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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CARRIE PUEBLO,

Appellant,

v.

RACHEL HAAS,

Appellee.

MSC Case No. 164046

Court of Appeals File No. 357577

Lower Court File No. 2020-6382-DC

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DEFENDANT-APPELLEE RACHEL HAAS' ANSWER AND BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF BASIS FOR JURISDICTION

Appellant, Carrie Pueblo, has brought this Appeal by Application, from the unpublished ruling of the Michigan Court of Appeals, dated December 28, 2021, affirming the trial court's decision that granted Defendant-Appellee's Motion for Summary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

Appellant has timely filed her Application for Leave to Appeal pursuant to MCR 7.305(C)(2).

This Court has jurisdiction over this application under MCR 7.303(B)(1).

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Whether the Trial Court erred in its decision, affirmed by the Court of Appeals, that the Appellant lacked standing to file her Complaint for Custody, Parenting Time and/or Child Support, where the record establishes that Appellant is not the natural parent, nor the adoptive parent of the minor child, nor a third person entitled to standing under Michigan's Child Custody Act, MCL 722.21 et seq.

A. Trial Court Answers: No.

B. Court of Appeals Answers: No.

C. Appellant Carrie Noble Answers: Yes.

D. Appellee Rachel Haas Answers: No.

II. Whether the Equitable Parent Doctrine applies in the case at bar, where the record indisputably establishes that the Appellant and Appellee are not and were never married.

A. Trial Court Answers: No.

B. Court of Appeals Answers: No.

C. Appellant Carrie Noble Answers: Yes.

D. Appellee Rachel Haas Answers: No.

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III. Whether the Trial Court's dismissal of the Appellant's Complaint for Custody, Parenting Time and/or Child Support, affirmed by the Court of Appeals, violated the Appellant's Due Process and Equal Protection Rights where the Appellant failed to allege and failed to establish that she was married to the Appellee and a genetic parent, birth parent, or adoptive parent of the minor child.

A. Trial Court Answers: No.

B. Court of Appeals Answers: No.

C. Appellant Carrie Noble Answers: Yes.

D. Appellee Rachel Haas Answers: No.

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COUNTER-STATEMENT OF FACTS

The Trial Court considered and relied upon the following facts -- and no additional facts were provided to the Court of Appeals to supplement the record -- all sworn to in the form of an Affidavit of Rachel Haas (filed with the Trial Court as part of the Defendant's Motion for Summary Disposition) and which facts are not in dispute.

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

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

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

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

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

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

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

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

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

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In view of the Michigan Court of Appeals' decision in Lefever v Matthews, No. 353106 (Mich.App. 2021) (released "FOR PUBLICATION"), it is also noted that the Appellant has not alleged, nor would she be able to factually establish, that she contributed genetic material to the fetus carried by the Appellee. In short, there is no genetic, nor birth connection between the Appellant and the minor child.

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

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

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

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

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

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

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ARGUMENT

I. PLAINTIFF CARRIE PUEBLO LACKS LEGAL STANDING TO FILE THIS COMPLAINT WHERE SHE IS NOT THE NATURAL PARENT, NOT THE ADOPTIVE PARENT, AND NOT A THIRD PERSON ENTITLED TO STANDING TO BRING A CUSTODY COMPLAINT FOR THIS MINOR CHILD.

Standard of Review

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

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

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

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under what it deems is the appropriate court rule, irrespective of the court rule applied by the trial court in this matter.

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

This Court is to review the Michigan Child Custody Act, MCL 722.21 et seq., and to interpret the statute as a matter of law. "Since the time of Marbury v Madison, interpreting the law has been one of the defining aspects of judicial power. 'Although we may not usurp the lawmaking function of the legislature, the proper construction of a statute is a judicial function, and we are required to discover the legislative intent.'" SBC Michigan v Public Service Commission, 482 Mich. 90; 754 N.W.2d 259, 265 (2008), citing Marbury v Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) and Webster v Rotary Electric Steel Co., 321 Mich. 526, 531; 33 N.W.2d 69 (1948). See also, Kelly v Secretary of State, 293 Mich. 530, 533; 292 N.W. 479 (1940) ("[I]n the final analysis the construction of a statute remains in the judicial branch of our government.")

"Statutory standing" simply entails statutory interpretation and the question it asks is whether the Legislature provided this plaintiff the right to sue this defendant to

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redress his injury. Lansing Schools Ed. Ass'n, MEA/NEA v Lansing Board of Educ., 282 Mich.App. 165; 772 N.W.2d 784, 787 (2009). Standing is critical to a court's exercising its jurisdiction over a particular claim – our state constitution requires that a plaintiff possess standing before a court can exercise its jurisdiction. Miller v Allstate Ins. Co., 481 Mich. 601; 751 N.W.2d 463, 467 (2008).

