S T A T E O F M I C H I G A N
IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

RIORDAN, P.J., AND MARKEY AND K.F. KELLY, JJ.

JENNIFER STANKEVICH a/k/a JENNIFER MILLIRON

Plaintiff-Appellant,

-and-

G.M.

Intervenor-Appellant

v.

LEANNE MILLIRON,

Defendant-Appellee
_____/

Supreme Court No.: 148097

Court of Appeals No.: 310710

Dickinson Circuit Court
LC No.: 12-016939-DP

BRIEF OF INTERVENOR-APPELLANT IN SUPPORT OF PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Plaintiff-Appellant, says "Yes".
Intervening-Appellant, says "Yes".

II. WHETHER JENNIFER MILLIRON, THE NON-BIOLOGICAL, SAME-SEX PARENT TO "G.M.", HAS STANDING TO BRING A CUSTODY ACTION?

Plaintiff-Appellant, says "Yes".
Intervening-Appellant, says "Yes".

III. WHETHER THE MICHIGAN SUPREME COURT DECISION IN *VAN V. ZAHORIK* SHOULD BE OVERTURNED AND THE CONCEPT OF EQUITABLE PARENTHOOD EXTENDED TO INCLUDE SAME-SEX OR NON-BIOLOGICAL PARENTS AND UNMARRIED INDIVIDUALS?

Plaintiff-Appellant, says "Yes".
Intervening-Appellant, says "Yes".

IV. WHETHER THE MICHIGAN CONSTITUTIONAL DEFINITION OF MARRIAGE UNFAIRLY SINGLES OUT THE CHILDREN OF SAME SEX PARENTS FOR DISCRIMINATORY TREATMENT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION AND THE UNITED STATES CONSTITUTION?

Intervening-Appellant, says "Yes".

V. WHETHER FAILURE TO RECOGNIZE AS LEGAL IN MICHIGAN, THE LEGAL SAME-SEX MARRAIGES OF OTHER JURISDICTIONS, IS A VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

Intervening-Appellant, says "Yes".

STATEMENT OF JURISDICTION

The Intervenor-Appellant G.M. hereby incorporates the Statement of Appellate Jurisdiction contained in the brief filed in this Court on behalf of Plaintiff-Appellant Jennifer Milliron.

STATEMENT OF FACTS

The Intervenor-Appellant G.M. hereby incorporates the Statement of Material Proceedings and Facts contained in the brief filed in this Court on behalf of Plaintiff-Appellant Jennifer Milliron.

LAW AND ARGUMENT

I. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO RESOLVE ISSUES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE

A. Standard of Review

"This court reviews a trial court's order on a motion for summary disposition *de novo*." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The interpretation and application of court rules and statutes is reviewed *de novo*. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 124; 693 NW2d 374 (2005). Further, a motion brought under MCL 2.116 is tested by the factual sufficiency of the Complaint, in the light most favorable to the party opposing the motion, based on the affidavits, pleadings, depositions, admissions, and other admissible evidence submitted by the parties. *Wilson v Alpena County Rd Com'n*, 474 Mich 161, 166; 713 NW2d 717, 720 (2006). Finally, questions of law are reviewed *de novo*. *Matley v. Matley*, 234 Mich App 535, 537; 594 NW2d 850, *vacated on other grounds*, 461 Mich 897, 603 NW2d 780 (1999).

B. Analysis of the Issue

1. An issue of "great jurisprudential significance"

By order dated July 22, 2011 in *Harmon v Davis*, SC# 141188, in a child custody case involving (1) the scope of the equitable parent doctrine established in *Atkinson v Atkinson*, 160 Mich App 601 (1987) as interpreted by this Court in *Van v Zahorik*, 460 Mich 320 (1999), and (2) the constitutionality of the marriage amendment of the Michigan Constitution; Justice Kelly, joined by Justices Cavanagh and Hathaway, dissented from this Court's denial of leave to appeal noting: "[t]his child custody case involves issues of great jurisprudential significance... [t]he application for leave to appeal should be granted." Justice Kelly further wrote:

