint. Notwithstanding and without waiving this defense, **admit**. (emphasis added) (Trial court record, Answer and Affirmative Defenses to Complaint, p 2).

However, Defendant-Appellee did not undergo IVF until a very careful selection process occurred; by way of further explanation, the parties sought a sperm donor who had strong physical characteristics resembling Ms. Pueblo's so as to ensure their child would have features resembling both parents/the parties. Ms. Pueblo assisted with the IVF process through which the child was conceived (Id p 14a).

Both parties entered into the contract with the IVF clinic. Ms. Pueblo paid for the IVF procedure on her Discover credit card. The successful IVF procedure occurred in approximately December of 2007. The parties entered into an agreement to conceive and raise their child with attendant parental rights and responsibilities. The parties/parents enjoyed prenatal visits together, the parties picked out a name for their child, together they obtained all things baby, and they even indulged in a 4D ultrasound when baby's gestational age was 28 weeks and 2 days. On that 4D ultrasound (below), we see that Defendant-Appellee continues to hold herself out as wife and lifelong partner to Ms. Pueblo by identifying herself as Rachel Haas Pueblo during prenatal medical appointments (Id p 14a).

[Space intentionally blank]

RECEIVED by MSC 2/8/2022 5:38:14 PM

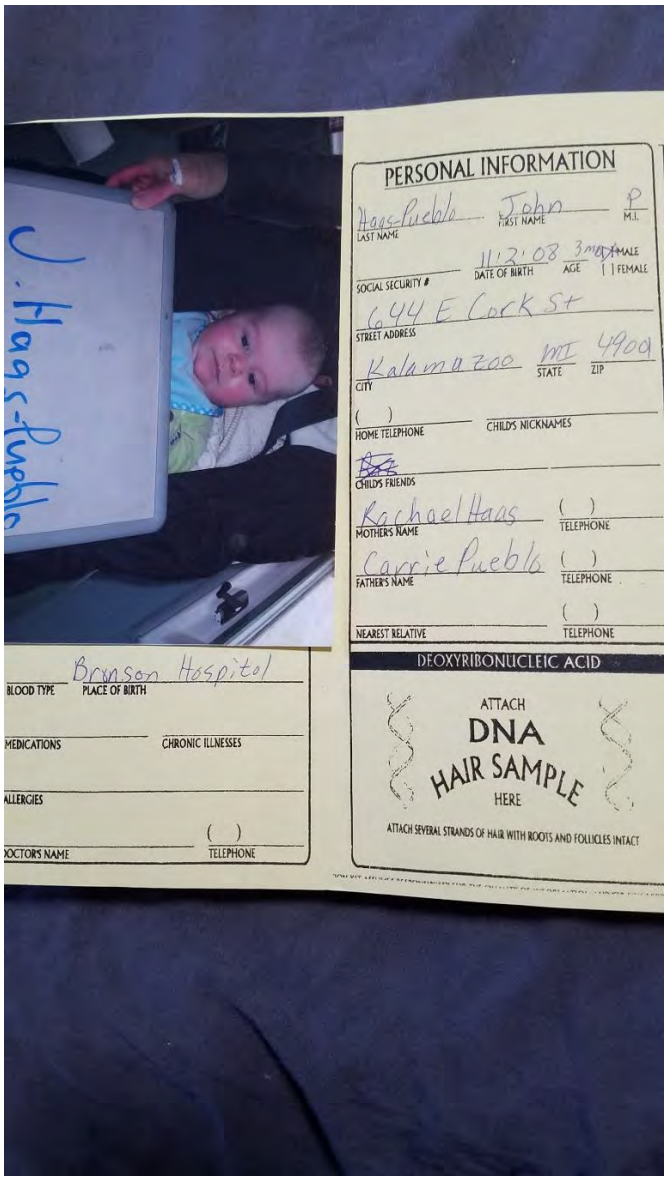


(Id p 15a)

John Paul Haas-Pueblo ("JPHP") was born on November 2, 2008. Ms. Pueblo was present for Defendant-Appellee's labor and JPHP's birth. JPHP's legal name includes both parties' last names, to wit: Haas and Pueblo.[2] . Despite hospital staffs' refusal to allow Ms. Pueblo to be listed on the birth certificate, Defendant-Appellee herself filled out an information card regarding JPHP. The information card Defendant-Appellee Haas personally filled out is seen here (Id p 15a):

[2] On multiple occasions in pleadings and/or responsive pleadings, Defendant-Appellee admits and/or acknowledges that the minor child shares both parties' last name: Haas-Pueblo. See also, paragraph 5 of Answer; paragraphs 2, 3, 6, 7, 8, 9, 10 of affirmative defenses; paragraphs 2 and 4 of motion for summary disposition. (Trial court record, Answer and Affirmative Defenses to Complaint, p 2, 6-7; Appendix 1-2a)

RECEIVED by MSC 2/8/2022 5:38:14 PM



(Id p 16a)

Above, Defendant-Appellee specifically identifies Carrie Pueblo, Plaintiff-Appellant, as JPHP's father.[3]

Up to this point, these facts are uncontested except Defendant-Appellee contests that the parties were married or equitably married (App. p 63a); (App. p 1a); (App p 10a). However,

[3] This directly refutes Defendant-Appellee's answer to paragraph 7 of Ms. Pueblo's Complaint. Based upon this document prepared by Defendant-Appellee in 2008, Ms. Pueblo clearly is JPHP's putative father; therefore, calling into question Defendant-Appellee's credibility.

RECEIVED by MSC 2/8/2022 5:38:14 PM

Defendant-Appellee does ***not*** contest the parties' commitment ceremony, vows exchanged, their intent to hold themselves out as a married couple, wearing wedding bands, living together, paying bills together, and—most importantly—choosing to undergo IVF to have a child as a product of their relationship.

From the date JPHP was born, Ms. Pueblo was present and active as JPHP's putative father. Defendant-Appellee did not begin contesting Ms. Pueblo's status in JPHP's life until the parties were no longer lifelong partners (Id p 16a).

Throughout and after the parties' partnership, the parties shared parental responsibilities and duties equally. Ms. Pueblo has continuously maintained or tried to maintain a strong parental role that included bonding with JPHP (Id p 17a).

In 2014, the parties ended their life-long partnership, but continued to informally share custody and parenting of JPHP (Id p 17a).

On or about February 20, 2016, tragically, JPHP suffered a stroke. Ms. Pueblo continued to assist in the child rearing of JPHP including, but not limited to, being JPHP's putative father; providing love, care, affection, and guidance to JPHP; bonding with JPHP; providing food, clothing, housing, transportation, and other necessities for daily living; providing financial support for JPHP; attending JPHP's healthcare appointments; making medical decisions with Defendant-Appellee regarding JPHP's care; and more. Ms. Pueblo participated in the care and rearing of JPHP until Defendant prevented her from doing so (Id p 17a).

In March of 2017, shortly after the St. Patrick's Day holiday, the Defendant-Appellee contacted Ms. Pueblo; during that contact, Defendant-Appellee aggressively, disrespectfully, and inappropriately demanded that Ms. Pueblo have no future contact with JPHP (Id p 17a).

Defendant-Appellee motioned for summary disposition on two grounds:

RECEIVED by MSC 2/8/2022 5:38:14 PM

1. That Ms. Pueblo lacks standing (MCR 2.116(C)(5)); and

2. For Ms. Pueblo's failure to "state a claim upon which relief may be granted" and that no amendment to pleadings could cure the defect (MCR 2.116(C)(8)). (App. p 37a).

The Trial Court's April 29, 2021, Decision granted Defendant-Appellee's motions for the following reasons:

> Plaintiff and Defendant were never married and Plaintiff is not a legal parent of the minor child involved or related at all to the child. There was no adoption, no judicial establishment of parentage, no Affidavit of Parentage, and Plaintiff has no biological relationship with the minor child. (App. p 35a)

After oral argument was heard in the case at bar, the Court of Appeals issued a decision in the case of *LeFever v Matthews*, Court of Appeals No. 353106, dated April 1, 2021, for publication. The Trial Court did not have *LeFever* before it to consider at the time of rendering its March 8, 2021, Decision. Nonetheless, the *LeFever* decision holds that the Child Custody Act does not define "natural parent" nor legally require a genetic connection between a parent and a child. Thus, the Trial Court erred in requiring adoption, judicial establishment of parentage, Affidavit of Parentage, or a biological relationship with the minor child and, therefore, erred in granting Defendant's MCR 2.116(C)(5) and MCR 2.116(C)(8) motions (App. p 38a).

On June 1, 2021, the Trial Court issued its Decision of the Court Regarding Plaintiff's Motion for Reconsideration wherein it denied Ms. Pueblo's Motion for Reconsideration. Ms. Pueblo timely appealed by right to the Court of Appeals. The Court of Appeals affirmed the Trial Court's decision. Ms. Pueblo now seeks leave to appeal from the Michigan Supreme Court.

RECEIVED by MSC 2/8/2022 5:38:14 PM

STANDARD OF REVIEW

"Whether a party has legal standing to assert a claim constitutes a question of law that is reviewed de novo." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001), citing *Terry v Alfum*, 233 Mich App 498, 501; 592 NW2d 791 (1999).

> As it relates specifically to 'the resolution of a child custody dispute,' the CCA provides that 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' MCL 722.28. A clear legal error occurs when the circuit court incorrectly chooses, interprets, or applies the law. *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014); *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). We review matters of statutory interpretation and constitutional issues de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009).

LeFever v Matthews, 2021 Mich App LEXIS 2109; 2021 WL 1232747.

RECEIVED by MSC 2/8/2022 5:38:14 PM

GROUNDS FOR SUPREME COURT APPEAL

Pursuant to MCR 7.305(B), this Application shows grounds for appeal because "the issue involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3).

Furthermore, this Application shows grounds for appeal "in an appeal of a decision of the Court of Appeals…" because "…the decision is clearly erroneous and will cause material injustice…" (MCR 7.305(B)(5)(a)).

RECEIVED by MSC 2/8/2022 5:38:14 PM

LAW AND ARGUMENT

I. THIS ISSUE INVOLVES A LEGAL PRINCIPLE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

Ms. Pueblo asserts, as though fully set forth herein, all content within Section II.

A. BUT FOR MICHIGAN LAW PREVIOUSLY UNCONSTITUTIONALLY PROHIBITING SAME-SEX MARRIAGE, THE PARTIES WOULD HAVE BEEN MARRIED, THE PARTIES' MINOR CHILD WOULD HAVE BEEN BORN IN WEDLOCK, AND THE EQUITABLE-PARENT DOCTRINE WOULD APPLY.