In the absence of a clear legal error made by the Trial Court in a child custody matter, the judgment of the Circuit Court will be affirmed on appeal. MCL 722.28. A clear legal error occurs when the Trial Court incorrectly chooses, interprets, or applies the law. Kubicki v Sharpe, 306 Mich.App. 525, 538; 858 N.W.2d 57 (2014). As set forth above, in the review of statutory interpretation and constitutional issues, the appellate court reviews such matters *de novo*. Estes v Titus, 481 Mich. 573, 578-579; 751 N.W.2d 493 (2008); and, In re MKK, 286 Mich.App. 546, 556; 781 N.W.2d 132 (2009).

A. Where The Appellant Is Not the Natural Parent, Nor the Adoptive Parent Of The Minor Child, Nor A Third Person Entitled To Standing Under Michigan's Child Custody Act, MCL 722.21 Et Seq., the Appellant Does Not Have Standing To Initiate Her Complaint For Custody, Parenting Time And/or Child Support In Relation To The Appellee's Minor Child.

i. Appellant Carrie Pueblo is Not the Natural Parent of the Minor Child.

The Michigan Child Custody Act defines a parent as "the natural or adoptive parent of the child." MCL 722.22(i). The Child Custody Act does not define what constitutes a "natural parent," but the Michigan Court of Appeals has defined the term to mean a person that is related to a child by "blood," rather than by adoption. See Stankevich v Milliron (on remand), 313 Mich.App.233, 236; 882 N.W.2d 194 (2015).

In 2021, the Michigan Court of Appeals expanded the meaning of natural parent to include a parent related to a child "by birth," regardless of genetic connection." See Lefever v Matthews, No. 353106 (Mich.App. 2021) (released "FOR PUBLICATION");

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slip op at 4 (including in the definition of "natural parent" a woman who gives birth to a child as a surrogate.)

Finally, a person may be deemed a "natural parent" under the "equitable-parent doctrine." Atkinson v Atkinson, 160 Mich.App. 601; 408 N.W.2d 516 (1987) outlines Michigan's Equitable Parent Doctrine, stating:

> ". . . a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of a complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support." Id., at 608-609.

This Court, however, has specifically declined to extend the equitable-parent doctrine to non-marital relationships. Van v Zahorik, 460 Mich. 320, 331; 597 N.W.2d 15 (1999).

To initiate its *de novo* review, this Court should consider the following uncontroverted facts: 1) the Appellant did not contribute genetic material to the ovum that was fertilized in the Appellee by way of *in vitro* fertilization; 2) the Appellant has no genetic, or "blood," relation with the minor child; 3) the Appellant did not give birth to the minor child; 4) the Appellant is not the adoptive parent of the minor child, nor did the Appellant ever commence adoption proceedings for the minor child; 5) the Appellant is not identified as a parent of the minor child on the birth certificate, nor has she ever been judicially established as a parent of the minor child in any prior proceeding; and, 6) the Appellant and the Appellee never married, even after Obergefell.

Clearly, the Appellant is not the natural parent of the minor child in this case. Accordingly, she has no standing under the Michigan Child Custody Act as a "natural parent." At most, the Appellant's status is that of an unrelated third party to this minor

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child [2] – to be certain, the Appellee is not conceding that the Appellant satisfies the requisites for "third party standing" under the Michigan Child Custody Act, as set forth in MCL 722.26c, 722.26d, and 722.26e. In fact, Appellee argues that Appellant clearly does not meet this standard.

Notwithstanding the clear language in Michigan's statutes relative to designation as a "natural parent," Appellant asks this Court to contort the reasoning set forth in Lefever, to establish that she is a "natural parent" of the minor child. This argument is without any factual or legal foundation and grossly mischaracterizes the Lefever opinion. Further, and as significantly, Appellant's argument erroneously asserts that the facts in Lefever and the facts in the case at bar are identical. They are not.

In Lefever, the parties were formerly romantically involved, beginning their same-sex relationship in 2011. At some point in their relationship, the parties decided to have children together, using the Lefever Appellee's fertilized eggs (fertilized by a sperm donor) and implanting them in the Lefever Appellant's womb. The *in vitro* fertilization resulted in the birth of twins. The parties cohabitated, raising the twins together, until 2014 when they separated, prior to the Obergefell ruling. The parties continued an informal shared custody arrangement until the Appellant became seriously ill in 2016. Thereafter, the Appellee became the primary caregiver until 2018, when a custody dispute between the parties arose.