> "Plaintiff's application raises significant constitutional questions that this Court has not yet considered. Courts across the country are grappling with similar issues [internal citations omitted]. Their jurisprudential significance is underscored by the fact that the ACLU Fund of Michigan and Family Watch International have already filed briefs amicus curiae… This case cries out for a ruling by the state's highest court." *Id.*

Today, the concept of a family continues to be redefined and if anything, the traditional family consisting of a married father and mother with children living in one home has become less the norm. Further, as this instant case demonstrates, the courts in Michigan continue to struggle with the issues in this case absent a ruling from this Court, as the trial court below very eloquently stated (see 5/18/12 Tr. at pg 23, ln 14):

> "If I could make law in this case, I would [] deny the defendant's motion. In 1967, the United States Supreme Court in Loving versus Virginia, for the first time recognized that no state could prohibit, under equal protection, the marriage of an interracial marriage. Until that time, I believe, thirty-nine states had something on the books prohibiting it. At that time, 70 percent of the people in this country favored those laws. And the Supreme Court said no, that's not—that's not who we are. And I agree [] that our United States Supreme Court soon, maybe not this year or this election cycle, but eventually, will come to the same conclusion with regard to same-sex marriage. I'm not very proud to be a citizen of the state of Michigan right now on this issue… Michigan passed a constitutional amendment recognizing that a marriage is between a man and a woman, and there's legislation to that

> effect… I think it violates the rights of citizens who want to enter into a loving relationship, who happen to be of the same sex, but I have to apply the law that it exists. I want to make some findings in this case. I believe that the best interests of [G.M.] would be served by him having a relationship with the Plaintiff. It's clear that they had bonded, and that to sever that relationship, I don't believe is in the best interests of [G.M.]… I believe the principles of equity favor the plaintiff's position in this case, but, again, the Michigan constitution and the Michigan statutory scheme prevents me from granting her the relief she is requesting. If I had the power to do so I would."

2. This case presents an excellent vehicle to address this significant issue

Importantly, whereas the parties in *Harmon* were same-sex parents in a domestic relationship, the parties in this case were legally married in a jurisdiction which recognized their same-sex marriage. Further, since this Court's 2011 order in *Harmon*, the Supreme Court of the United States struck down the federal exclusion of legally-married same-sex couples from the rights and privileges of marriage (codified in the Defense of Marriage Act "DOMA") in *United States v. Windsor*, 570 US___ (2013), holding that:

> "DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. **And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives**." (emphasis added)

The marriage between the parties in this case, which is legal in Canada and eighteen other US states, is only unworthy of recognition in Michigan because of the constitutionally-protected sexual orientation and choices of the parties. Moreover, here the harm to G.M. is not merely "humiliation" or difficulty understanding the "integrity and closeness" of his own family. Instead, the laws in Michigan as applied to this case have been used to rip asunder the bond

between parent and child. This case, and the rights of G.M., and the rights of all affected children and families in Michigan, cry out for an expeditious ruling by this Honorable Court.

II. THIS COURT'S DECISION IN *VAN* AS APPLIED BELOW AND MICHIGAN'S BAN ON GAY MARRIAGE CANNOT PASS CONSTITUTIONAL MUSTER

A. Standard of Review

See Argument § I(A) herein.

B. Analysis of the Issue

1. Parents in and the children of same-sex marriages are entitled to equal protection in the law

The Supreme Court of the United States has long protected family relationships and employed a liberal interpretation of the word "family." The Supreme Court first placed the parent-child relationship under the protection of the Fourteenth Amendment, recognizing that the right "to marry, establish a home and bring up children" is protected by the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 533-34 (1925). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972) the Supreme Court protected families from governmental intrusion into the parental authority inherent in raising a child and later recognized in *Santosky v. Kramer,* 455 U.S. 745, 758 (1982) that the rights of natural parents to the care custody and management of their child is a fundamental right protected by the Fourteenth Amendment. Notably, the Supreme Court did not employ the use of "birth parents" in *Santosky* which would infer only a biological connection to a child, but instead used "natural parent", which has always been the "first parent" of a child, irrespective of genetic connection. In this case it is undisputed that the Plaintiff-Appellant is the "first" or "natural" parent of G.M.

