

IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals

Carrie Pueblo,
Plaintiff-Appellant,

MSC Case No. 164046
COA Case No. 357577
LC No. 2020-6382-DC

vs.

Rachel Haas,
Defendant-Appellee

BRIEF OF AMICUS CURIAE
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The Family Law Council (“The Council”) is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2,600 lawyers in Michigan practicing in, and committed to, the area of family law.

The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law.

The instant case addresses standing to seek custody under Michigan’s Child Custody Act, MCL 722.21, *et seq.* in light of *Obergefell v Hodges*.

The Family Law Section presents its position on the issues as invited by this Court in its September 23, 2022 Order. The State Bar approved submission of the amicus brief on March 17, 2023.

¹ Disclosure per MCR 7.312(H)(4): Neither counsel for either party authored this brief in whole or in part. Neither counsel for either party, nor either party, made a monetary contribution intended to fund the preparation or submission of the brief.

STATEMENT OF BASIS OF JURISDICTION

The Court of Appeals issued its decision on December 28, 2021. **Tab A**, Opinion, attached. Petitioner-Appellant Carrie Haas filed a timely application for leave to appeal per MCR 7.305. On September 23, 2022, this Court granted leave to appeal, inviting the Family Law Section of the State Bar of Michigan to submit an amicus brief.

QUESTIONS INVOLVED

This Court has granted leave to appeal to address: (1) whether, in light of *Obergefell v Hodges*, 576 US 644 (2015), the equitable parent doctrine should be extended to provide standing to persons such as the plaintiff, who, at the time of the parties' same-sex relationship, was not permitted by Michigan law to legally marry the defendant, and if so, (2) what the parameters of that extension should be.

Amicus answers that the equitable parent doctrine should not be extended to provide standing.

Amicus advocates standing in this case based on construing the term "parent" in the Child Custody Act on equal protection/due process principles.

SUMMARY OF POSITION

This case should not be viewed as a “third-party custody” case. And this is not a retroactive imposition of a marriage. Amicus advocates recognition that the plaintiff here – and other parties in similar circumstances – was denied a fundamental opportunity to assert parental rights. The constitutional principles set out in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015) apply beyond the right to marry – they apply to the rights and opportunities that are part of a “unified whole” of related rights including childrearing and procreation. *Obergefell*, 576 US at 668. These rights include the right to raise a child, which is a central part of the liberty protected by the Due Process Clause. See *Troxel*, *supra*.

Amicus is cognizant that seeking relief through the Legislature is generally the appropriate approach in these cases. But relief can be based on an equal protection/due process analysis construing the statutory term “parent,” based on criteria distilled from this case, including: the existence of a committed relationship (although opposite sex encounters resulting in a child do not always involve committed relationships), an *intentional* joint decision to have a child during the relationship, the child being conceived/born during that relationship, the child looking to both parties as their parents, and both parties holding themselves and each other out to the world and the child as parents, and accordingly acting as parents. This is a standing analysis – not a dispositive determination based on the best interest of the child factors. The constitutional argument in this brief is limited to these or similar facts.

STATEMENT OF MATERIAL FACTS²

Plaintiff Pueblo and Defendant Haas were in a committed partner relationship beginning in the early 2000s. During the relationship, Defendant underwent in-vitro fertilization and on November 11, 2008, gave birth to a child. The relationship lasted until 2012 or 2014 (the parties disagree as to the year, but the relationship ended before 2015 – the year *Obergefell* was issued). The parties were not married to each other, nor did they marry after the United States Supreme Court decision in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015). **Tab B.** The parties agree that Plaintiff has no biological relationship to the child, and that after the child was born Plaintiff did not adopt the child. By 2017, Plaintiff was no longer allowed contact with the minor child.

In 2020, Plaintiff filed an action under the Child Custody Act of 1970 (CCA), MCL 722.21 *et seq.*, seeking joint legal and physical custody of the child. Defendant argued that Plaintiff lacked standing to seek custody of the child under the CCA because she had neither a biological nor adoptive relationship with the child. Defendant moved for summary disposition of Plaintiff's complaint under MCR 2.116(C)(5) and (8), asserting that Plaintiff lacked standing to seek custody of the child and had failed to state a claim upon which relief could be granted.