In November 2018, the Lefever Appellee filed a complaint for custody, with a motion to establish temporary custody and parenting time. The issue was submitted to

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

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a referee for hearing and recommendation, who indicated that parentage should first be established – the custody motion was withdrawn and resubmitted by the Appellee as a complaint to establish parentage.

After hearing, the trial court agreed with the Appellee's argument that she was the twins' "natural and legal mother" and ordered that the birth certificates be amended to add the Appellee's name, accordingly. The trial court awarded joint legal custody and established an interim parenting time order. However, the trial court also directed the parties to brief the issue of whether the Appellant was, in fact, a "natural parent" of the twins.

The Appellee argued that the Appellant was not the twins' "natural parent" because she shared no genetic connection with them. The Appellant argued that she had a biological connection to the twins, by virtue of gestation, and as such that she should be considered their "natural parent," too. Appellant pointed out that the Michigan Child Custody Act provides no definition for "natural parent" and should not be limited to mean only a "genetic" parent. The trial court agreed with Appellee's argument and Appellant made application for leave to appeal, which was dismissed for lack of jurisdiction and remanded to the trial court for a decision on the dispositive motion.

After a trial on the underlying merit of the motion for physical custody, the trial court concluded that the Appellant failed to meet her burden to establish parentage. The Appellee was awarded sole legal and physical custody and the trial court ordered that the Appellant's name be removed from the twins' birth certificates. Appellant appealed and challenged the trial court's ruling that she was not the twins' natural parent.

In reversing the trial court, after lengthy discussion, the Lefever majority ruled that the Appellant was the twins' natural parent. It notes that the term is undefined under

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the Child Custody Act, but then engages in a meaningful comparative analysis against the term "third persons" who in certain limited circumstances do have standing to maintain actions for custody of a minor child.

In distinguishing the Appellant from a stepparent, a foster parent, or a grandparent, who do not constitute "natural parent" under the Michigan's Child Custody Statute but rather constitute "third persons," the appeals court noted that the Appellant's relationship has a closer biological connection to the child than any of those "third persons" as she actually gave birth to the minor child.

After further detailed analysis of the definitions given to the term "natural parent," or other derivative and related terms, the majority concluded that the term "natural parent," given its ordinary meaning from "textual clues," "is elastic" enough to include the Appellant who, "although she ha[d] no genetic connection to the twins, is related to them by birth rather than through marriage." Lefever, No. 353106 (Mich.App. 2021) (released "FOR PUBLICATION"); slip op at 6. In other words, both the Appellee and Appellant were "natural parents" of the twins in question – the former by reason of her status as a "biologic parent" and "genetic parent" and the latter by reason of her status as a "birth parent." Id. at 5.

Appellant, in the case at bar – Ms. Pueblo, somehow wants this Court to use the Lefever reasoning to conclude that she is a "natural parent" of the minor child. This argument is grossly misplaced. She argues that the "facts in Lefever v Matthews are identical in the case at bar." With due respect, these facts aren't identical at all – at least not the facts that matter to the Lefever discussion, reasoning, and holding.

As the Trial Court concluded in its Decision of the Court Regarding Plaintiff's Motion for Reconsideration, dated June 1, 2021:

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> "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 [sic] of the Lefever case, this Court finds that it does not provide a 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).

The Appellant spends inordinate time focusing on interesting coincidental facts between the case at bar and Lefever, but she misses the gravamen of the Appellant's complaint in Lefever. The Appellant in Lefever gave birth to the twins!

Among all the Lefever facts, the fact that the Appellant gave birth to the twins is the *sine qua non* of the appeals court decision, juxtaposed against the Appellee's unduly restrictive argument that only those that contribute genetic material can be considered "natural parents" of any child under Michigan's Child Custody Act. This point is seemingly lost in the Appellants' erroneous argument to this court in her effort to get this Court to adopt the Lefever reasoning to facts that are significantly dissimilar.

The Trial Court was correct in concluding that this Appellant was not a natural parent of the minor child, even under the more expansive contemplation articulated in Lefever. The Trial Court's conclusion that Appellant lacks standing to file a custody complaint under Michigan's Child Custody Act and that dismissal was warranted, were correct applications of the law and should be affirmed.

ii. Appellant, Carrie Pueblo, Does Not Have Third Party Standing to File a Custody Complaint.

In 1993, Michigan's legislature expanded third party, or "third person" standing, to file an original action seeking custody. This standing is addressed in MCL 722.26c(1)(a) and 722.26c(1)(b).