APPLICABLE LAW

In *Mabry v Mabry*, the Supreme Court denied application for leave to appeal in a same-sex custody case. Chief Justice Bridget Mary McCormack penned a dissent in *Mabry v Mabry*, 499 Mich 997; 882 NW 2d 539 (2016) stating in part as follows:

> I think that this Court 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.
>
> Not surprisingly, this issue is not unique to Michigan. Other state courts have grappled with the implications of *Obergefell* on common-law doctrines akin to our equitable-parent doctrine. Many have already extended similar equitable doctrines to same-sex couples who were prohibited from marrying yet had children during their relationship. These states have provided guidance and workable rules for trial courts under similar doctrines while preserving the constitutional rights of same-sex couples who were unconstitutionally prohibited from marrying and parenting their children. See, e.g., *In Re Registered Domestic Partnerships of Madrone*, 271 Or App 116, 129; 350 P,3d 495 (2015) (holding that '[b]ecause the question is whether a couple would have married *if they could have*, the factfinder must determine what the individual's views would have been if marriage had not been prohibited'); *Ramey v Sutton,* 2015 Okla 79, ¶13; 362 P3d 217, 220-221 (2015) (holding that a same-sex couple's failure to marry before *Obergefell* could not be used to prevent the nonbiological parent from seeking custody of the child when she had acted *in loco parentis* to the child; cf. *Conover v Conover,* 448 Md 548, 577, 2016 Md. LEXIS 433 (July 7, 2016) (Docket No. 79), pp 35-36 (holding that a same-sex

RECEIVED by MSC 2/8/2022 5:38:14 PM

> partner had standing under the de factor parent doctrine to pursue custody of a child born to her partner before their marriage.) *Mabry, supra,* at 1000.

Justice McCormack goes on to explain that:

> Many other states addressed this issue before *Obergefell*. See, e.g., *Bethany v Jones,* 2011 Ark 67, 378 S.W.3d 731, pp 10-12 (2011) (holding that a same-sex partner, who was not legally married, stood *in loco parentis* to the child); *ENO v LMM,* 429 Mass 824, 829-830; 711 N.E.2d 886 (1999) (holding that a same-sex partner was the de facto parent of the biological child of her former partner); *Mullins v Picklesimer,* 317 SW3d 569, 574-577 (Ky, 2010) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when the child was born into the relationship and the partner coparented the child); *In re Parentage of LB,* 155 Wash 2d 679, 683; 122 P.3d 161 (2005) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when she was the de facto parent)… *Id at* fn 2.

While several other states have molded their law to properly protect Ms. Pueblo's and the minor child's constitutional rights while using and applying the equitable-parent doctrine, Michigan has not yet done so.

ANALYSIS

Michigan law currently fails to account for the Constitutional rights of a narrow portion of our population: persons who were engaged in a same-sex relationship during a time when it was illegal for them to be married, and those persons conceived a child—intended to be coparented by the parties/persons involved in the same-sex relationship. Michigan law does not consider children conceived to a same-sex couple via assistive reproductive technologies ("ART"). If that same-sex relationship ended before our Supreme Court handed down the ruling in *Obergefell v Hodges*, often times, at least one person/party to that same-sex relationship is denied the legal right to access their child—the child that was intended to be coparented by both persons/parties. This gap is

RECEIVED by MSC 2/8/2022 5:38:14 PM

articulated by the Michigan Court of Appeals in their December 28, 2021, unpublished holding in the case-at-bar in relevant part as follows:

> …Michigan's equitable-parent doctrine applies only to married couples [*Lake v Putnam*, 316 Mich App 247; 894 NW 2d 62 (2016)] at 254. In this case, as in *Lake*, because the parties were never married, plaintiff's argument that she is an equitable parent fails. See *Lake* 316 Mich App at 250-253. (12/28/21 unpublished Decision, p 5).

After considering *LeFever v Matthews*, 2021 Mich App LEXIS 2109; 2021 WL 1232747, and comparing it to the case-at-bar, the Court of Appeals held:

> …plaintiff lacks the physical connection to the child that this Court in *Lefever* found determinative to being a natural parent. Nor is plaintiff an adoptive parent of the child. Because plaintiff is not related to the child genetically or by birth, she could only be determined to be a parent if under the equitable-parent doctrine she met the requirements for being a natural parent. (12/28/21) unpublished Decision, p 6).

The following is a list of cases previously relied upon by the Court of Appeals and/or Defendant-Appellee in their argument to not extend the Equitable-Parent Doctrine or the definition of a "natural parent" to Ms. Pueblo:

Year Case Published	**Case Name/Citation**	**Applicable Issues Addressed:**
1934	*Snyder v Mass., 291 U.S. 97 (1934)*	Due process
1987	*Atkinson v Atkinson,* 160 Mich App 601; 408 NW2d 516 (1987)	Equitable-parent doctrine
1989	*Michael H v Gerald D*, 491 US 110, 109 S Ct 2333 (1989)	Three parents to a minor child; sanctity of marriage uninterrupted
1992	*Bowie v Arder,* 190 Mich App 571 (1992)	Third-person standing does not accrue for a party who lived with a child; standing does not accrue because party has personal stake in outcome of litigation.
1995	*Porter v Overton,* 214 Mich App 95 (1995)	Domestic partners lack standing under Child Custody Act.

RECEIVED by MSC 2/8/2022 5:38:14 PM

1997	*York v Morofsky*, 225 Mich App 333, 571 NW 2d 524 (1997)	Equitable-parent doctrine
1999	*Van v Zahorik,* 460 Mich 320, 330-331; 597 NW2d 15 (1999)	Equitable-parent doctrine; court will not apply outside of context of marriage.
2006	*Barnes v Jeudevine*, 477 Mich 1201, 720 NW2d 748 (2006)	Standing denied to putative parent with biological connection.
2009	*In Re Anjoski*, 283 Mich App 41, 770 NW2d 1 (2009)	Third person unable to create custody dispute by filing a lawsuit and alleging best interests.
2015	*Obergefell v Hodges,* 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015)	Same-sex marriages deemed Constitutional
2015	*Stankevich v Milliron,* 313 Mich App 233; 882 NW2d 194 (2016)	Same-sex parties who were married in foreign jurisdiction both awarded parental rights as result of *Obergefell*.
2016	*Lake v Putnam,* 316 Mich App 247, 260; 894 NW2d 62 (2016)	*Lake* was denied standing to seek custody/parenting time of minor child born during same-sex relationship because the parties were not wed.
2018	*Sheardown v Guastella,* 324 Mich App 251, 920 NW 2d 172 (2018)	Opposite-sex custody case.
2021	*LeFever v Matthews*, 2021 Mich App LEXIS 2109; 2021 WL 1232747	Unwed same-sex parties; granted each party legal rights to children.

Seen above, all cases pre-existing *Obergefell* denied rights to the parent seeking rights in same-sex custody cases. Following *Obergefell*, thus far, only parties who can show they were illegally married or have a physical or biological connection are being granted custody and parenting time. Michigan is resting on its pre-*Obergefell* laurels and has not properly analyzed the Constitutional rights of persons who were:

1. in a long-term committed relationship that were unwed because it was illegal;

RECEIVED by MSC 2/8/2022 5:38:14 PM

2. otherwise did everything legally possible to hold themselves out as a married couple while still in their relationship (ie: commitment ceremony[4]); and
3. reared a child in the course of that relationship that was intended to be coparented by the same-sex couple.

Failing to analyze cases post-*Obergefell* with a fresh perspective that can stand alone and not rest upon unconstitutional pre-*Obergefell* rulings, perpetuates injury to a portion of Michigan's population. *Mabry, supra.*

Failing to apply 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*." *Mabry, supra,* at Mich at 997.

Chief Justice McCormack goes on to state:

> Until 2015, same-sex couples were not permitted to marry in Michigan. See MCL 551.1. Nor did Michigan recognize a legal marriage between a same-sex couple solemnized in another jurisdiction. See MCL 551.271; Const 1963, art 1, § 25. Michigan also prohibited second-parent adoption between unmarried couples. See MCL 710.24. Thus, before the Supreme Court's decision in *Obergefell*, a same-sex partner had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner. *Id* at 540; 1-2.

Therefore, *Obergefell* does, in fact, compel us to, "…apply the equitable-parent doctrine to same-sex couples who had children conceived or adopted by one party during their relationship but were unconstitutionally prohibited from marrying under this state's law." *Mabry*, at Mich at 998. Furthermore, holding otherwise:

> …impermissibly violates both the plaintiff's and her child[ren]'s equal protection and due process rights by creating an untenable

[4] Unlike the case-at-bar, the parties in *Lake v Putnam*, did not present facts regarding a commitment ceremony.

RECEIVED by MSC 2/8/2022 5:38:14 PM

> requirement that same-sex couples have sought a legal marriage in another jurisdiction, despite the fact that any extra-jurisdictional marriage would have been legally unrecognized in Michigan. *Id* NW 2d at 541.

Chief Justice McCormack further states:

> In *Obergefell*, the Supreme Court held that Michigan's ban on same-sex marriage was unconstitutional, that marriage is a fundamental right, and that same-sex couples and their children are equally entitled to the benefits of marriage. *Mabry*, *supra,* Mich at 998, NW 2d at 541 and LEXIS at 6 citing *Obergefell,* 576 U.S.___; 135 S Ct at 2604-2605. Indeed, the children of same-sex couples and their constitutional rights were central to the Court's analysis in *Obergefell*.

Prohibiting same-sex couples from marrying naturally gives way to negatively impacting the child/ren reared from a same-sex relationship. Chief Justice McCormack quoted the *Obergefell* court as follows:

> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. *Mabry, supra* at 999, 541 and 6-7 citing *Obergefell*, at _____; 135 S Ct at 2600-2601.

Because the State of Michigan denied same-sex couples access to marriage, and, therefore, the benefits of marriage, "…including the equitable-parent doctrine, the Court of Appeals' [refusal to extend the equitable-parent doctrine to unwed same-sex parties] may contravene the United States Supreme Court's direction in *Obergefell* that same-sex couples have a fundamental right to marriage and the benefits of marriage." *Mabry, supra*, Mich at 999.

RECEIVED by MSC 2/8/2022 5:38:14 PM

Extension of the Equitable-Parent Doctrine to unwed same-sex couples, previously unconstitutionally prohibited from marrying, would apply to very few people. As Chief Justice McCormack states:

> [Any] exception [to the Supreme Court's] decision in *Van*, 460 Mich 320; 597 NW 2d 15, limiting the equitable-parent doctrine to married couples would extend only to the 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. *Mabry, supra*, Mich at 1001, NW 2d at 544, Lexis at 12-13 footnote 3 (emphasis added)

1. Proffered Remedy

Appellant prays this Honorable Court implement a test to evaluate and determine whether or not same-sex couples engaged in a custody dispute would have been married but for Michigan unconstitutionally prohibiting same-sex marriage.

Otherwise stated by former Court of Appeals Judge J. Shapiro in a concurring opinion:

> …[A] party is entitled to seek equitable parent rights arising out of a same-sex nonmarital relationship when a preponderance of the evidence shows that but for the ban on same-sex marriage in the parties' state of residency, they would have married before the birth of the child. *Lake v Putnam, supra*, at 262-263.

II. THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE.

Ms. Pueblo asserts, as though fully set forth herein, all content within Section I.

B. MS. PUEBLO HAS STANDING BECAUSE THE PARTIES' COMMITMENT CEREMONY CREATED AN EQUITABLE/DE FACTO MARRIAGE RISING TO THE LEVEL OF A LEGAL MARRIAGE, THEREBY FORMING GROUNDS FOR MS. PUEBLO TO BE LEGALLY RECOGNIZED AS THE MINOR CHILD'S FATHER/PARENT BY THE EQUITABLE-PARENT DOCTRINE.