Ripe to the issues in this case, the Supreme Court has refused to adopt a narrow definition of "family" that limits constitutional protections to only a traditional family, recognizing the

need to adopt a broad definition of family. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Justice Powell explained: "our decisions establish 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… Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Id.* at 503-04. The Supreme Court further acknowledged that "family" is not limited to blood, marriage or by adoption in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843-44 (1977). Also, the Supreme Court "has long recognized that freedom of personal choices in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). The Supreme Court further acknowledged that "[t]he demographic changes of the past century make it difficult to speak of an average American family" when strengthening the rights of parents to determine with whom a child associates in *Troxel v. Granville*, 530 U.S. 57 (2000). The decisions below, and this Court's decision in *Van*, cannot be squared with the clear scrutiny required by *Troxel* and the liberal definition of family established by the jurisprudence of the US Supreme Court.

Further, whereas the Supreme Court has acknowledged the importance of a liberal definition of family and rights of parents, it has demonstrated a greater determination to protect the rights of children; in *Pyler v Doe*, 457 U.S. 202 (1982) the Supreme Court refused to punish children for the mistakes of the parents. Accordingly, G.M.'s fundamental right as a citizen to continue his parent-child relationship with his parents, who came together, married, and formed an intact family into which he was born, is being denied.

2. <u>Michigan law unfairly discriminates against children based on the constitutionally-protected choices of their parents</u>

In *Pyler*, the Supreme Court observed:

> "Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants…. Their 'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status." *Id.* at 220.

In Michigan, and in this instant case, the status of G.M.'s parents as a married same-sex couple is the only reason why he is being singled out and excluded from the protections of the Child Custody Act and a review of his best interests pursuant to MCL 722.23. This cannot be squared with the Supreme Court's holding in *Pyler.*

Importantly however, the status of G.M.'s parents which is being used against him is not an illegal alien status which the Court considered in *Pyler* but instead is a constitutionally protected right that has been repeatedly affirmed by the Supreme Court. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court recognized the constitutional right of all individuals, to engage in homosexual sexual relations within the privacy of their own homes. In doing so, the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) and instead followed the lead of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and its broad construction of the rights and traditions at stake inherent in the right to sexual liberty. Indeed, in applying *Pyler*, the Massachusetts Supreme Court held: "[i]t cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003).

Importantly, Michigan cannot discriminate against a person in Michigan based upon their homosexual orientation. *Lawrence* prevents the Legislature and voters of Michigan from interfering with the sexual relations of all individuals based upon a heterosexual or homosexual

orientation within the privacy of their own homes. However the intent of the 2004 voter-approved Proposal 2—the Article 1, Section 25 marriage amendment to the Michigan Constitution—was precisely to discriminate against gay persons, by precluding them from the rights and privileges of legal marriage precisely because of their sexual-orientation, which the Supreme Court directly addressed in *Windsor*, holding:

> "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that 'it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.' H. R. Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' *Id.,* at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."

Michigan's marriage amendment was enacted for the same reason, to interfere with the dignity of same-sex marriages. Moreover, in this case, the parties have a legal marriage certificate which would otherwise be recognized by Michigan, *if they were not a same-sex couple.* As such, they are being discriminated against precisely and only because of their constitutionally-protected sexual orientation, which is every bit offensive as if their marriage certificate was subject to strict scrutiny and validity upon some other constitutionally-protected factor such as their religion, age and ability to conceive or bear children, or their race.

Accordingly, the unlawful discrimination against the parties in this case, based on their sexual orientation, extends to G.M. who is being punished by the choices and sexual orientation

of his parents over which he has no control. G.M. is only one of thousands of Michigan children in this same circumstance, who continued to be discriminated against.