Under MCL 722.26c(1)(a), a third party may file such a complaint if both of the following conditions are met: 1) the child was placed for adoption with a third person

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under the laws of the adoption laws of the state of Michigan or another state and the placement order is still in effect when the action is filed; and (2) since the placement, the child has resided with the person for at least six (6) months. This, obviously, is to address the situation of an incomplete adoption proceeding. Where there is no ongoing adoption proceeding involving this minor child, this provision has no applicability to the case at bar.

Under MCL 722.26c(1)(b), a third party, or third person, has standing to initiate a complaint for custody if all three (3) of the following conditions are met: 1) the child's biological parents have never been married to one another; 2) the child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under a court order [3]; and, 3) the third person is related to the child within the fifth degree of consanguinity by virtue of marriage, blood or adoption. See In re Anjoski, 283 Mich.App. 41; 770 N.W.2d 1, 8 (2009).

In the case at bar, while it is true that the biological parents of the minor child have never been married to one another, the other two mandatory conditions for "third person" standing cannot be met. The Appellee is the biological mother of the minor child. She is alive and not missing. Finally, the Appellant has no relationship to the minor child by marriage, blood, or adoption. Accordingly, the Appellant has no standing to initiate this custody complaint under MCL 722.26c(1)(b).

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3 This provision, requiring the death or absence of an involved biological parent, is presumably designed to be read consistently with MCL 722.25, that provides "Section 5. (1) 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." [emphasis added].

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B. Domestic Partners of a Custodial Parent Do Not Have Standing To Seek Custody Under These Expanded Provisions Of The Child Custody Act.

This legal result would be the same if Carrie Pueblo and Rachel Haas remained mere domestic partners today, notwithstanding opportunities for same-sex marriage under Obergefell v Hodges, 576 U.S. 644 (2015). Domestic partners of a custodial parent do not have standing to seek custody under these expanded provisions of the Child Custody Act. Porter v Overton, 214 Mich.App 95; 542 N.W.2d 288 (1995).

For these reasons, the Appellant's Application for Leave to Appeal should be denied.

II. WHERE THE APPELLANT AND THE APPELLEE ARE NOT AND WERE NEVER MARRIED, THE EQUITABLE PARENT DOCTRINE DOES NOT APPLY TO THIS CASE AND DOES NOT CONFER STANDING TO THIS APPELLANT TO PURSUE HER CUSTODY COMPLAINT.

Standard of Review

As a general proposition, "[t]he standard of review is *de novo* with regard to questions of law." People v Stevens, 460 Mich. 626, 631; 597 NW2d 53 (1999); Cunningham v Cunningham, 289 Mich App 195, 200; 795 NW2d 826 (2010). More specifically, in relation to an issue of legal standing to initiate an action for affirmative relief, the question is whether the party has the legal capacity to sue or standing to bring the legal action.

In the case at bar, the question is whether the plaintiff has legal standing to initiate an action for custody, parenting time and child support under Michigan's Child Custody Act, MCL 722.21 et seq. "Whether a party has legal standing to assert a claim constitutes a question of law. . ." Heltzel v Heltzel, 248 Mich.App. 1, 28; 638 N.W.2d 12 (2001). Like other questions of law, this means that the question of whether a party has legal standing to initiate a particular action is reviewed de novo. Barclae v Zarb, 300

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Mich.App. 455, 467; 834 N.W.2d 100 (2013). Whether a party has sufficient basis to assert parental rights under the equitable-parent doctrine is a question of law that is reviewed de novo, as well. Lake v Putnam, 316 Mich.App. 247, 250; 894 N.W.2d 62 (2016).

In the absence of a clear legal error made by the Trial Court in a child custody matter, the judgment of the Circuit Court will be affirmed on appeal. MCL 722.28. A clear legal error occurs when the Trial Court incorrectly chooses, interprets, or applies the law. Kubicki v Sharpe, 306 Mich.App. 525, 538; 858 N.W.2d 57 (2014). In the review of statutory interpretation and constitutional issues, the appellate court reviews such matters *de novo*. Estes v Titus, 481 Mich. 573, 578-579; 751 N.W.2d 493 (2008); and, In re MKK, 286 Mich.App. 546, 556; 781 N.W.2d 132 (2009).

A. Appellant's Argument That She Is Equitably Entitled to Standing To Bring This Complaint For Custody, As An "Equitable Parent" Of The Minor Child Under Michigan's Equitable Parent Doctrine Must Also Fail, Where The Minor Child Was Not Born In Wedlock.

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

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

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

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> afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support." Id., at 608-609.