RECEIVED by MSC 2/8/2022 5:38:14 PM

APPLICABLE LAW

Atkinson v Atkinson, 160 Mich App 601, 608-609; 408 NW2d 516 (1987) establishes the Equitable-Parent Doctrine as follows.

> …a husband is 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.

Stankevich v Milliron, 313 Mich App 233; 882 NW2d 194 (2016) at 241 states:

> Plaintiff alleges that the parties entered into an agreement to conceive and raise the child with the attendant parental rights and responsibilities. Plaintiff also claims that she assisted with the artificial insemination process through which the child was conceived, that she was present at the child's birth, and that she fully participated in the care and rearing of the child until Defendant prevented her from doing so. Further, Plaintiff alleges that, during the parties' relationship, they shared parental responsibilities and duties equally. She asserts that she always has maintained a strong parental role that included bonding with the child, providing for the child financially, attending the child's health care appointments, making medical decisions with Defendant concerning the child's care, and providing a home for the child. Further, after going their separate ways in March 2009, the parties had a parenting-time schedule for a significant period of time…As set forth, Plaintiff's allegations would establish factually her standing to file this action seeking equitable parenthood. The facts alleged in the complaint, if proved, would support the elements of the equitable-parent doctrine as set forth in *Atkinson* 160 Mich App at 608-609.

The court in *Stankevich* states as follows in footnote 3 at 240:

> Unlike marriages solemnized in sister states, which are generally recognized as valid in this state, Michigan has no statute requiring the recognition of marriages celebrated in foreign nations. Nonetheless, Michigan courts recognize marriages solemnized in foreign nations as a matter of comity. ***It is well settled that Michigan's law and public policy favor the institution of marriage***,

RECEIVED by MSC 2/8/2022 5:38:14 PM

> *Van,* 460 Mich at 332; *Boyce v McKenna*, 211 Mich 204, 214; 178 NW 701 (1920), and Michigan courts have long recognized the validity of marriages celebrated in foreign countries, provided that those marriages are valid in the nation of celebration, see, e.g., *Boyce*, 211 Mich at 215; *People v Imes,* 110 Mich 250, 251; 68 NW 157 (1896); *Hutchins v Kimmell*, 31 Mich. 126, 130-131 (1875) (emphasis added).

ANALYSIS

If we can give comity to marriages celebrated in foreign nations, and since Michigan's law and public policy favor the institution of marriage, surely it is appropriate for this Honorable Court to recognize as valid in this state the Commitment Ceremony/Holy Union the parties celebrated in Lansing, Michigan on June 30, 2007, wherein the parties took vows, exchanged rings, and persons bore witness to the parties' pledging a lifelong commitment to one another. The parties were wed de facto. Failure to acknowledge the parties' commitment ceremony/holy union as a/an de facto marriage/equitable marriage within the context of this case, "…perpetuates the troubling effect of this state's [once] unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in *Obergefell*." *Mabry, supra,* at Mich 997.

Granting comity to the parties' ceremony for purposes of this custody case effectively makes Ms. Pueblo the Defendant-Appellee's equitable husband, but not the biological father of JPHP, and, their child was conceived during their equitable/de facto marriage (App p 20a). Therefore, Ms. Pueblo may be considered the natural father of JPHP because she satisfies the following:

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.

Ms. Pueblo and JPHP did, in fact, mutually acknowledge their relationship as father and child. From the date JPHP was born, and even before, Ms. Pueblo was there to bond; provide love,

RECEIVED by MSC 2/8/2022 5:38:14 PM

care, affection, necessities, etc. JPHP looked to Ms. Pueblo for guidance, support, understanding, instruction; Ms. Pueblo partook in JPHP's medical care and treatment; Ms. Pueblo made and assisted in making medical decisions regarding JPHP; and so much more (Id p 21a).

Defendant-Appellee (mother of JPHP) cooperated in the development of the father-child relationship with Ms. Pueblo and JPHP from the date JPHP was conceived up to March of 2017. Let us remember the shared name on Defendant-Appellee's ultrasound pictures; the child's information card Defendant-Appellee filled out wherein she named Ms. Pueblo as JPHP's father; and that JPHP's full legal name is John Paul **Haas-Pueblo**. (Id p 21a)

2. The husband desires to have the rights afforded to a parent.

Since JPHP's inception, through the end of time, and by way of filing this action for custody and parenting time, Ms. Pueblo is asserting and has always asserted her desire to have the rights afforded to a parent (Id p 21a).

3. The husband is willing to take on the responsibility of paying child support.

Ms. Pueblo has historically provided financially for JPHP. Ms. Pueblo specified in her Complaint's prayer for relief that she "prays this Honorable Court calculate and award child support as is appropriate pursuant to the Michigan Child Support Guidelines." Ms. Pueblo is willing to take on the responsibility of paying child support (Id p 21a).

4. Proffered Remedy

Judge Shapiro wrote a concurring opinion that distinguishes *Lake v Putnam,* 316 Mich App 247, 260; 894 NW2d 62 (2016) from the case at bar as follows (Transcript pp 21-22, App. p 79a):

> …The fact that marriage was available in some other jurisdiction did not remove the unconstitutional burden faced by same-sex couples residing in a state that bars same-sex marriage within its borders. The impediment was defined by Michigan law, and the existence of that law to those who lived under it should not now be

RECEIVED by MSC 2/8/2022 5:38:14 PM

> treated as constitutionally insignificant because other states treated the issue differently…
>
> *In re Madrone*, 271 Ore App 166; 350 P3d 495 (2015) …'the distinction between married and unmarried heterosexual couples is that the married couples have chosen to be married while the unmarried couples have chosen not to be.' at 128. In contrast, a same-sex couple living in a jurisdiction that did not allow or recognize the validity of same-sex marriage was unable to choose whether they would be a married or unmarried couple. The deprivation of that choice was a violation of their equal protection rights. *Obergefell, 576 U.S. 644; 135 S Ct at 2604-2605…*
>
> Ultimately, the *Madrone* court concluded that the determination of whether to extend the statute to same-sex couples who would have chosen to marry must be made on a case-by-case basis and suggested several factors that may be relevant…
>
> ***I would adopt this approach and hold that a party is entitled to see equitable parental rights arising out of a same-sex nonmarital relationship when a preponderance of the evidence shows that but for the ban on same-sex marriage in the parties' state of residence, they would have married before the birth of the child.*** *Lake v Putnam, supra,* at 260-263 (emphasis added)

The emphasized portion of Judge Shapiro's concurring opinion offers an excellent resolution for the case at bar.

Furthermore, the Court of Appeals' December 28, 2021, decision in the case-at-bar issued their denial relying upon, in part, the decision in *Lake*. It is important to note that the *Lake* Court did not have a commitment ceremony within its facts for consideration; thus it is clear legal error for the Courts to bind the case-at-bar to the opinion rendered in *Lake*. Moreover, the holding in *Lake* is unconstitutional. As Chief Justice McCormack stated in *Mabry:*

> If not for this state's unconstitutional prohibition on their parents' right to marry, its child[ren] in this case would be entitled to all the benefits conferred on [the] child[ren] of opposite-sex couples by the equitable-parent doctrine. And as a result of the Court of Appeals' order, the parties' children will be unable to seek the love and guidance of the plaintiff, have access to her health care benefits,

RECEIVED by MSC 2/8/2022 5:38:14 PM

> social security benefits, and death benefits, or inherit from her if she dies intestate.
>
> What is more, the plaintiff's fundamental right to parent her child[ren] is potentially violated by the Court of Appeals' ruling. **Denying individuals who were unconstitutionally prohibited from marrying access to the equitable-parent doctrine perpetuates the constitutional harms inflicted by the state's unconstitutional prohibition of same-sex marriage. By denying the parties access to marriage, and subsequently to the benefits of marriage, including the equitable-parent doctrine, the Court of Appeals' ruling [does] contravene the United States Supreme Court's direction in *Obergefell* that same-sex couples have a fundamental right to marriage and the benefits of marriage.** *Mabry, supra* at 999 Mich. (emphasis added)

Therefore, *Lake v Putnam* must be distinguished, if not abrogated.

C. MS. PUEBLO HAS STANDING BECAUSE SHE IS A "NATURAL PARENT" AS DEFINED BY MCL 722.22(i), OF THE CHILD CUSTODY ACT AND AS DEFINED IN LEFEVER V MATTHEWS, 2021 MICH. APP. LEXIS 2109; 2021 WL 1232747 (FOR PUBLICATION).

1. Child Custody Act of 1970

APPLICABLE LAW

MCL 722.25(1) states as follows:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control…

MCL 722.22(i) states as follows:

> 'Parent' means the natural or adoptive parent of a child.

a. MCR 2.116(C)(5)

i. Child Custody Act of 1970

MCL 722.26(1) specifies that the Child Custody Act is "…equitable in nature and **shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved**…" (emphasis added).

RECEIVED by MSC 2/8/2022 5:38:14 PM

ANALYSIS

As previously stated, same-sex marriage was not permitted in the State of Michigan until the Supreme Court ruled on *Obergefell v Hodges,* 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015) on June 26, 2015. While staying within the confines of the law (knowing that same-sex marriage was illegal as of June 30, 2007) the parties chose to partake in a Holy Union/Commitment Ceremony wherein they pledged to be lifelong partners; this was the maximum the parties could legally do at that time. Following that Commitment Ceremony/Holy Union, the parties held themselves out to the public as husband and wife, and the parties held Ms. Pueblo out as JPHP's putative father. In recognizing the parties' Commitment Ceremony/Holy Union as being a de facto/equitable marriage, pursuant to MCL 700.2114(1)(a): (Id at p 18a)

> If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. If a man and a woman participated in a marriage ceremony in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession. (Id at p 19a)

Pairing MCL 700.2114(1)(a) with MCL 722.22(i) we find that Ms. Pueblo and the Defendant-Appellee are the natural parents of JPHP. Wherefore, pursuant to MCL 722.25, this is a child custody dispute between the parents, and the best interests of the child control (Id at p 19a).