3. Failure to recognize legal same-sex marriage from another jurisdiction violates the First and Fourteenth Amendments to the United States Constitution and harms children

Since 2003 and the Supreme Court decision in *Lawrence* and Massachusetts Supreme Court Decision in *Goodridge*, every other state has either legalized same-sex marriage or, like Michigan, passed a constitutional amendment (or other legislation) to ban same-sex unions. Today, seven states have legalized same-sex marriage through court decisions (California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico and Utah); eight states have legalized same-sex marriage through the enactment of legislation (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, and Vermont); and three states have legalized same-sex marriage through a popular vote (Maine, Maryland and Washington).[1] Same-sex marriage is also legal in Washington, D.C., as well as across the US borders to the north and south in Canada and many jurisdictions in Mexico.

Importantly, since *Windsor,* not a single state constitutional or legislative ban on same-sex marriage has passed judicial scrutiny in state or federal courts. To wit, in the last decision on this issue, District Judge Shelby held in Memorandum and Order (*see e.g. Kitchen et al. v. Herbert et. al.*, 2:13-cv-00217-RJS, December 20, 2013, D.Utah):

> "The State of Utah defends its laws and maintains that a state has the right to define marriage according to the judgment of its citizens. Both parties have submitted motions for summary judgment. The court agrees with Utah that regulation of marriage has traditionally been the province of the states, and remains so today. But any regulation adopted by a state, whether related to marriage or any other interest, must comply with the Constitution of the United States. The issue the court must address in this case is therefore not who should define marriage, but the narrow question of whether Utah's current definition of marriage is permissible under the Constitution. Few

[1] In Michigan, Federal examination of the Marriage Amendment, Mich Const Art 1, Sec 25 and Michigan's Second Parent Adoption Statute is presently under review in *Deboer v Snyder* (E.D.Mich No 12-10285).

> questions are as politically charged in the current climate. This observation is especially true where, as here, the state electorate has taken democratic action to participate in a popular referendum on this issue. It is only under exceptional circumstances that a court interferes with such action. But the legal issues presented in this lawsuit do not depend on whether Utah's laws were the result of its legislature or a referendum, or whether the laws passed by the widest or smallest of margins. The question presented here depends instead on the Constitution itself, and on the interpretation of that document contained in binding precedent from the Supreme Court...

More persuasive, the Supreme Court has explicitly and repeatedly refused interfere with judicial review holding that a voter-approved state-constitutional ban on gay marriage (like the 2004 voter-approved Proposal 2 now Michigan Constitution, Article 1, §25) is unconstitutional. *Hollingsworth v. Perry*, 570 U.S. ___ (2013) (S.Ct. Ap. No.: 13A18).

Accordingly, Michigan now refuses to recognize the marriages of its citizens which are legal in nineteen US jurisdictions, only on the grounds that these otherwise legal marriages are between homosexual adults. This raises competing interests of states' rights and individual rights, which the Supreme Court did not address in *Windsor*. However, state and federal courts have since recognized that state-law prohibitions are insufficient to save same-sex marriage bans that deny parties their "rights to due process and equal protection under the law":

> The Plaintiffs argue that for the same reasons the Fifth Amendment prohibits the federal government from differentiating between same-sex and opposite-sex couples, the Fourteenth Amendment prohibits state governments from making this distinction. Both parties present compelling arguments, and the protection of states' rights and individual rights are both weighty concerns. In *Windsor*, these interests were allied against the ability of the federal government to disregard a state law that protected individual rights. Here, these interests directly oppose each other. The *Windsor* court did not resolve this conflict in the context of state-law prohibitions of same-sex marriage. [internal quotations omitted] ("The Court does not have before it . . . the distinct question whether the States . . . may continue to utilize the traditional definition of marriage."). But the Supreme Court has considered analogous questions that involve the tension between these two values in other cases. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (balancing the state's right to regulate marriage against the individual's right to equal protection and due process under the law). In these cases, the Court has held that the Fourteenth

> Amendment requires that individual rights take precedence over states' rights where these two interests are in conflict." *Id. Kitchen,* pgs 12-13

Therefore, Michigan's right to regulate the domestic relations of parties in the context of marriage, which conflicts with the fundamental rights vested in children and parents under the authority of the United States Constitution "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Further, marriage is "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888). Finally, a state cannot "unnecessarily impinge on the right to marry" *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Therefore, Michigan Constitution Article 1, §25 violates the equal protection liberties of same-sex spouses legally married in other jurisdictions that are protected by the First and Fourteenth Amendments to the United States Constitution.