Appellant argues that Atkinson creates an equitable window for her to obtain standing necessary to bring a custody complaint. [4]

"Generally, a party has standing so long as he or she 'has some real interest in the cause of action' or its subject matter. Anjoski, 283 Mich.App. 41, 50 [partial citation omitted]. 'However, this concept is not given such a broad application in the context of child custody disputes involving third parties, or any individual other than a parent[.]' Id." Lake v Putnam, 316 Mich.App. 247; 894 N.W.2d 62, 65 (2016).

It should not be lost on this Court that the Appellant has almost completely ignored the Lake ruling, which on its facts and application of the law destroys the Appellant's argument. In Lake, the Plaintiff and Defendant were in a same-sex romantic relationship from 2001 to 2014. They were not married and never did marry, post-Obergefell. During their relationship, the Defendant was artificially inseminated and gave birth to the minor child at issue in the case. There was no biological relationship, birth relationship, or adoptive relationship between the Plaintiff and the minor child.

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4 In making this argument, Appellant cites the case of Stankevich v Milliron, 313 Mich.App. 233; 882 N.W.2d 194 (2016), in support of her proposition that she is entitled to "equitable parent" status. It is no small coincidence that many, if not all, the alleged facts that Appellant claims to establish her close relationship with both the Appellee and the minor child are set forth in the Stankevich decision, *cf.*, Appellant's *Statement of Facts*, pp. 2-6, with Stankevich, 313 Mich.App. at 241.

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

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Shortly thereafter, the parties' relationship ended. Defendant denied the Plaintiff's requests to spend time with minor child.

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

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

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

The Court of Appeals points out that the Plaintiff "'ignores one crucial, and dispositive, requirement for the equitable-parent doctrine to apply – *the child must be born in wedlock.*' Van, 460 Mich. at 330, 597 N.W.2d 15." Lake, 316 Mich.App. at 252. "The child at issue in this case was not born or conceived during a marriage. In fact, it is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply." Id. To eliminate any confusion regarding the impact of

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Obergefell on this analysis, the Court of Appeals goes further to state that it is not within the court's discretion, considering Obergefell, "to retroactively transform an unmarried couple's past relationship into marriage for the purpose of custody proceedings. Stated differently, it is, in our view, improper for a court to impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so." Id. at 253.

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

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

Having failed to establish *standing* under the rubrics of existing Michigan law against existing facts, Appellant next argues for a change to the facts and to Michigan law in her "but for" argument to this Court, to wit: "*but for* Michigan's unconstitutional ban on same-sex marriage, corrected by Obergefell, these parties would have been married" and, accordingly, standing would be conferred to initiate a custody proceeding. There are two glaring problems with the Appellant's position. First, it changes the facts of the case and assumes facts "not in the record." Second, it engages a slippery slope that implies or suggests that case outcomes could and/or should be retroactively affected by subsequent changes in the law. In theory, cases would never be "final." [5]

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5 It is long and well-settled law in Michigan that the public policy of this state favors

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Appellant uses Chief Justice McCormack's dissent in Mabry v Mabry, 499 Mich. 997; 882 N.W.2d 539 (Mem) (2016) to advance her position, adopting Chief Justice McCormack's argument, in sum: 1) that Michigan "might fashion a rule to ensure that the

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finality of judgments. See by example, Rose v Rose, 289 Mich.App. 45; 795 N.W.2d 611 (2010); Gillespie v Detroit Housing Comm. Bd. Of Tenant Affairs, 145 Mich.App.424; 377 N.W.2d 864 (1985); Sumner v Gen. Motors Corp. (On Remand), 245 Mich.App. 653; 633 N.W.2d 1 (2001).

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

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

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

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

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

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plaintiff's and the children's constitutional rights are protected without opening the doctrine to any third party seeking parental rights" Id. at 1000.; and, 2) "that the denial of the equitable parent doctrine in same-sex cases where a non-biological parent was unconstitutionally prohibited from marrying the biological parent "perpetuates the troubling effect of this state's unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in Obergefell." Id., at 997.

Appellant argues that this change to the equitable parent doctrine would apply to a "small group of same-sex couples who were unconstitutionally prohibited from marrying but separated before the Supreme Court's decision in Obergefell and have a custody dispute." Id. at 1001, n 3. To implement this change, Appellant urges this Court to develop a "test" to "determine whether or not same-sex couples engaged in a custody dispute would have been married *but for* Michigan unconstitutionally prohibiting same-sex marriage." (Application, p 16.)