2. LeFever v Matthews

APPLICABLE LAW

The *LeFever* Court of Appeals concluded that the:

> …trial court committed error requiring reversal when it concluded that [Lanesha Matthews] was not a 'natural parent' under the CCA

RECEIVED by MSC 2/8/2022 5:38:14 PM

> because she lacked a genetic connection to the [minor children]. (*LeFever* p 4)
>
> The term 'natural parent' is not defined by the statute…
>
> …[W]hen interpreting an undefined statutory term, the term 'must be accorded its plain and ordinary meaning.' *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).
>
> …We have found no dictionary definition for 'natural parent,' (*LeFever* p 5)
>
> …the textual clues indicate that the term 'natural parent' is elastic enough to include defendant…although she has no genetic connection to the twins…
>
> **"In addition, a review of [Michigan's statutes] does not support the trial court's conclusion that Michigan law generally requires a genetic connection in order to establish maternity…This definition does not hint at any legal requirement of a genetic connection between a parent and a child. In fact, '[n]othing in the Acknowledgment of Parentage Act requires that the man completing the Acknowledgment form actually be the child's biological father."** *In re Daniel's Estate,* 301 Mich App 450, 456; 837 NW2d 1 (2013). (*LeFever* p 7) (emphasis added) (App. p 46a)

The Court of Appeals considered several Acts and statutes before arriving to their conclusion. Acts and statutes considered by the Court of Appeals within *LeFever* include, but are not limited to, the following:

a. Child Custody Act;
b. Surrogate Parenting Act;
c. Revocation of Paternity Act;
d. Acknowledgment of Parentage Act;
e. The Safe Delivery of Newborns Act;
f. The Adoption Code; and
g. Genetic Parentage Act. (App p 46a)

"The Legislature has provided numerous statutory paths to establishing paternity." *In Re MKK*, 386 Mich App at 557 … "There is no indication in the plain language of any of these statutes

RECEIVED by MSC 2/8/2022 5:38:14 PM

that the Legislature intended to limit the path to establishing maternity to the single route of demonstrating a genetic connection." (*LeFever* p 7) (Id p 46a)

The Court of Appeals summarized *LeFever* in relevant part as follows:

> …[t]his case arises out of the dissolution of the parties' relationship and subsequent custody dispute over their two minor children…plaintiff and defendant, both women, began a romantic relationship [pre-Obergefell]. At some point during the course of the relationship, they decided to have children together…and implanted in Defendant's womb. The invitro fertilization resulted in Defendant's pregnancy… Defendant gave birth…in Michigan. At that time, the Michigan Department of Health and Human Services' Division of Vital Records permitted one father and one mother to be listed on the birth certificate. As a result of this practice, Defendant was listed as the…mother, and although Plaintiff was not listed on the birth certificates, the [newborns were] given Plaintiff's last name.
>
> The parties cohabitated and parented…together until they separated…--before statutes excluding same-sex couples from marriage were declared unconstitutional in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015). The parties continued co-parenting…the trial court held a hearing to establish Plaintiff's standing as a parent…Defendant…argued that…Plaintiff lacked standing to seek custody. (Id p 46a)

LeFever's Court of Appeals held:

> …that the trial court improperly interpreted the term 'parent' as defined by MCL 722.22(i) and the Child Custody Act ('CCA'), MCL 722.21 *et seq*., as requiring a genetic connection and misapplied the Surrogate Parenting Act ('SPA'), MCL 722.851 *et seq*." (*LeFever* p 1) (Id p 46a)

ANALYSIS

In the Trial Court's June 1, 2021, Decision of the Court Regarding Plaintiff's Motion for Reconsideration, the court held as follows:

> The LeFever case is clearly distinguishable from the case at issue. Plaintiff in this case was not a birth parent, did not have any biological connection or genetic connection. After a very close-read of the LeFever case, this Court finds that it does not provide a legal

RECEIVED by MSC 2/8/2022 5:38:14 PM

> basis for the Plaintiff, Carrie Pueblo, to have standing in the present custody case. This Court finds no palpable error in its determination. (App. p 60a)

In the Court of Appeals December 28, 2021, *unpublished* decision in the case-at-bar, the Court of Appeals opined:

> Plaintiff here argues that the facts of this case mirror those of *LeFever*. In *LeFever*, however, unlike this case, although the twins were the produce of the plaintiff's eggs and donor sperm, the defendant gave birth to the twins, which this Court equated with the physical connection of being a parent by virtue of genetic relationship. Here, plaintiff lacks the physical connection to the child that this Court in *LeFever* found determinative to being a natural parent...(12/28/2021 Court of Appeals Decision, p 6).

The Trial and Appellate Courts' opinions regarding *LeFever v Matthews* are clearly erroneous and will cause material injustice.

The facts in *LeFever v Matthews* are identical in the case at bar as follows:

1. This case arises out of the dissolution of the parties' relationship;
2. This is a subsequent custody dispute regarding the parties' minor child;
3. Ms. Pueblo and Defendant-Appellee are both women;
4. Ms. Pueblo and Defendant-Appellee were involved in a long-term, committed relationship;
5. During the relationship, the parties decided to have a child together;
6. The process of invitro fertilization resulted in Defendant-Appellee's pregnancy;
7. Defendant-Appellee gave birth in Michigan;
8. The Michigan Department of Health and Human Services' ("MDHHS") Division of Vital Records permitted only one father and one mother to be listed on a birth certificate at the time the parties' child was born;

RECEIVED by MSC 2/8/2022 5:38:14 PM

9. As a result of the MDHHS Division of Vital Records' practice, Ms. Pueblo was not listed on the birth certificate;
10. Despite Ms. Pueblo not being listed on the birth certificate, the parties' minor child, John Paul **Haas** Pueblo ("JPHP") was given Ms. Pueblo's last name;
11. The parties cohabitated and parented JPHP together until they separated before statutes excluding same-sex couples for marriage were declared unconstitutional in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015);
12. There was no adoption, no judicial establishment of parentage at the Trial Court level, no Affidavit of Parentage, and Ms. Pueblo had no biological relationship with the minor child; and
13. After their split, the parties continued co-parenting JPHP and shared custody. (App p 41-42a)

The above facts were not contested by Defendant-Appellee either in oral argument or in their written brief. The parties clearly intended to both be JPHP's natural parents (App p 12a).

In short, because the parties' relationship pre-dated *Obergefell*, they were in a committed relationship, they chose together to utilize ART to conceive their child, and they co-parented that child, (these facts are uncontested by the Defendant-Appellee) the elastic definition, afforded by the *LeFever* Court, of the phrase "natural parent" must be interpreted in such a manner so as to include Ms. Pueblo to also be a natural parent of JPHP, thus putting her and Defendant-Appellee on equal footing, which was the intent of the parties at the time the child was conceived (App. p37a).

Of importance, footnote 9 within the *LeFever* opinion considered and articulated the following:

RECEIVED by MSC 2/8/2022 5:38:14 PM

> …the statutes at play in this case…were written and enacted in an era when modern forms of assisted reproductive technology that are commonly used today were considered science fiction, and the cutting-edge technology being developed now was unimaginable then. Certainly, the **common law could not have anticipated the fairly common circumstances of the parties in this case, let alone the circumstances of families where one child has three genetic parents, or where a child is produced from the DNA of one egg fertilizing a second egg, or where a child has two genetic fathers and no genetic mother. Our current statutory schemes are poor vehicles for modern-made families to seek relief, and we question whether they are robust enough in their current form to provide equitable outcomes to such families**. These new technologies have thrown a wrench into the legal understanding of parentage and have given rise to novel issues in contract law, insurance coverage, immigration law, and estate planning. Accordingly, we anticipate that the Legislature will need to modernize the law to keep pace with technological advancements and appropriately balance various public policy concerns. (emphasis added) (App p 42a)

This Court of Appeals' footnote lends way for interpretation of the parties' initial intent, as proffered by Ms. Pueblo: that Ms. Pueblo be a natural parent to JPHP.

D. MS. PUEBLO'S GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY DISMISSAL OF HER CASE AND BY THE FINDING THAT A PHYSICAL OR BIOLOGICAL TIE MUST EXIST FOR MS. PUEBLO TO MAKE A CLAIM FOR PARENTING TIME.

APPLICABLE LAW

The 14th Amendment of the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Planned Parenthood of SE Pennsylvania v Casey*, 505 US 833, 851 (1992), citing *Carey v Population Serv Int'l*, 431 US 678, 685 (1977). The decision of whether or not to procreate, and how, is a protected fundamental liberty interest. *Eisenstadt, Sheriff v Baird*, 405 US 438, 453 (1972). Constitutional rights connected to our liberty to procreate and to bodily autonomy are not limited by the method chosen to procreate (i.e., ART). See *DMT v TMH*, 129 So 3d 320, 338 (FLA 2013). (App. p 40a)

RECEIVED by MSC 2/8/2022 5:38:14 PM

Our Supreme Court recognizes "that the relationship between parent and child is constitutionally protected." *Quillion v Walcott*, 434 US 246, 255 (1978). (App. p 40a)

The "State must provide access to its judicial processes" in the context of termination of parental rights because "a fundamental interest is at stake"—maintaining a parent-child relationship. See *MLB v SLJ*, 519 US 102 (1996). It is well-settled law that a classification creating unequal access to a fundamental right is subject to strict scrutiny. *Zablocki v Redhail*, 434 US 374, 381-390 (1978). (App p 40a)

Michigan's "…failure to apply the equitable-parent doctrine to nonbiological parents who were unconstitutionally prohibited from marrying the biological parent of their child[ren] violated [Plaintiff's equal protection and due process rights as well as those of her child]. Mabry, supra, Mich at 998. Chief Justice McCormack continues:

> The Court's decision in *Obergefell* reflects a long-recognized constitutional principle that children born to unmarried parents are entitled to the same benefits as children born to married parents. See, e.g., *Weber v Aetna Cas & Surety Co*, 406 US 164, 165; 92 S. Ct. 1400; 31 L. Ed. 2d 768 (1972) (holding that a workers' compensation statute denying equal recovery rights to dependent unacknowledged children violated equal protection); *Clark v Jeter*, 486 U.S. 456, 457, 465; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988) (holding that a six-year statute of limitations for paternity actions to seek support, required for a child of an unmarried couple but not a child of a married couple, violated equal protection); *New Jersey Welfare Rights Org v Cahill*, 411 U.S. 619, 621; 93 S. Ct. 1700; 36 L. Ed. 2d 543 (1973) (holding that a state program that denied benefits to children who were not of the marriage violated equal protection). *Mabry, supra,* at 999.

ANALYSIS

The United States Constitution protects the right to procreate and the right to maintain relationships that form between children and parents. No matter a person's gender, sexual orientation, or the use of ART--every parent-child relationship is protected by the Constitution.

RECEIVED by MSC 2/8/2022 5:38:14 PM

The Trial Court erred when it stated that, "…Plaintiff is not a legal parent of the minor child involved or related at all to the child…and Plaintiff has no biological relationship with the minor child." (App. p 35a).

The Court of Appeals was clearly erroneous when it held that:

> The trial court did not dismiss plaintiff's complaint because of the method the parties used to become pregnant; the trial court dismissed the complaint because plaintiff lacked standing to seek custody of the child, being neither a natural nor adoptive parent of the child under the CCA. (12/28/2021 Court of Appeals Decision p 7).

This violates the Constitutional rights of both Ms. Pueblo and the minor child. It is uncontested that the same-sex parties chose, together, to create their family utilizing ART. Ms. Pueblo and JPHP were discriminated against because Michigan's laws do not account for rights of children born to same-sex couples previously unconstitutionally prohibited from marrying and this is unconstitutional. Ms. Pueblo and JPHP are entitled to Constitutional protection of their parent-child relationship because that Constitutional protection is not limited solely to genetic parent-child relationships. In essence, the Trial Court treated Ms. Pueblo and JPHP differently because of the method by which the same-sex parties chose to create their family, thus effectively discriminating on the basis of sexual orientation, and this is a Constitutional violation. (App. p 43a)

The case-at-bar is:

> …distinguishable from [the Supreme Court's] decision in [*Van v Zahorik*, 460 Mich 320, 330-331; 597 N.W. 2d 15 (1999)] in which the parties had the option to get married, but chose not to. *Van*, 460 Mich at 323. The plaintiff here was unconstitutionally prohibited from marrying the defendant, though she took every legal step available to replicate marriage…When the parents themselves did not choose not to marry, but instead had that choice made for them by our state's laws, and the parents otherwise demonstrated the same commitment and legitimacy as married parents, their children

RECEIVED by MSC 2/8/2022 5:38:14 PM

> should not be barred from the potential benefits of our common-law rule. *Mabry, supra*, Mich 999-1000.