After a hearing, the trial court granted Defendant's motion and dismissed Plaintiff's complaint without prejudice. Defendant moved for reconsideration, arguing that she was entitled to dismissal with prejudice. On reconsideration, the trial court entered an order dismissing with prejudice. Plaintiff then moved for reconsideration on the basis that *LeFever v Matthews*, 336 Mich App 651, 663; 971 NW2d 673 (2021), supported a finding that she had standing to bring the custody action. The trial court disagreed, finding *LeFever* to be factually distinct and that it had not palpably erred by granting Defendant summary disposition of plaintiff's claim.

² These facts are based on the Court of Appeals opinion, Tab A, pg. 1.

Plaintiff appealed. The Court of Appeals issued its unpublished decision on December 28, 2021, affirming the trial court and finding that Plaintiff did not have standing under the Child Custody Act. **Tab A.**

Plaintiff appealed to this Court, which granted leave. The Family Law Section was invited to file an amicus brief.

ARGUMENT

Amicus advocates standing in this case based on construing the term “parent” in the Child Custody Act on equal protection/due process principles.

Overview

Amicus proposes a construction of the term “parent” contained in MCL 722.22 of the Child Custody Act (CCA or “Act”) based on an equal protection analysis, providing standing for parties who were in committed partner relationships as in this case. This is not intended to be a basis for generalized third person standing to seek custody under the CCA. Any expanded construction should be limited to considerations derived from this case, such as: two same-sex partners in a committed relationship who made the joint decision to have a child, intended to raise that child together, determined how the child would be conceived and born, held themselves out to the world and the child as the child’s parents, and parented the child. Any expanded definition of parent would not include a party who had a child prior to the relationship, i.e. a child who was not born during the relationship based on the joint decision of the parties.

A. MCL 722.22(i) – Parental Standing under the Child Custody Act

The term “parent” is contained in the Child Custody Act. MCL 722.22 is the definitional section of the CCA and subsection 22(i) provides that a parent means:

“... the natural or adoptive parent of a child.”

A parent *automatically* has standing under the CCA to seek custody or parenting time.

As discussed in *LeFever v Matthews*, 336 Mich App 651, 663; 971 NW2d 673 (2021) (expanding the definition of natural parent):

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) (Stankevich III) (citing the 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 used 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 subdivision, MCL 722.22(i). Thus a "parent" within the meaning of the

CCA does not include relations such as stepparents (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" under the CCA. 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 stepparent 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).

Tab C, *LeFever*.

B. Construction of the Term "Parent"

LeFever v Matthews, *supra*, 336 Mich App 651, found that the statutory term "natural" parent (which is not expressly defined in the statute) is elastic enough to allow expansion (id at 666; 674, n. 9) and held that the defendant in that case – a same-sex parent who did not have a genetic link but gestated and birthed the children -- was a "natural" parent for purposes of standing under the Child Custody Act.

The defendant in *LeFever* argued that that neither the CCA, nor the dictionary definition, limit "natural parent" to mean only a genetic parent and that such a narrow interpretation of the term is antithetical to the overall purpose of the CCA³ to ensure the best interests and welfare of children and would violate her constitutional rights to substantive due process and equal protection. But the Court of Appeals in *LeFever* did not reach the constitutional arguments because the decision was based on a statutory analysis. The Court of Appeals vacated the custody award to only the genetic parent and remanded the case to the trial court for a new custody hearing in which both parties were considered parents.

³ The Child Custody Act "does not create substantive rights of entitlement to custody of a child" based on equity. *Bowie v Arder*, 441 Mich 23, 55 (1992), citing *Ruppel v Lesner*, 421 Mich 559, 565 (1984). Michigan addresses the best interests and welfare of children within a statutory framework. Standing must be based on a cognizable right. Here, the Constitution provides the foundation for construing and expanding the statutory term "parent" or "natural" parent.