In essence, Appellant and the Mabry dissent are seemingly arguing for a ***carve out*** to apply to same-sex couples on the issue of child custody. This would create an equal protection nightmare and open pandora's box to filings seeking comparable treatment by same-sex couples who were together but didn't get married, pre-Obergefell, but who were denied legal assistance in the courts on issues of property division, spousal support, and any of the other traditional areas of domestic relations law that occasion a divorce. Theoretically, are those typical, non-children related "marital dissolution" issues to a same sex couple any less deserving of the law's equal protection? If this Court creates a "carve-out" for just custody issues, there will be a flood of due process and equal protection claims made by disenfranchised former same sex partners whose "marital" contributions to the financial success of a same sex couple were never fairly recognized

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and apportioned at the time of the couple's relationship ending.

In fact, an argument can be easily made that such individuals are more deserving of legal protection than the Appellant. At least in those instances, there likely were joint assets that were built and contributed to by both parties, unlike the absence of any biological connection between the Appellant and this minor child.

Beyond, the equal protection and due process constitutional arguments, let's suppose that this Court were inclined to create an even broader "carve out" than just custody issues for pre-Obergefell same sex couples, practically speaking, how far back do you go to analyze the status of that relationship? How would litigants deal with the destruction of evidence and records that may have been relevant at the time, but which is or are now irretrievable? Do you create retroactively applied relief based on what could have been and should have been awarded at the time of the same sex couple's break-up? Where do the equities support imposition of equitable relief and where do they discourage relief?

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

Apart from these constitutional and logistical quandaries, the essence of what the Appellant and the Mabry dissent suggests is that courts should be empowered to create an "equitable marriage" between pre-Obergefell, same sex couples for purposes of its subsequent application of the "equitable parent doctrine" in custody disputes, has already

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been addressed here in Michigan. While the Court of Appeals viewed Appellant's argument as creative and thought-provoking, considering Lake, the Court of Appeals recognized this as a "bridge too far."

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

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

Appellee anticipates that the Appellant will highlight that the Mabry dissent mentions several cases that have granted standing in any number of circumstances where a same-sex partner was asserting custodial rights or interests. Two points need to be made in response. First, none of those case, save one maybe, have based their decision on the "but for" argument relative to Obergefell and advanced by the Appellant and the

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Mabry dissent. Second, it may well be that standing was conferred but only in the context of the particular state's existing child custody statutes.

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

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

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

In sum, this Court should not expand Obergefell's sanctioning of same-sex marriage to confer custodial rights to *unmarried* couples. "[O]bergefell did not grant same-sex couples anything more than the right to have states recognize their marriage (not an insignificant right, no doubt) and to treat *those marriages* the same as one between heterosexuals." Id., at 262. A "but for" argument could be made in nearly every area of the law to create redress to individuals, or a class of individuals, for which prior iterations of the law did not provide relief – irrespective of whether the law was constitutional and subsequently changed or the law was unconstitutional and successfully

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challenged. To revisit all those cases or many or some selectively will create the logistical and constitutional chaos that an ordered democracy and constitutional legal system cannot invite, nor survive.

For these reasons, Appellants' Application for Leave to Appeal should be denied.

III. WHERE THE APPELLANT IS NOT MARRIED AND FAILED TO ESTABLISH THAT SHE HAD LEGAL STANDING TO FILE HER CUSTODY COMPLAINT, APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS HAVE NOT BEEN VIOLATED.

Standard of Review

As a general proposition, "[t]he standard of review is *de novo* with regard to questions of law." People v Stevens, 460 Mich. 626, 631; 597 NW2d 53 (1999); Cunningham v Cunningham, 289 Mich App 195, 200; 795 NW2d 826 (2010). More particularly, the standard of review for questions of constitutional law is *de novo*. Detroit Mayor v Arms Technology, Inc., 258 Mich.App. 48, 57; 669 N.W.2d 845 (2003), citing People v LeBlanc, 465 Mich. 575, 579; 640 N.W.2d 246 (2002). See also Estes v Titus, 481 Mich. 573, 578-579; 751 N.W.2d 493 (2008); and, In re MKK, 286 Mich.App. 546, 556; 781 N.W.2d 132 (2009).

A. There Has Been No Denial of Appellant's Due Process Rights Where the Appellant and The Appellee Were Not Married and Appellant Has Not Been Denied Any Benefit Granted To A Heterosexual Married Person.