But for Michigan unconstitutionally prohibiting the parties in the case-at-bar to marry, the parties' child would inherently receive the same benefits received by children born to opposite-sex couples—including the equitable-parent doctrine. Because of the Court of Appeals' decision herein, the parties' minor child is not able to, "seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits and death benefits, or inherit from her if she dies intestate." *Mabry, supra*, Mich at 999.

Furthermore, Ms. Pueblo's fundamental right to parent JPHP is violated by the Court of Appeals ruling. *Id.*

By refusing to recognize Ms. Pueblo as JPHP's parent because of the method of procreation the same-sex parties used, thus denying Ms. Pueblo her Constitutionally protected rights to custody and parenting time with the minor child, the Trial Court's and Appellate Court's decision burdened Ms. Pueblo's access to her fundamentally protected right of maintaining her parent-child relationship with JPHP and this violation is subject to strict scrutiny; a test which cannot be passed to uphold the Trial Court's original finding on March 8, 2021. (App. p 43-44a)

The Court's refusal to recognize Ms. Pueblo as JPHP's parent burdens JPHP's access to his fundamentally protected right of maintaining his parent-child relationship with Ms. Pueblo. This violation is subject to strict scrutiny; a test that cannot be passed in favor of Defendant-Appellee. (App p 44a)

RECEIVED by MSC 2/8/2022 5:38:14 PM

CONCLUSION AND RELIEF REQUESTED

Therefore, we pray this Honorable Court grants leave to appeal and finds the following:

A. That before the Supreme Court's decision in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L. Ed. 2d 609 (2015), a same-sex partner had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner[5];

B. That *Obergefell* compels this Honorable Court to apply the Equitable-Parent Doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married;[6]

C. That the Equitable-Parent Doctrine is applicable in the case-at-bar because the parties were equitably married or married de facto.

D. That failure to apply the Equitable-Parent Doctrine to non-biological parents who were unconstitutionally prohibited from marrying the biological parent of their children violated Ms. Pueblo's equal protection and due process rights as well as those of JPHP.[7]

E. Find that the Court of Appeals "…impermissibly violates both [Ms. Pueblo's] and her child[ren]'s equal protection and due process rights by creating an untenable requirement that same-sex couples have sought a legal marriage in another jurisdiction, despite the fact that any extra-jurisdictional marriage would have been legally unrecognized in Michigan."[8]

[5] *Mabry*, *supra*
[6] *Mabry, supra*
[7] *Mabry, supra*
[8] *Mabry, supra*

RECEIVED by MSC 2/8/2022 5:38:14 PM

F. Find that "[i]f not for this state's unconstitutional prohibition on their parents' right to marry, the children in this case would be entitled to all the benefits conferred on children of opposite-sex couples by the Equitable-Parent Doctrine."[9]

G. Find that "[d]enying individuals who were unconstitutionally prohibited from marrying access to the Equitable-Parent Doctrine perpetuates the constitutional harms inflicted by the state's [prior] unconstitutional prohibition of same-sex marriage."[10]

H. That Ms. Pueblo is the natural and/or equitable parent of JPHP, thus giving Ms. Pueblo standing to seek custody and parenting time;

I. This matter is referred back to the Trial Court for status conference and evidentiary hearing so that the parties may present proofs relative to the best interest factors for the purpose of rendering a decision regarding custody and parenting time;

J. Ms. Pueblo's proffered remedies are adopted as new law;

K. *Lake v Putnam* is overturned; andAny/all other relief this Honorable Court deems just, fit, and equitable to award.

Respectfully submitted,

STARKS LAW, PLC
Attorney for Plaintiff-Appellant

Dated: February 8, 2022

By: */s/ Reh Starks*
Reh Starks (P76689)

[9] *Mabry, supra*
[10] *Mabry, supra*

RECEIVED by MSC 2/8/2022 5:38:14 PM

LexisNexis

User Name: Reh Starks
Date and Time: Friday, October 16, 2020 2:18:00 PM EDT
Job Number: 127831329

Document (1)

1. *Mabry v. Mabry, 499 Mich. 997*

Client/Matter: -None-
Mabry v Mabry, 499 Mich 997, 882 NW2d 539 (2016):
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	custom: Custom

RECEIVED by MSC 2/8/2022 5:38:14 PM

Neutral
As of: October 16, 2020 6:18 PM Z

Mabry v. Mabry

Supreme Court of Michigan

August 2, 2016, Decided

SC: 153082

Reporter
499 Mich. 997 *; 882 N.W.2d 539 **; 2016 Mich. LEXIS 1610 ***

DEANNA D. MABRY, Plaintiff-Appellant, v JOHANNA SUZANNE-GRAINE MABRY, Defendant-Appellee.

Subsequent History: As Amended August 3, 2016.

Prior History: [***1] COA: 329786. Washtenaw CC: 15-001873-DC.

Mabry v. Mabry, 2015 Mich. App. LEXIS 2491 (Mich. Ct. App., Dec. 18, 2015)

Core Terms

marriage, same-sex, married, couples, equitable-parent, custody, unconstitutionally

Judges: Robert P. Young, Jr., Chief Justice. Stephen J. Markman, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Joan L. Larsen, Justices. MCCORMACK, J. (dissenting). BERNSTEIN, J., joins the statement of MCCORMACK, J.

Opinion

Order

[539] [*997]** On order of the Court, the application for leave to appeal the December 18, 2015 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Dissent by: Bridget M. McCormack

Dissent

[540]** McCormack, J. (*dissenting*).

I respectfully dissent from this Court's order denying leave to appeal. I would grant leave to appeal to address whether *Obergefell v Hodges, 576 U.S. : 135 S Ct 2584; 192 L. Ed. 2d 609 (2015)*, compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married.

Until 2015, same-sex couples were not permitted to marry in Michigan. See *MCL 551.1*. Nor did Michigan recognize a legal marriage between a same-sex couple solemnized in another jurisdiction. See *MCL 551.271*; *Const 1963, art 1, § 25*. Michigan also prohibited second-parent adoption between unmarried couples. See *MCL 710.24*. Thus, before the Supreme Court's decision in *Obergefell*, a same-sex partner **[***2]** had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner. I would grant leave to appeal to consider whether the Court of Appeals' peremptory order in this case illustrates and 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*.

RECEIVED by MSC 2/8/2022 5:38:14 PM

The relationship between the parties in this case was longstanding and committed. The plaintiff and the defendant began their relationship in 1995 in Philadelphia, and soon after moved together to Michigan. The parties took repeated steps to solidify their relationship and demonstrate their commitment to one another. These steps included filing a declaration of domestic partnership, purchasing a home together, entering a formal domestic-partnership agreement, solemnizing their relationship in a commitment ceremony in Hawaii, and entering into a marriage covenant in the form of a ketubah. The defendant took the plaintiff's last name. During the entire course of their relationship, they were prohibited from marrying each other in Michigan, and Michigan **[***3]** did not recognize extra-jurisdictional same-sex marriage.

After taking these deliberate steps to solidify their relationship, the parties decided to have children. They agreed that the defendant would carry the children through pregnancy using an anonymous donor. The parties had three children between 2001 and 2008, all of whom were biological children of the defendant but took the plaintiff's last name and were parented by both the defendant and the plaintiff. During their relationship, the plaintiff's parental role in the children's lives was significant: She provided the defendant and the children with health insurance, she was the sole financial provider for the family, and she provided care and guidance to the children. The defendant executed a will and trust agreements that provided that in the event of her death, the plaintiff would be the children's legal guardian and conservator.

In 2010, five years before the decision in *Obergefell*, the parties ended their 15-year relationship. For the following year, the plaintiff remained in the family home, continued paying for health insurance for the defendant and the children, and paid all other family bills and living **[*998]** expenses. Eventually, **[***4]** the parties were unable to resolve custody and financial-support arrangements, and the defendant prohibited the plaintiff from seeing the children.

After *Obergefell* was decided, the plaintiff filed a complaint for custody and parenting time, seeking legal and physical custody of the parties' three children pursuant to Michigan's common-law equitable-parent doctrine. The trial court denied the defendant's early motion for summary disposition, noting that it needed further **[**541]** factual development before it could decide whether the plaintiff had standing to pursue custody under the equitable-parent doctrine. See *Atkinson v Atkinson*, 160 Mich App 601; 408 N.W.2d 516 (1987). The defendant filed an interlocutory appeal in the Court of Appeals, and the Court of Appeals peremptorily vacated the trial court's denial of summary disposition. The order held that the plaintiff did not have standing to bring a custody action pursuant to the equitable-parent doctrine because that doctrine is only available to a parent who was married. *Mabry v Mabry*, unpublished order of the Court of Appeals, entered December 18, 2015 (Docket No. 329786). The plaintiff sought leave to appeal in this Court, arguing that the failure to apply the equitable-parent doctrine to nonbiological **[***5]** parents who were unconstitutionally prohibited from marrying the biological parent of their children violated her equal protection and due process rights as well as those of her children.

The equitable-parent doctrine recognizes a third person who is not a biological parent as the child's parent when (1) the would-be equitable parent and the child acknowledge the parental relationship or the biological or adoptive parent has cultivated the development of a relationship over a period of time, (2) the would-be equitable parent desires to have the rights afforded a parent, and (3) the would be-equitable parent is willing to pay child support. *Atkinson*, 160 Mich App at 608-609. This Court endorsed the equitable-parent doctrine in *Van v Zahorik*, 460 Mich 320, 330-331; 597 N.W.2d 15 (1999), but limited its application to would-be parents who were married.

The plaintiff's constitutional challenges merit further review from this Court. I would grant leave to consider whether *Obergefell* compels us to apply the equitable-parent doctrine to same-sex couples who had children conceived or adopted by one party during their relationship but were unconstitutionally prohibited from marrying under this state's law. I would address whether the line drawn by the Court of Appeals in this case **[***6]** impermissibly violates both the plaintiff's and her children's equal protection and due process rights by creating an untenable requirement that same-sex couples have sought a legal marriage in another jurisdiction, despite the fact that any extra-jurisdictional marriage would have been legally unrecognized in Michigan.

In *Obergefell*, the Supreme Court held that Michigan's ban on same-sex marriage was unconstitutional, that marriage is a fundamental right, and that same-sex couples and their children are equally entitled to the benefits of marriage. *Obergefell*, 576 U.S. . . ; 135 S Ct at 2604-2605. Indeed, the children of same-sex

RECEIVED by MSC 2/8/2022 5:38:14 PM

couples and their constitutional rights were central to the Court's analysis in *Obergefell*. The Court reasoned:

> **[*999]** Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex **[***7]** couples. [*Id. at ; 135 S Ct at 2600-2601*.]