III. THE LIMIT OF "EQUITABLE PARENT DOCTRINE" TO THE CONTEXT OF A LEGAL MARRIAGE ESTABLISHED BY THIS COURT IN *VAN* SHOULD BE OVERTURNED

A. Standard of Review

"This court reviews a trial court's order on a motion for summary disposition *de novo*." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Also, issues pertaining to a parties standing are reviewed *de novo*. *LSEA v. Lansing Bd. of Educ.*, 487 Mich 349, 792 NW2d 686 (2010).

B. Analysis of the Issue

1. This Court's Decision in *Van* unfairly discriminates against children of unmarried parents and same-sex parents

This court first established the equitable parent doctrine in *Atkinson v Atkinson*, 160 Mich App 601; 408 NW 2d 516 (1987), holding:

> "[W]e adopt the doctrine of equitable parent and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where [] husband and child mutually acknowledge a relationship as father and child or the mother of the child has cooperated in the development of such relationship over a period of time, the husband desires to have the rights afforded to a parent, and the husband is willing to take on the responsibility of paying child support. *Id* at 608.

Subsequently, this Court limited the equitable parent doctrine to marriage, holding that "doctrine of equitable parenthood was rooted in marriage and extending it to persons who were never married would have repercussions on the institution of marriage." *Van v Zahorik*, 460 Mich 320, 332; 597 NW 2d 15 (1999). However, Justice Brickley implicitly adopted the US Supreme Court's earlier holding in *Pyler* when noting in his dissent to *Van*:

> "[t]he majority's approach creates an all or nothing resolution of such conflicts, in that it focuses on the adult's marital status and legal relationship with the child, but ignores the equitable considerations presented by this case. The majority's approach is particularly inadequate, as it devalues the importance of the child's personal relationship with the putative father… The deficiency in the majority opinion is the Court's utilization of an adult-centered approach to resolve a dispute that primarily affects the lives and development of the children. Because children do not participate in the formation of their biological or legal child-parent relationships, they are wholly blameless for the shortcomings… By placing an artificial restriction on the definition of "parent" the majority absolves itself from address[ing], as mandated by the Legislature, the organizing principle of the Child Custody Act: the best interest of the child." *Id* at 338.

Accordingly, in light of the herein noted precedents of the Supreme Court concerning the definition of families and parentage, and the changing dynamics of American families, this court should overturn its earlier holding in *Van* and adopt the criteria established by other states for "*equitable*" or "*de facto*" parents.

2. <u>The Plaintiff-Appellant in this case and other same-sex, unmarried parents in Michigan can be *de facto* parents under the doctrine of equitable parent</u>

Legal authorities are increasingly emphasizing the complexity in how "judges, legislators and social scientists alike are constantly faced with the question of how to deal with today's

nontraditional families and their dissolutions." *See e.g.* Heather Buethe, *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 Wash. U. J. L. & Pol'y 283 (2006), *supra*. This case is one such case which involves a person who was clearly the *de facto* parent to G.M. at his conception, his birth, and at all stages of his life, both during a marriage and afterwards while separated, until this litigation commenced.

Indeed, the American Academy of Pediatrics Committee on Psychosocial Aspects of Child and Family Health noted:

> "Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual. When two adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition." [2]

Unlike Michigan however, a number of states have recognized that with the treatment of an unmarried biological parent or a same-sex partner as a stranger, a single legal parent has the absolute right to deny an ex-parent all custody or visitation rights and violate the best interests of the child. In doing so, these states emphasize that the parent-child relationship from the perspective of the child is paramount, and award rights based upon the non-legal parent's relationship with the child by focusing on the best-interests of the child, rather than the former relationship among the adults. Traditionally, Courts do so by employing a four-part test in applying the equitable parent doctrine: "(1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the

[2] *See, e.g., Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339–40 (2002), available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b109/2/339.

child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." *Buethe*, *Id.* at 298. The findings of the trial court below clearly establish in this case that the Plaintiff-Appellant has adequately pled that these four factors are met.