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

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

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

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

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

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

Due process has not been denied to the Appellant under application of Michigan's Child Custody Act, where she was not married and has not been denied any benefit granted to a heterosexual married person. In Sheardown v Guastella, 324 Mich.App. 251; 920 N.W.2d 172 (2018), *infra* at 19, the Michigan Court of Appeals considered the case of an unmarried same-sex couple, who entered a contract with a sperm donor to assist the defendant with getting pregnant. The couple broke up, prior to Obergefell, and then the defendant's child, MEG, was born as a result of the insemination/sperm donor agreement. Plaintiff and defendant never got married, nor did the plaintiff seek to adopt MEG, even post-Obergefell. The Plaintiff initiated a custody action which was dismissed by the trial court for lack of standing.

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On appeal, after a trial court determination on remand that MCL 722.22(i) was unconstitutional in light of Obergefell, the plaintiff argued that she should be considered a parent due to the sperm donation agreement that contained statements that plaintiff and defendant "intend[ed] to be legal parents of any child born as a result of [the] inseminations" and that "they will file a petition for [plaintiff] to adopt the child as soon as possible after its birth." Accordingly, she argued that the agreement conferred standing and that the fundamental right to parent, recognized in Troxel v Granville, 530 U.S. 57 (2000), was violated by the trial court's refusal to allow her to seek custody of MEG. Sheardown, 324 Mich. at 254.

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

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

Sheardown, 324 Mich.App. at 260.

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By either account of the Appellant or the Appellee, their relationship lasted past 2011. By the time same-sex marriage was legalized in New York in June 2011, seven (7) states allowed for same-sex marriage, some with residency requirements and some without. Those states were Massachusetts, California, Connecticut, Iowa, Vermont, New Hampshire, and New York. Notwithstanding Appellant's present argument that the Appellant and Appellee would have been married if they could, they didn't get married in any of the seven (7) states that afforded them that right prior to the termination of their relationship in 2012. Further, Appellant made no attempt at any time to adopt the minor child in the case at bar, either pre-Obergefell or post-Obergefell. In such circumstances, like in Sheardown, it is impossible to find that Appellant has been denied her fundamental right to liberty by virtue of any denial of her right to marry and the further dismissal of her custody complaint for lack of standing.

In the case at bar, the legal question then becomes whether the relationship between the Appellant and the minor child has been treated as a "protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection." For reasons previously discussed, relative to Michigan's well-developed child custody laws and long-held adherence to the strictures of the *equitable parent doctrine* requiring marriage, it is impossible to conclude it has; *cf.*, Michael H. v Gerald D., 491 U.S. 110, 124 (1989). [6]

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

In ruling on a motion for summary judgment, brought by the mother's husband,

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

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

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

> "It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint . . . In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to ranked as fundamental.' Snyder v Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed 674 (1934) (Cardozo, J.)
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> ". . . Thus, the legal issue in the present case reduces to whether the relationship between person in the situation of Michael and Victoria [his alleged biological daughter] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family against the sort of claim Michael asserts.
>
> "The presumption of legitimacy was a fundamental principal of the common law. H. Nicholas, Adulterine Bastardy 1 (1836). Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had no access to his wife during the relevant period. Id., at 9-10 [citations omitted] . . .
>
> ". . . We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where

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Simply stated, if denial of standing to an unmarried father who (without any reasonable doubt) has an established biological connection to a minor child is not a violation of due process, how is it that this Appellant's due process rights have been violated where she has no biological, genetic, or adoptive relationship with the minor child? And is the Appellant's non-biological, non-genetic, non-adoptive relationship the type of "filial" relationship that has been protected within our nation's traditions? No, it is not.

> the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case. But the evidence shows that even in modern times – when, as we have noted, the rigid protection of the marital family has in other respects been relaxed – the ability of a person in Michael's position to claim paternity has not been generally acknowledged. . .
>
> ". . . Moreover, even if it were clear that one in Michael's position generally possesses, and has generally always possessed, standing to challenge the marital child's legitimacy, that would still not establish Michael's case. As noted earlier, what is at issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael. It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration. What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. . .
>
> ". . . What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made." Michael H., 491 U.S. 121-127. [Emphasis added].

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B. There Has Been No Denial of Equal Protection to The Appellant Who Has Not Suffered Dissimilar Treatment As A Result Of Dismissal Of Her Custody Complaint.

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

"Unless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate government purpose. [7] Id. at 662; 487 N.W.2d 166. When determining the constitutionality of a statute, a court must not be "'guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy . . .'" Gomez v United States, 490 U.S. 858, 864 [citations omitted] (1989)." Id. Undergirding the entirety of Supreme Court jurisprudence on state or federal statutes that affect parents and children is the Court's

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

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inviolate principle that ". . . the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v East Cleveland, 431 U.S. 494 (1977).