The Court's decision in *Obergefell* reflects a long-recognized constitutional principle that children born to unmarried parents are entitled to the same benefits as children born to married parents. See, e.g., **[**542]** *Weber v Aetna Cas & Surety Co, 406 U.S. 164, 165; 92 S. Ct. 1400; 31 L. Ed. 2d 768 (1972)* (holding that a workers' compensation statute denying equal recovery rights to dependent unacknowledged children violated equal protection); *Clark v Jeter, 486 U.S. 456, 457, 465; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988)* (holding that a six-year statute of limitations for paternity actions to seek support, required for a child of an unmarried couple but not a child of a married couple, violated equal protection); *New Jersey Welfare Rights Org v Cahill, 411 U.S. 619, 621; 93 S. Ct. 1700; 36 L. Ed. 2d 543 (1973)* (holding that a state program that denied benefits to children who were not of the marriage violated equal protection).

The Court of Appeals' order in this case overlooks this general principle. If not for this state's unconstitutional prohibition on their parents' right to marry, the children in this case would be entitled to all the benefits conferred on children of opposite-sex couples by the equitable-parent doctrine. And as a result of the Court of Appeals' order, the parties' children will be unable to seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits, and death benefits, **[***8]** or inherit from her if she dies intestate.

What is more, the plaintiff's fundamental right to parent her children is potentially violated by the Court of Appeals' ruling. Denying individuals who were unconstitutionally prohibited from marrying access to the equitable-parent doctrine perpetuates the constitutional harms inflicted by the state's unconstitutional prohibition of same-sex marriage. By denying the parties access to marriage, and subsequently to the benefits of marriage, including the equitable-parent doctrine, the Court of Appeals' ruling may contravene the United States Supreme Court's direction in *Obergefell* that same-sex couples have a fundamental right to marriage and the benefits of marriage.

This case is of course distinguishable from our decision in *Van*, in which the parties had the option to get married, but chose not to. *Van, 460 Mich at 323*. The plaintiff here was unconstitutionally prohibited from marrying the defendant, though she took every legal step available to replicate marriage. In my view, the Court of Appeals' decision overlooks our central reasoning in *Van*, in which we noted that limiting the equitable-parent doctrine to children born or adopted within a marriage reinforces **[***9]** the "importance of marriage and legitimacy." *Id. at 333*. When the parents themselves did not choose not to marry, but **[*1000]** instead had that choice made for them by our state's laws, and the parents otherwise demonstrated the same commitment and legitimacy as married parents, their children should not be barred from the potential benefits of our common-law rule. In other words, we should consider whether the constraint that makes it impossible for the children of same-sex parents to benefit from the equitable-parent doctrine is constitutionally viable post-*Obergefell*.

The defendant's argument that this Court should not apply the equitable-parent doctrine to the plaintiff because it would enable any third party to gain parental rights is not powerful.[1] The plaintiff **[**543]** is not *any* person. She acted as a parent, providing her name, her love, support, and affection, her financial support, and her health insurance to these children. Yet, under the Court of Appeals' order, she is a legal third party to the children. I think that this Court 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 **[***10]** rights.

Not surprisingly, this issue is not unique to Michigan. Other state courts have grappled with the implications of

---

[1] The defendant has argued that the equitable-parent doctrine should not apply to the plaintiff because it would infringe her rights to parent by allowing any person the ability to seek custody. See *Troxel v Granville, 530 U.S. 57; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000)* (holding that a visitation statute that allowed *any person* to petition a court for visitation rights violated the fundamental right of the child's parents to parent).

RECEIVED by MSC 2/8/2022 5:38:14 PM

Obergefell on common-law doctrines akin to our equitable-parent doctrine. Many have already extended similar equitable doctrines to same-sex couples who were prohibited from marrying yet had children during their relationship. These states have provided guidance and workable rules for trial courts under similar doctrines while preserving the constitutional rights of same-sex couples who were unconstitutionally prohibited from marrying and parenting their children. See, e.g., *In re Registered Domestic Partnership of Madrone*, 271 Or App 116, 129; 350 P.3d 495 (2015) (holding that "[b]ecause the question is whether a couple would have married *if they could have*, the factfinder must determine what the individual's views would have been if marriage had not been prohibited"); *Ramey v Sutton*, 2015 Okla 79, ¶ 13; 362 P3d 217, 220-221 (2015) (holding that a same-sex couple's **[***11]** failure to marry before *Obergefell* could not be used to prevent the nonbiological parent from seeking custody of the child when she had acted *in loco parentis* to the child); cf. *Conover v Conover*, 448 Md 548, 577, 2016 Md. LEXIS 433 (July 7, 2016) (Docket No. 79), pp 35-36 (holding that a same-sex partner had standing under the de facto parent doctrine to pursue custody of a child born to her partner before their marriage).[2]

[*1001] As with all child custody disputes, the child's best interests are paramount, and trial courts regularly engage in fact-finding to determine how those interests should be served. I believe Michigan's trial courts are capable of evaluating the parties' relationship to determine whether the parties would have married but for **[**544]** Michigan's unconstitutional prohibition of same-sex marriage in the limited number of cases in which this issue will arise.[3]

Like the many other state courts addressing this issue, then, I would grant leave to appeal to consider whether *Obergefell v Hodges* compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married. The Constitution might require that the children born and adopted into same-sex families be able to access the same benefits that children born into opposite-sex families have under Michigan law when they arrive at our courthouse doors. At the very least, this question deserves this Court's considered analysis.

BERNSTEIN, J., joins the statement of MCCORMACK, J.

End of Document

[2] Many other states addressed this issue before *Obergefell*. See, e.g., *Bethany v Jones*, 2011 Ark 67, 378 S.W.3d 731, pp 10-12 (2011) (holding that a same-sex partner, who was not legally married, stood *in loco parentis* to the child); *ENO v LMM*, 429 Mass 824, 829-830; 711 N.E.2d 886 (1999) (holding that a same-sex partner was the de facto parent of the biological child of her former partner); *Mullins v Picklesimer*, 317 SW3d 569, 574-577 (Ky, 2010) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when the child was born into the relationship and the partner coparented the child); *In re Parentage of LB*, 155 Wash 2d 679, 683; 122 P.3d 161 (2005) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when she was the de facto parent).

And while some other states have yet to squarely address the issues raised in this case post-*Obergefell*, they have resolved similar issues on the basis of their unique state statutes. See, e.g., *McGaw v McGaw*, 468 SW3d 435, 442-443, 448 (Mo App, 2015) (holding that the equitable-parentage **[***12]** theory did not apply to a same-sex couple who had separated before *Obergefell* because there was a separate statute enabling the parent to seek third-party custody and visitation); *Russell v Pasik*, 178 So 3d 55, 61 (Fla App, 2015) (holding that a same-sex partner did not have standing to seek custody and visitation rights by asserting de facto parent status, but noting that the same-sex partner could have adopted the children under Florida's adoption statutes); *Sheets v Mead*, 238 Ariz 55, 58; 356 P.3d 341 (Ariz App, 2015) (denying nonparent visitation to a same-sex partner, who had been a foster parent of the child with her partner before the couple's separation, after the other partner adopted the child because the child was no longer "born out of wedlock" as required by the statute providing nonparent visitation rights).

[3] Any exception to our decision **[***13]** in *Van*, 460 Mich 320; 597 N.W.2d 15, limiting the equitable-parent doctrine to married couples would extend only to the 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.

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 2/8/2022 5:38:14 PM

STATE OF MICHIGAN

COURT OF APPEALS

KYRESHA LEFEVER,

Plaintiff-Appellee,

v

LANESHA MATTHEWS,

Defendant-Appellant.

FOR PUBLICATION
April 1, 2021
9:15 a.m.

No. 353106
Wayne Circuit Court
LC No. 19-103263-DP

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

RIORDAN, J.

In this child custody case, defendant, Lanesha Matthews, appeals as of right the trial court's order of parentage, custody, and parenting time. The trial court awarded sole legal custody and sole physical custody of plaintiff's and defendant's two minor children to plaintiff, Kyresha LeFever, granted parenting time to defendant, and ordered defendant's name be removed from the children's birth certificates. The custody order was premised on an earlier determination that defendant was merely a third party and not a parent to the children because, although she gestated and birthed the children, she did not have a genetic connection to them, unlike plaintiff whose ova were used in the procreation of the children.

However, we conclude that the trial court improperly interpreted the term "parent" as defined by MCL 722.22(i) in the Child Custody Act ("CCA"), MCL 722.21 *et seq*., as requiring a genetic connection, and misapplied the Surrogate Parenting Act ("SPA"), MCL 722.851 *et seq*. Accordingly, we vacate the trial court's order and remand this case for further proceedings.

I. FACTS & PROCEDURAL HISTORY

This case arises out of the dissolution of the parties' relationship and subsequent custody dispute over their two minor children, twin girls. Plaintiff and defendant, both women, began a romantic relationship in 2011. At some point during the course of the relationship, they decided to have children together using plaintiff's eggs, fertilized by a sperm donor, and implanted in defendant's womb. The in vitro fertilization resulted in defendant's pregnancy with the twins. Although the parties intended for defendant to give birth in Ohio, where both women could be listed on the birth certificates, defendant gave birth two months early in Michigan. At that time,

RECEIVED by MSC 2/8/2022 5:38:14 PM

the Michigan Department of Health and Human Services' Division of Vital Records permitted one father and one mother to be listed on a birth certificate. As a result of this practice, defendant was listed as the twins' mother, and although plaintiff was not listed on the birth certificates, the twins were given plaintiff's last name.

The parties cohabitated and parented the twins together until they separated in 2014—before statutes excluding same-sex couples from marriage were declared unconstitutional in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 609 (2015). The parties continued co-parenting the twins and shared custody until defendant experienced serious health concerns in 2016. At that time, plaintiff became the twins' primary caretaker until 2018 when a custody dispute arose.

In November 2018, plaintiff filed a complaint for custody of the twins as well as a motion to establish interim custody and parenting time. The matter was heard by a referee who determined parentage should first be established. The case was dismissed and resubmitted by plaintiff as a complaint to establish parentage.

The trial court held a hearing to establish plaintiff's standing as a parent. Plaintiff argued that she was the twins' "natural mother" by virtue of her genetic connection to the children, and that defendant, the "gestational surrogate," was merely "the woman who carried the eggs of [plaintiff] and the sperm of an anonymous donor." Plaintiff also raised due process and equal protection arguments. Defendant countered that the SPA applied in such a way that it invalidated any surrogacy contract between the parties. Defendant reasoned that because there is no valid surrogacy contract, she is the twins' "natural parent" by default because she gave birth to them. Defendant further argued that Michigan law provides no avenue for conferring maternity on a party except by way of birth and delivery of a child, and therefore, plaintiff lacked standing to seek custody. Defendant asserted that the parties decided not to have plaintiff recognized as a legal parent to the children at the time of their birth, and that plaintiff must now live with the consequences of that decision.

The trial court found that plaintiff is the twins' "natural and legal mother" and ordered that the birth certificates be amended to add plaintiff. The trial court also awarded joint legal custody on an interim basis and set forth a parenting-time schedule. However, during the course of the preliminary hearing, the trial court raised the issue of defendant's standing as a "natural parent" and ordered additional briefing on the matter. Defendant moved for reconsideration of the trial court's orders, which it denied.