C. This Appeal Addressed in a Constitutional Context

This case should be viewed within the line of cases, including *Obergefell*, which are constitutionally based. As noted in the concurrence in *LeFever*, “[d]ue-process and equal-protection principles similarly **open the door to parental rights** for unmarried, same-sex parents to enjoy the rights and obligations of parenthood.” *Id* at 692 (emphasis added). As discussed in more detail below in Section E, equal protection and due process principles provide the soundest approach in expanding the construction of “parent” under the CCA – a term already included in the statute.

D. Issues with the Equitable Parent Doctrine

This Court has expressly asked whether the equitable parent doctrine should be extended to provide standing for persons in a similar situation to the parties in this case. The equitable parent doctrine is not a reliable basis for standing.

The equitable parent doctrine is a judicially constructed concept and has never been adopted by the Michigan Legislature since its inception in 1987. The term “equitable parent” first appeared in *Atkinson v Atkinson*, 160 Mich App 601, 408 NW2d 516 (1987). The *Atkinson* court attempted to address, through the creation of the “novel” equitable parent doctrine, the specific situation where a child will be left fatherless and without support. In *Atkinson*, after the trial court determined that the child was not of the marriage, the plaintiff argued that he should be treated as a parent for purposes of custody and visitation because he had lived with the child and shared a close relationship. The doctrine has since been applied in varying circumstances but has **never been codified**.

The Michigan legislature has instead enacted more targeted third-party custody provisions as well as specific standing requirements for grandparenting time. See e.g., MCL 722.26(b) (standing for guardians and limited guardians); MCL 722.26(c-e) (limited third-person custody standing and jurisdiction provisions); MCL 722.27b (grandparenting time standing provisions).

The Court of Appeals in *Lipnevicius v Lipnevicius*, Mich Ct App No. 289073 (August 26, 2010)⁴ addressed the equitable parent doctrine in a case involving a legal father seeking custody against the claims of the child's mother and the biological/natural father:

With respect to whether the equitable parent doctrine should continue to be recognized in Michigan, the Supreme Court's order of remand does not ask us to determine the soundness of *Atkinson*, i.e., whether Michigan courts should continue to recognize the equitable parent doctrine. Nonetheless, we note that the continuing existence of the equitable parent doctrine necessitated a lengthy, multifaceted analysis of an otherwise simple and straightforward case. In our view, the equitable parent doctrine irreconcilably conflicts with statutes intended to occupy the entire field of child custody regulation. The governing laws, enacted by our Legislature, compel a far more direct end to this litigation. [*Id* at 2-3, fns. omitted].

Moreover, neither the Child Custody Act nor the Paternity Act contemplates the notion of an "equitable" parent. ... "Very few jurisdictions have embraced the equitable-parent doctrine adopted in *Atkinson* . . . " *Titchenal v Dexter*, 166 Vt 373, 384-385; 693 A2d 682 (1997). The Connecticut Supreme Court explained as follows one rationale for other jurisdictions' rejection of the equitable parent doctrine:

[E]ven if we were to conclude that our statutes left room for a redefinition of parentage, we are not persuaded that it would be wise to employ the equitable parent doctrine in that fashion. It is true that the doctrine has considerable emotional appeal, because it permits a court, in a particularly compelling case, to conclude that, despite the lack of biological or adoptive ties to the child, the deserving adult nonetheless may be determined to be the child's parent. This appeal may be enhanced in a given case because the best interests of the child, if determined irrespective of the otherwise invalid claim of parentage, may point in that direction. That doctrine, however, would lack the procedural and substantive safeguards provided to the natural parents and the child by the adoption statutes. In addition, the equitable parent

⁴ Although not precedential, unpublished cases may be instructive. The case is attached as **Tab D**.

doctrine, which necessarily requires an ad hoc, case-by-case determination of parentage after the facts of the case have been determined, would eliminate the significant degree of certainty regarding who is and who is not a child's parent that our jurisprudence supplies. [*Doe v Doe*, 244 Conn 403, 444 n 46; 710 A2d 1297 (1998)], overruled in part on other grounds, *In re Joshua S*, 260 Conn 182, 796 A2d 1141 (2002).]