In the application of Michigan's Child Custody Act, is this Appellant being treated differently than another third party, non-biological parent arguing for standing under Michigan's Child Custody Act as either a recognized third party, qualifying under certain limited circumstances, or under the doctrine of "equitable parenthood?" The answer to that question is "no."

Equal protection has not been denied to the Appellant under Michigan's Child Custody Act where she was not married. "What is dispositive of this constitutional argument is that a male in an opposite-sex relationship could also meet the same fate as plaintiff, and thus receive the same treatment as plaintiff under the statute. For example, suppose the female in an opposite-sex relationship becomes pregnant with a third party's child, but once born, the male in the relationship treats the child as his own. Once the relationship ends, the male would be in the same position as plaintiff relative to the statutory definition of "parent," i.e., he would have no biological or legal link to the child born during the relationship. Because the foregoing shows that the statute can be applied equally to someone in plaintiff's position, but not in a same-sex relationship, MCL 722.22(i) is constitutional." Sheardown, 324 Mich. at 260. The statute is constitutional and, derivatively, its application to this same sex but unmarried relationship, in the case at bar, is constitutional.

As indicated above, Appellant makes the argument that "but for" the constitutional prohibition against same-sex marriage, these parties would have been married; and, accordingly, she might be able to claim *equitable parent* status even in the absence of

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genetic, biological, or birthing relationships with the minor child. But there are no facts in the record to suggest that this is true – there is nothing to suggest that these parties would have been married. They did not get married in any of the seven states that provided for same-sex marriage as far back as 2004. And even with the opportunity to get married in Michigan after Obergefell, the parties did not reconcile and did not get married. Appellant did not initiate any adoption proceedings before or after Obergefell.

As Lake held, courts are reticent to retroactively go back and impose a certain status to a relationship between parties where it desired by only one party. This would be the case whether the parties were in a same-sex relationship or a heterosexual relationship.

These laws, whether created by statute (as in the Michigan Child Custody Act) or the product of common law (like the presumption of legitimacy given to children born in wedlock [8]), reflect the importance of marriage and the preservation of a family unit. At its core, Obergefell is the by-product of a growing and broader societal desire to extend the sanctity of "marriage" to a larger group of individuals, irrespective of sexuality – and, certainly, if the fact of "marriage" weren't legally, religiously, and symbolically important to all persons, irrespective of sexuality, would Obergefell have been so monumental? Certainly not. Michigan law has developed for centuries around these central tenets. Obergefell doesn't change these tenets – if anything it reinforces them.

Standing to establish and, in some instances, challenge the nature of the relationships extant in the family unit are narrowly circumscribed by law to prevent

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8 See Barnes v Jeudevine, 475 Mich. 696; 718 N.W.2d 311 (2006), reh'g den. 477 Mich. 1201; 720 N.W.2d 748 (2006); cert. den. Barnes v Jeudevine, 127 S.Ct. 1494, 167 L.Ed.2d 229 (U.S.Mich. Mar 05, 2007) (No. 06-911).

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unwarranted disruption to that family unit – this is so whether the persons involved are homosexual or heterosexual. Appellee has a constitutional right of privacy in raising her child, including her determination with whom he spends time. The State would necessarily be interfering with such constitutional right by allowing this case to proceed.

In Michigan, like the Child Custody Act, the legislature has only provided very narrow exceptions to the general prohibition against state interference in the family unit. The legislature has repeatedly affirmed this protection in Michigan's Paternity Act (MCL 722.711 et seq.), Michigan's No Fault Divorce Act (MCL 552.1 et seq.), Michigan's Vital Records Act (MCL 333.2824(1) and MCL 333.2824(6)), and Michigan's EPIC Statute Outlining Parent/Child Relationship (MCL 700.2114(1)(a)).

It is almost impossible to conceive of an instance in which Michigan's reasonable limitations on standing in and among these various acts in order to prevent third parties from undermining the integrity of the family unit would violate equal protection prohibitions. Certainly not in the case at bar.

Even if a court were to apply a higher "quasi-suspect" standard to the denial of standing to this Appellant, her equal protection claim must fail. Clearly, existing Michigan child custody law and application of the *equitable parent* doctrine to require marriage serves an important governmental objective, i.e., the preservation of marriage and the sanctity of the family unit from unwarranted third-party challenges and disruption. Such laws are substantially related to achievement of those objectives.

For these reasons, the Appellant's Application for Leave to Appeal should be denied.

CONCLUSION

Appellee Rachel Haas hereby respectfully requests that this Court deny the Appellant's Application for Leave to Appeal.

Dated 4/19/2022

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