Regarding defendant's standing, plaintiff then argued that defendant was not the twins' natural parent because she shared no genetic connection with them. In response, defendant maintained her position that her biological connection to the twins, by way of gestation, made her the twins' natural parent too. Defendant argued that neither the statute, nor the dictionary definition, limit "natural parent" to mean only a genetic parent, and such a narrow interpretation of the term is antithetical to the purpose of the CCA and would violate her constitutional rights to substantive due process and equal protection. Defendant also argued that she has "standing by agreement" by way of the parties' co-maternity arrangement and that plaintiff's action to revoke defendant's parentage of the twins was barred by the limitations period set forth in the Revocation of Paternity Act ("ROPA"), MCL 722.1437(1).

RECEIVED by MSC 2/8/2022 5:38:14 PM

The trial court concluded that the SPA applied to the facts of this case because it broadly defines a surrogate parentage contract as encompassing any arrangement in which a female agrees to conceive a child through artificial insemination, or in which a female agrees to surrogate gestation. The trial court further reasoned that the SPA identifies the "mother" as a party with a genetic connection to the child, whereas a "surrogate carrier" gestates and births a child to whom she has no genetic relationship. The trial court recognized that the SPA does not indicate which party should have custody to the resultant offspring, but rather directs court to apply the CCA.

The trial court noted that this case presents a matter of first impression in Michigan, but it considered the various outcomes in other jurisdictions under similar factual circumstances. The trial court was persuaded by the public policy rationale in *Belsito v Clark*, 67 Ohio Misc 2d 54; 644 NE2d 760 (1994). The trial court considered the Acknowledgment of Parentage Act, MCL 722.1003, the Safe Delivery of Newborns Act, MCL 712.1 *et seq.*, the Adoption Code, MCL 710.21, and finally the CCA, which defines a parent as "natural" or "adoptive," MCL 722.22(i). The trial court concluded that "the [L]egislature of this state has established that it is the public policy of this state to identify a parent as a person with a biological connection to the child." In this case, the trial court concluded that plaintiff, by way of her genetic connection to the twins, was the only party to establish such a biological connection. As a result, this finding created a presumption that the best interests of the twins were served by awarding plaintiff custody, while the SPA granted defendant standing as a third party.

Defendant sought leave to appeal to this Court, but the application was dismissed for lack of jurisdiction because the opinion issued by the trial court was not a decision on a dispositive motion. *LeFever v Matthews*, unpublished order of the Court of Appeals, entered October 23, 2019 (Docket No. 351133). Accordingly, the matter progressed to trial where defendant was required to show by clear and convincing evidence that it was in the twins' best interest for her to have custody.

After a six-day trial, the court concluded that defendant failed to carry her burden to establish parentage. Plaintiff was awarded full legal and physical custody and the trial court ordered that defendant's name be removed from the twins' birth certificates. However, the trial court granted parenting time to defendant pursuant to her standing as a third party under MCL 722.271(b). Defendant now appeals and challenges the trial court's finding that she is not a natural parent. She argues that the trial court misinterpreted the CCA when it found that she is not a "natural parent," that it misapplied the SPA to the facts of this case, and that the trial court's order implicates her federal constitutional rights to substantive due process and equal protection under the law.

II. STANDARDS OF REVIEW

Legal standing constitutes a question of law that we review de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). As it relates specifically to "the resolution of a child custody dispute," the CCA provides that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A clear legal error occurs when the circuit court incorrectly chooses, interprets, or applies the law. *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014); *Fletcher v Fletcher*, 447 Mich

RECEIVED by MSC 2/8/2022 5:38:14 PM

871, 881; 526 NW2d 889 (1994). We review matters of statutory interpretation and constitutional issues de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009).

III. THE CHILD CUSTODY ACT OF 1970

Defendant first argues that the trial court committed error requiring reversal when it concluded that she was not a "natural parent" under the CCA because she lacked a genetic connection to the twins. We agree.

The CCA governs custody, parenting time, and child support issues for minor children in Michigan and it is the exclusive means of pursuing child custody rights. MCL 722.24(1); *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003). It is "equitable in nature," and must be "liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved." MCL 722.26(1). The CCA contains the following parental presumption:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. [MCL 722.25(1).]

"Parent" is defined as "the natural or adoptive parent of a child." MCL 722.22(i). However, determining whether the term "natural parent" is elastic enough to include defendant is a matter of statutory interpretation. To that end, we consider the following principles:

> The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, the court must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion. The courts may not read into the statute a requirement that the Legislature has seen fit to omit. When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another. [*In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015), quoting *Book–Gilbert v Greenleaf*, 302 Mich App 538,

RECEIVED by MSC 2/8/2022 5:38:14 PM

541–542; 840 NW2d 743 (2013) (brackets omitted).]

The term "natural parent" is not defined by the statute. However, we have previously interpreted the term to mean a blood relation. *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 236; 882 NW2d 194 (2015), (hereinafter, *Stankevich III*) (citing Random House Webster's College Dictionary (2005) definition of "natural"). A blood relation is different from relation by affinity or adoption, and the term "natural parent" as defined in the CCA does not include those relationships. This is supported by the inclusion of the term "adoptive parent" as a separate category from "natural parent" within the same subsection, MCL 722.22(i). Thus a "parent" within the meaning of the CCA does not include relations such as step-parents (who are related to a child by marriage or affinity), foster parents (whose relationship to a child is determined and controlled by the agency foster/parent agreement), or grandparents (who may be related to a child by consanguinity, but are removed in their relation by one degree). Such parties are "third persons." See MCL 722.22(k) (defining "third person" as "an individual other than a parent"); *In re Anjoski*, 283 Mich App 41, 52; 770 NW2d 1 (2009) (considering a step-parent as a third party); *Tallman v Milton*, 192 Mich App 606; 482 NW2d 187 (1992) (considering foster parents as third parties); *Bowie v Arder*, 441 Mich 23, 48–49; 490 NW2d 568 (1992) (considering a grandparent as a third party). Here, defendant's relationship to the twins as their birth mother has a closer biological connection than a step-parent or foster parent, and even that of a grandparent because she is related to the twins in a closer degree than a grandparent as defendant gave birth to the children.

Moreover, when interpreting an undefined statutory term, the term "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). Consulting a lay dictionary is proper when defining common words or phrases that lack a unique legal meaning, but when the statutory term is a legal term of art, the term must be construed in accordance with its peculiar and appropriate legal meaning. *Id*. *Black's Law Dictionary* (11th ed 2019) does not define "natural parent," but it defines "blood relative" as "[s]omeone who shares an ancestor with another." In addition, the entry for "genetic parent" refers to the definition for "biological parent" which is "[t]he woman who provides the egg . . . to form the zygote that grows into an embryo." "Birth parent" is defined as "[e]ither the biological father or the mother who gives birth to the child." Thus, plaintiff meets the definition of "biological parent" and "genetic parent" and defendant satisfies the definition of a "birth parent." However, those terms are not included in the definition of "blood relative" or otherwise mention the term "natural parent."

Accordingly, we must consider the lay dictionary definition as we did in *Stankevich III*, 313 Mich App at 236.[1] We have found no dictionary definition for "natural parent," but, building

[1] In that case, the parties were a same-sex couple that had been married in Canada in 2007. *Stankevich III*, 313 Mich App at 233. Using artificial insemination, the defendant became pregnant and gave birth before the parties separated in 2009 and a subsequent custody complaint was filed. *Id.* It was undisputed that the defendant was the biological parent to the child. *Id.* Rather, the issue before us concerned the application of the equitable-parent doctrine which recognizes that " 'a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child,' such a person, in

RECEIVED by MSC 2/8/2022 5:38:14 PM

off our analysis in *Stankevich III*, we consider the various dictionary definitions of "blood relation," and conclude that they merely differentiate between relation by birth and adoption. See *American Heritage Dictionary of the English Language* (5th ed) (defining "blood relation" as "a person who is related to another by birth rather than by marriage"); *Merriam-Webster Online Dictionary* (defining "blood relative" as "someone who has the same parents or ancestors as another person"); *MacMillan Dictionary Online* (defining "blood relation" as "someone that you are related to by birth, rather than by marriage"); *Cambridge Dictionary Online* (defining "blood relation" as "someone who is related to you by birth rather than through marriage"). Thus, the textual clues indicate that the term "natural parent" is elastic enough to include defendant, who, although she has no genetic connection to the twins, is related to them by birth rather than through marriage.[2]

In concluding otherwise, the trial court erroneously considered the genetic requirements in other family-law statutes, namely, the Acknowledgment of Parentage Act, MCL 722.1003, the Safe Delivery of Newborns Act, MCL 712.1 *et seq.*, and the Adoption Code, MCL 710.21. "However, the first step of statutory interpretation is to review the language of the statute at issue, not that of another statute." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 521; 821 NW2d 117 (2012). Although a statute must be read in conjunction with other

---

being treated as a parent, may also seek the rights of custody or parenting time." *Id.* at 238, quoting *Atkinson v Atkinson*, 160 Mich App 601, 608–609; 408 NW2d 516 (1987).

Initially, we concluded that the equitable-parent doctrine was inapplicable to the case because in *Van v Zahorik*, 460 Mich 320, 330–331; 597 NW2d 15 (1999), the Michigan Supreme Court had declined to extend application of the doctrine outside the context of marriage, and because at the time of the appeal Michigan did not recognize same-sex marriage, the doctrine was inapplicable to the facts of that case. *Stankevich v Milliron*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 1, (hereinafter *Stankevich I*) vacated and remanded 498 Mich 877; 868 NW2d 907 (2015) (hereinafter *Stankevich II*). While appeal from *Stankevich I* was pending, the United States Supreme Court issued its decision in *Obergefell*, 576 US 644, which struck down as unconstitutional Michigan's statute that prohibited same-sex marriage. Accordingly, the Michigan Supreme Court vacated *Stankevich I* and remanded the case to the Court of Appeals for reconsideration in light of *Obergefell*. On remand, we maintained our interpretation of the term "natural parent" but concluded that the plaintiff was not barred from asserting the equitable-parent doctrine and we remanded the matter to the trial court for an evidentiary hearing regarding the validity of the marriage and the other disputed factual issues *Stankevich III*, 313 Mich App at 240-242.

[2] The concurrence criticizes us for relying on dictionaries, rather than the common law, to ascertain the meaning of "natural parent." However, the CCA is "a comprehensive statutory scheme" concerning child-custody matters. See *Van*, 460 Mich at 327. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Our duty is therefore to address the comprehensive statutory language of the CCA.

RECEIVED by MSC 2/8/2022 5:38:14 PM

relevant statutes and interpreted in a manner that ensures that it works in harmony with the entire statutory scheme, *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009), none of these statues were implicated by the facts of this case.