While the Supreme Court has apparently reserved this question for another day, the continuing viability of the equitable parent doctrine merits prompt and careful evaluation. In *Hunter*, 484 Mich at 251, 261, 271-275, our Supreme Court overruled *Mason v Simmons*, 267 Mich App 188; 704 NW2d 104 (2005), a case similarly premised in part on equitable considerations, instead of a governing statute. This Court had held in *Mason* "that unfit parents have the burden 'to show, by a preponderance of the evidence, that a change in the established custodial environment with the guardian was in the child's best interests.'" *Hunter*, 484 Mich at 272, quoting *Mason*, 267 Mich App at 207. The Supreme Court criticized that "*Mason* and its predecessors created this new standard out of thin air." *Id.* The equitable parent doctrine suffers from the same intrinsic infirmities as *Mason's* groundless injection of unfitness considerations into the parental presumption contained in MCL 722.25(1). As did the fit parent requirement adopted in *Mason*, the equitable parent doctrine plainly contravenes the statutory scheme governing child custody. For this reason, it should be overruled. [*Id* at 4-5, fns. omitted].

A sample of cases from other jurisdictions reveals a variety of bases for standing concerning custody or parenting time but not the equitable parent doctrine.⁵ A constitutional analysis focused on equal protection provides a sounder foundation for an expanded but focused construction of the definition of parent.

⁵ See e.g., *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015) (the court found the same-sex partner's right to be parent based on in loco parentis, and not reaching constitutional and other issues); *Schaberg v. Schaberg* (Mo. App. 2021) (court found the statute defining parent as "man" in a marriage must be read in a gender-neutral way, per *Obergefell*); *Kelly S. v. Farah M.*, 28 N.Y.S.3d 714, 139 A.D.3d 90 (N.Y. App. Div. 2016) the court found that a separated same-sex spouse had standing to seek visitation); *Brooke S.B. v. Elizabeth A.C.C.*, 2016 NY Slip Op 5903 (N.Y. 2016) (the court noted that the definition of "parent" established 25 years ago has become unworkable when applied to increasingly varied familial relationships and overruled the earlier case, holding that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing

E. Equal Protection as the Basis for Construing “Parent”

Here, Plaintiff is not in the position of a stepparent, a grandparent, an adoptive parent, or a third person. The parties are analogous to an opposite-sex couple who had a child (whether married or not). Opposite-sex parties automatically have standing to seek custody under the CCA. The parties here, however, do not. Because of impossibility (currently), a child cannot be genetically related to both same-sex parents. But each party here chose to be a parent of this child and hold themselves out as the parent(s). A long line of cases, including *Obergefell*, provide a constitutional context. And the Constitution provides the basis behind standing.

In *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 2060; 147 L Ed 2d 39 (2000), the United States Supreme Court addressed the fundamental right of parents to make associational decisions on behalf of their children. *Troxel* reviews the long history of the rights associated with being a parent – including the decision to have a child, and the right to raise that child and make the educational, religious, and associational decisions a parent deems is in their child’s best interests. The Court recognized the right to establish a home and bring up children as a fundamental liberty interest under the Fourteenth Amendment. *Meyer v Nebraska*, 262 US 390 (1923). And, “those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v Society of Sisters*, 268 US 510, 535 (1925).

Troxel found the State of Washington’s overbroad third-person visitation statute violated the Constitutional presumption that fit parents make the decisions that are in the best interests of their children.

to seek visitation and custody). *But see Guzman v. Guzman*, 507 P.3d 630 (Okla. 2021)(the court found that a same-sex spouse had no standing for custody of a child who was adopted by her spouse **prior** to the marriage). The *Gutman* decision, however, is consistent with the approach advocated by Amicus – that any expansion of standing would not include children who were born to one partner before any relationship between the parties.

In *Obergefell*, *supra*, the United States Supreme Court addressed the fundamental right to marry -- recognizing that denying same-sex couples the ability to marry violated the equal protection and due process clauses of the Fourteenth Amendment. Justice Kennedy stated that "the right to marry is a fundamental right inherent in the liberty of the person...." *Id.*, 576 US at 675.