In addition, a review of these statutes does not support the trial court's conclusion that Michigan law generally requires a genetic connection in order to establish maternity. Specifically, the trial court concluded that "MCL 722.1003, Michigan's Acknowledgment of Parentage Act has clearly identified that only a biological parent will have the 'duties of a child-parent relationship and legal status of [a] natural parent'." However, the act establishes paternity (not maternity). MCL 722.1004. The act defines the term "father" but not the term "mother." MCL 722.1002. Moreover, the act defines "father" as "the man who signs an acknowledgment of parent of a child." MCL 722.1002(d). This definition does not hint at any legal requirement of a genetic connection between a parent and a child. In fact, "[n]othing in the Acknowledgement of Parentage Act requires that the man completing the acknowledgement form actually be the child's biological father." *In re Daniels Estate*, 301 Mich App 450, 456; 837 NW2d 1 (2013). MCL 722.1007(g)(*i*) expressly provides that the acknowledgement form must include notice that signing the form waives blood or genetic tests to determine if the man is the biological father of the child. The only indication in the act as to how maternity is determined is found in MCL 722.1002(b) which defines the term "child" as "a child conceived and born to a woman . . . ." This definition does not include any requirement that the child be conceived by the same woman who births the child, nor does it indicate any preference for a genetic parent to take priority over a birth parent. Although MCL 722.1437 permits for the revocation of acknowledgment of parentage, "[n]othing in the act indicates that DNA results, standing alone, are sufficient to require revocation of an acknowledgment of parentage." *Helton v Beaman*, 304 Mich App 97, 108; 850 NW2d 515 (2014).

The Safe Delivery of Newborns Act states that a party petitioning for custody of a newborn may be ordered to submit to genetic testing "[u]nless the birth was witnessed by the emergency service provider and sufficient evidence exists to support maternity." MCL 712.11(2). Thus, it appears that the act only contemplates scenarios when a birth mother is also the genetic mother, and is uninformative as to the statutory construction of the CCA in this case.

The trial court's reliance on the Adoption Code is also misplaced. The act does not define or otherwise address genetic parents or birth parents. In addition, the trial court did not consider the Genetic Parentage Act, MCL 722.1461 *et seq.*, which permits a man to establish paternity by way of blood, tissue, or genetic testing. MCL 722.1467. The act focuses on a genetic parent-child connection, but considering it in the context of the entire statutory scheme, it does not support a conclusion that the Legislature intended for genetics to be the only way to establish parentage. Rather, "[t]he Legislature has provided numerous statutory paths to establishing paternity." *In re MKK*, 386 Mich App at 557. There is no indication in the plain language of any of these statutes that the Legislature intended to limit the path to establishing maternity to the single route of demonstrating a genetic connection.

In addition, the trial court relied on the public policy rationale provided in *Belsito v Clark*, 67 Ohio Misc 2d 54. We do not find this case by the Ohio Court of Common Pleas to be persuasive. In that case, the plaintiffs, Anthony and Shelly Belsito, a heterosexual married couple, used in vitro fertilization to combine their own genetic material and produce an embryo which was implanted into a surrogate, Carol Clark (Shelly's younger sister). *Id.* Before the child was born, the local

RECEIVED by MSC 2/8/2022 5:38:14 PM

hospital informed Shelly that, in accordance with Ohio law, Carol would be listed on the birth certificate as the child's mother, and because Carol was not married to the child's father, Anthony, the child would be considered illegitimate. *Id.* Thereafter, Shelly, along with Anthony, sought a declaratory order recognizing that they were the child's legal and natural parents. *Id.* The court concluded that, although both Shelly and Carol would be considered legal mothers under the language of the applicable Ohio statutes, society would be served best by a determination that only one woman was the child's mother. *Id.*

On public policy grounds, the Ohio court rejected the "intent test" adopted by California courts whereby parentage was awarded to the "intended parent." *Id.* Instead, the court, without reliance on any legal authority, concluded that in such cases, genetics wins out over gestation because the "genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits." *Id.* at 64. However, our Supreme Court has stated that "[i]t is not within the authority of the judiciary 'to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy.' " *Lash v City of Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007), quoting *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002).

Therefore, we vacate the trial court's final order and remand this case for the trial court to consider custody and parenting time with both parties as "natural parents" under the CCA.

IV. THE SURROGATE PARENTING ACT

Defendant also argues that the trial court erred when it concluded that the SPA applies to the facts of this case. We agree but conclude that the trial court's misapplication of the law does not require reversal.[3]

[3] At the outset, we note that defendant has waived this issue by initially arguing that the SPA *applies* during the May 7, 2019 hearing on plaintiff's standing in the trial court. Now on appeal, defendant reverses course and argues that the trial court erred when it concluded that the SPA applies. Waiver is a voluntary and intentional abandonment of a known right. *Braverman v Granger*, 303 Mich App 587, 608; 844 NW2d 485 (2014). "A party cannot stipulate [to] a matter and then argue on appeal that the resultant action was error." *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008) (quotation marks and citation omitted). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). To allow a party to assign error on appeal to something that he or she deemed proper in the lower court would be to permit that party to harbor error as an appellate parachute. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). Although an issue is waived, we "may overlook the preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Johnson Family Ltd Pship v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008) (internal quotation marks and citation omitted). Moreover, when the trial court "incorrectly

RECEIVED by MSC 2/8/2022 5:38:14 PM

The SPA, MCL 722.851 *et seq.*, governs surrogacy agreements. MCL 722.855 renders invalid surrogate parentage contracts. MCL 722.853(i) defines "surrogate parentage contract" as follows:

> a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to *voluntarily relinquish her parental or custodial rights to the child*. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child. [Emphasis added.]

In turn, "surrogate gestation" means "the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female." MCL 722.853(g). In addition, MCL 722.861 provides:

> If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in [the CCA, MCL 722.23].

There is no doubt that the parties had an arrangement, though not at arm's length, for plaintiff to provide the eggs and for defendant to carry and birth the twins. However, we have previously explained that the voluntary relinquishment of parental rights is a necessary element to finding that a surrogate parentage contract exists:

> The statutory language clearly defines "a surrogate parentage contract" as consisting of two elements: (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) her voluntary relinquishment of her parental rights to the child. Only a contract, agreement, or arrangement combining these two elements constitutes a "surrogate parentage contract" that is void and unenforceable under the act.
>
> * * *
>
> To summarize, we hold:

---

chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher*, 447 Mich at 881. Accordingly, we address defendant's argument on appeal.

RECEIVED by MSC 2/8/2022 5:38:14 PM

> (1) A surrogate parentage contract is void and unenforceable under § 5;
>
> * * *
>
> (3) For a surrogate parentage contract to exist there must be present the elements of (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) the voluntary relinquishment of her parental rights to the child; and
>
> (4) A contract, agreement, or arrangement that does not contain both elements set forth in (3) above is neither void and unenforceable under § 5 nor unlawful and prohibited by § 9, even when entered into for compensation. [*Doe v Attorney Gen*, 194 Mich App 432, 441-443; 487 NW2d 484 (1992) (footnotes omitted).]

MCL 722.853(i) does not state that the presumption of relinquishment of parental rights is conclusive,[4] but it also does not indicate what level of proof is required to rebut the presumption of relinquishment. Thus, we must use the "the usual standard required to overcome a rebuttable presumption: competent and credible evidence." *Reed v Breton*, 475 Mich 531, 539; 718 NW2d 770 (2006). In addition, where the statute does not specify the standard of proof, the usual civil "preponderance of the evidence" quantum of proof applies. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 521-522; 857 NW2d 529 (2014); *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993).[5]

The trial court did not make any finding on whether the evidence in this case successfully rebutted the statutory presumption of relinquishment of parental rights set forth in MCL 722.853(i). However, the parties testified that they intended to co-parent the twins and the clinic forms which were filled out at the time of the in vitro fertility treatments state that the parties intended a co-maternity arrangement. In any event, the trial court does not need to consider this issue on remand because, even assuming the SPA applies, MCL 722.861 of the SPA directs the trial court to consider the best-interest factors as set forth in the CCA when determining custody.[6]

---

[4] A statutory conclusive presumption may not be rebutted by other evidence. *Pearo v Mackinac Island*, 307 Mich 290; 11 NW2d 893 (1943). In the absence of any language indicating that a statutory presumption is conclusive, we will decline to make such an inference. *Maier v General Telephone Company of Michigan*, 247 Mich App 655; 637 NW2d 263 (2001).

[5] MRE 301, entitled "Presumptions in Civil Actions and Proceedings," explains the effect of rebuttable presumptions:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[6] MCL 722.861 states:

RECEIVED by MSC 2/8/2022 5:38:14 PM

Notably, the SPA does not indicate that the surrogate mother is a third party under the CCA, nor does it cross-reference any other provision of the CCA. Nor does MCL 722.23 (the CCA's best-interest factors) cross-reference MCL 722.25(1) (the parental presumption provision of the CCA). But, because the CCA is the exclusive means of pursuing child custody rights,[7] there is no reason to conclude that MCL 722.25(1), which provides that the best interests of the child are served by awarding custody to the child's parent or parents unless there is clear and convincing evidence to the contrary, is inapplicable. In other words, even if the SPA applies, defendant remains a "natural parent" under the CCA, as discussed above, and the trial court's erroneous conclusion that the SPA applies does not alter the outcome of the case.

V. CONSTITUTIONAL CLAIMS

Defendant also argues that the trial court's order violates her constitutional rights under the Equal Protection Clause and Due Process Clause of the United States Constitution.[8] However, because we conclude that the trial court erred in interpreting the CCA and misapplied the SPA in this case, we need not address defendant's remaining constitutional arguments. See *Dep't of Health & Human Services v Genesee Circuit Judge*, 318 Mich App 395, 407; 899 NW2d 57 (2016) (the widely accepted and venerable rule of constitutional avoidance counsels that we first consider whether statutory or general law concepts are instead dispositive).

VI. CONCLUSION

The trial court erred when it concluded that defendant is not a "natural parent" under the CCA because she lacks a genetic link to the twins that she carried through gestation and birthed.[9]

If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in [MCL 722.23].

[7] *Aichele*, 259 Mich App at 153.

[8] See US Const, Am XIV.

[9] We conclude that the term "natural parent" is elastic enough to include both parents in this case, where the parties divided the female reproductive roles of conceiving a child so that each has assumed a function traditionally used to evidence a legal maternal relationship. However, we note that the advent of assisted reproductive technology has complicated an area of law that traditionally was fairly straightforward. The statutes at play in this case, specifically the Child Custody Act of 1970, MCL 722.21 *et seq*., and the Surrogate Parenting Act ("SPA"), MCL 722.851 *et seq*. (first passed in 1988, 1988 PA 199) were written and enacted in an era when modern forms of assisted reproductive technology that are commonly used today were considered science fiction, and the cutting-edge technology being developed now was unimaginable then. Certainly, the common law could not have anticipated the fairly common circumstances of the parties in this case, let alone the circumstances of families where one child has three genetic parents, or where a child is

RECEIVED by MSC 2/8/2022 5:38:14 PM

Accordingly, we vacate the custody order and remand this case to the trial court for a new custody hearing where both parties are considered parents.

/s/ Michael J. Riordan
/s/ Kirsten Frank Kelly

produced from the DNA of one egg fertilizing a second egg, or where a child has two genetic fathers and no genetic mother. Our current statutory schemes are poor vehicles for modern-made families to seek relief, and we question whether they are robust enough in their current form to provide equitable outcomes to such families. These new technologies have thrown a wrench into the legal understanding of parentage and have given rise to novel issues in contract law, insurance coverage, immigration law, and estate planning. Accordingly, we anticipate that the Legislature will need to modernize the law to keep pace with technological advancements and appropriately balance various public policy concerns.