Both *Obergefell* and *Troxel* address a continuum of rights -- stemming from the freedom to make associational and private, personal decisions, including the right to marry, and to have and raise a child.

The majority's analysis in *Obergefell* is ordered around four principles that demonstrate why constitutional marriage guarantees must apply with equal force to same-sex couples.⁶ These principles also stress that confusion surrounding the children of same-sex couples is a source of social instability and suffering, and the right to marriage "safeguards children and families,"⁷ and draws meaning from the *related rights of procreation and childrearing*. The Court in *Obergefell* --echoing *Troxel* -- described as a "unified whole" an array of rights, including the rights to "marry, establish a home and bring up children" all " 'a central part of the liberty protected by the Due Process Clause.' " *Id.* at 688 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978)).

Obergefell's analysis applies beyond marriage, recognizing that unmarried same-sex partners provide loving and nurturing homes for their children, whether biological or adopted:

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae*. Most States

⁶ These principles include the right of personal autonomy to make choices; the focus on a special and committed nature of marriage and family; it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education; and marriage is a keystone of our social order. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, discussing decisions to marry and have a family. *Id.* at 646, 701-702.

⁷ More starkly, the Court stated that "[t]he marriage laws at issue here ... harm and humiliate the children of same-sex couples." *Id.* at 668.

have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families. *Id* at 626.

In *Pavan v Smith*, 582 US ___, 137 S. Ct. 2075 (2017), the Supreme Court relied on *Obergefell* to overturn an Arkansas law which required the father of a child to be listed on that child's birth certificate. The consolidated appellants in *Pavan* were two legally married lesbian couples. The fathers were anonymous sperm donors. The law was invalidated because it infringed "the **constellation** of benefits that the States have linked to marriage." *Pavan*, 137 S. Ct. at 2077.⁸

At the time of the *Obergefell* decision, Michigan prohibited same-sex couples from marrying and further prohibited recognition of same-sex marriages legally performed in other jurisdictions. Mich Const Art 1, Sec 25. *Obergefell* rendered this provision unconstitutional and opened the door for same-sex couples to marry and enjoy the benefits which come along with marriage.

Under Michigan law, a person can be established as the legal parent of a child by marriage, filiation, affidavit of parentage, or adoption. Pre-*Obergefell*, it was a legal impossibility for same-sex couples to comply with various options for recognition as a legal parent and many restrictions still exist. Marriage was barred by constitutional amendment. Filiation is not biologically possible if the partners are of the same sex. The Acknowledgment of Parentage Act, MCL 722.1001 *et seq*, remains limited to opposite-sex parents. Prior to *Obergefell*, same-sex

⁸ The constellation of benefits linked to marriage would include the right to have and raise children. "When a married woman gives birth in Arkansas, state law generally requires the name of the mother's male spouse to appear on the child's birth certificate—regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell's* commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage." *Id* at 2077.

couples were for the most part prohibited from adopting a child together.⁹ Same-sex partners in the same positions as opposite-sex parents were treated differently than opposite-sex partners concerning these options.

These broad restrictions on the ability of both partners in a same-sex relationship to be established as the legal parents of a child they jointly brought into a relationship violates the Equal Protection Clause of the Fourteenth Amendment. Michigan's paternity laws created an avenue for opposite-sex partners to both secure the legal rights of parentage, even if the relationship was nothing more than a single sexual encounter and an accidental pregnancy. Yet committed same-sex couples who purposefully and intentionally bring a child into the world and raised that child together have no legal status allowing both parties to exercise parental rights.

The rationale of *Obergefell* and *Pavan* combined with the fundamental liberty interest in raising children (see *Troxel, supra*) leads to one conclusion: Michigan laws which restricted the establishment of two same-sex partners as legal parents of a child were (and are) unconstitutional violations of equal protection and due process.

The concurrence in *LeFever* addressed the equal protection arguments concerning a same-sex standing to seek custody, including based on gender-focused treatment:

LeFever and Matthews also have a constitutional right to the custody of their children. Our Supreme Court has described the CCA as "a comprehensive statutory scheme" representing "the exclusive means for pursuing" rights to a child's custody, support, and parenting time. *Van v Zahorik*, 460 Mich 320, 327-328; 597 NW2d 15 (1999). As the majority points out, the CCA does not specifically address the unique question presented in this case. The United States Constitution fills this gap. Longstanding constitutional principles compel the conclusion that both LeFever and Matthews are legal parents of the twins and are entitled to a full complement of parental rights.

⁹ Stepparent adoption in Michigan requires the parties to be married. MCL 710.51(6)

"The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). The Genetic Parentage Act (GPA), MCL 722.1461 et seq., permits a man to establish paternity by way of genetic testing and to then acquire parental rights. The Revocation of Paternity Act (ROPA), MCL 722.1431 et seq., grants an unmarried man who claims to be the father of a child standing to challenge paternity determinations under certain circumstances. No "exceedingly persuasive justification" exists for treating men and women differently. *Mississippi Univ for Women v Hogan*, 458 US 718, 724; 102 S Ct 3331; 73 L Ed 2d 1090 (1982) ("Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification.") (citation omitted). *Id* at 689.

Also as noted in *LeFever*, Michigan law provides that a husband is the legal parent of a child born to his wife through assisted reproduction technology if he consented to the procedure. MCL 333.2824(6). A married woman in a same-sex relationship should have precisely the same right. Interpreting this statute as allowing only men to utilize and benefit from alternative methods of establishing "natural parenthood" would violate basic equal-protection principles. And when a child is not the "issue" of a marriage, the husband is considered a child's "legal father" until that presumption is overcome, as well as the parent for purposes of intestate succession if he and the child "have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either." MCL 700.2114(1)(b)(iii). These are some examples of disparate treatment.

The *LeFever* concurrence also recognizes the effect of impossibility:

Applying the equitable and due-process principles described in a century of Supreme Court jurisprudence regarding parenthood and families, I conclude that unmarried parents in same sex relationships who do not avail themselves of the sophisticated reproductive technology used by these parties should nevertheless be considered "natural parents" under Michigan law. Matthews and *LeFever* were able to afford a technology that provided both of them with a biological connection to their child. Two men in a committed but

unmarried same-sex relationship would not be able to avail themselves of that option, and for some lesbian couples, shared biology may also be impossible.

The parties here are in the position of opposite-sex parents (recognizing the impossibility of a genetic link for both parties and no biological link as in *LeFever*). The parties in opposite-sex relationships always have options – whether or not married. The constitutional arguments support the expanded construction of the term “parent” in MCL 722.22(i).

Conclusion:

This case should not be viewed as a “third-party custody” case. And this is not a retroactive imposition of a marriage. But it is a recognition that the plaintiff here – and other parties in similar circumstances – was denied a fundamental opportunity to assert parental rights. The constitutional principles set out in *Obergefell* apply beyond the right to marry – they apply to the rights and opportunities that are part of a “unified whole.” *Obergefell, supra*. These rights include the right to have and raise a child, which is a central part of the liberty protected by the Due Process Clause. See *Troxel, supra*.

Amicus is cognizant that seeking relief through the Legislature is generally the appropriate approach in these cases. But relief can be based on an equal protection/due process analysis construing the statutory term “parent,” based on criteria distilled from this case, including: the existence of a committed relationship (although opposite sex encounters resulting in a child do not always involve committed relationships), an *intentional* joint decision to have a child during the relationship, the child being conceived/born during that relationship, the child looking to both parties as their parents, and both parties holding themselves and each other out to the world and the child as parents, and accordingly acting as parents. This is a standing analysis – not a dispositive determination based on the best interest of the child factors. That would come later. The constitutional argument is limited to these or similar facts and not expanded beyond this context.

REQUESTED RELIEF

Amicus respectfully requests that this Court address the issue of standing for same-sex partners as in this case and consider the construction of the term “parent” contained in the Child Custody Act based on an equal protection/due process analysis.

Respectfully submitted on behalf of the Family Law Section of the State Bar of Michigan:

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CERTIFICATE OF COMPLIANCE

There are 5,510 words in this entire document. The font is 12 point Arial.