Applying this test, Colorado has recognized the equitable parent doctrine in granting joint custody to same-sex partners. *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004). New Jersey also acknowledged that a third party's psychological bond to a child merits visitation based upon the equitable parent doctrine, prior to its legalization of same-sex marriage *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000). Indeed, prior to the legalization of same-sex in Massachusetts, the Supreme Court of Massachusetts used the equitable parent doctrine to provide visitation to the same-sex parent of a former committed, monogamous, same-sex domestic partnership. *E.N.O. vs L.M.M.*, 429 Mass. 824, 827-829; 711 N.E.2d 886 (1999), holding:

> "The court's duty as *parens patriae* necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation. 'In every case in which a court order has the effect of disrupting a relationship between a child and a parent, the question surely will arise whether it is in the child's best interest to maintain contact with that adult.'[internal citations omitted]… A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent"

In summary, G.M.'s relationship with his parent in this case would be protected in Arkansas, Arizona, Connecticut, Florida, Iowa, Indiana, Massachusetts, Nebraska, and Washington upon the equitable parent doctrine without any examination of his parents' same-sex marriage.[3] *Id.*

Additionally, this case is about the use of artificial reproductive technology between two parents to conceive a child whereby only one parent is the biological parent from a genetic perspective however the other parent is an "intended parent." On this point, when extending the equitable parent doctrine to the natural but non-biological parents, the Connecticut Supreme Court held in *Raftopol et al. v. Ramey et al.,* 299 Conn. 681, 683-684; 12 A.3d 783 (2011):

> "This appeal raises the question of whether Connecticut law permits an intended parent who is neither the biological nor the adoptive parent of a child to become a legal parent of that child… The use of technology to accomplish reproduction by means other than sexual intercourse no longer may be considered "new" science… no one can deny that assisted reproductive technology implicates an essential matter of public policy--it is a basic expectation that our legal system should enable each of us to identify our legal parents with reasonable promptness and certainty. Despite the facts that assisted reproductive technology has been available for some time, and that the technology implicates the important issue of the determination of legal parentage, our laws, and the laws of most other states, have struggled unsuccessfully to keep pace with the complex legal issues that continue to arise as a result of the technology. It is our view that our laws should provide an answer to the following two basic questions: (1) who are the legal parents of children born as a result of such technology; and (2) what steps must such persons take to clarify their status as legal parents of such children?"

Here, the Plaintiff-Appellant has clearly pled below that she was the intended parent to G.M., and that she took substantial legal steps to codify this status, which the parties do not dispute.

Finally, in a case where a party learned prior to the dissolution of his marriage that he was not the biological father of a child he had parented from birth, the Iowa Supreme Court reversed its earlier rejection of the equitable parent doctrine, emphasizing the manner in which a

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[3] *See e.g. Bethany v. Jones*, 2011 Ark. 67; 378 S.W.3d 731 (2011); *Egan v. Fridlund-Horne, et al.*, 221 Ariz. 229; 211 P.3d 1213 (2009); *D.M.T. v. T.M.H.*, Florida Supreme Court No. SC-12-261 (Order, November 7, 2013); *A.C. v. N.J.*, No. 20A04-1301-DR-37, 2013 Ind. App. LEXIS 545; *Latham v. Schwerdtfeger*, 282 Neb. 121; 802 N.W.2d 66 (2011); *In the Matter of the Parentage of L.B.*, 155 Wn.2d 679; 122 P.3d 161 (2005)

child was conceived into a family determines whether the equitable parent doctrine applies, holding:

> "In every way, Riley was received by both John and Amy as their daughter, and the family relationship developed accordingly. John was no stranger, or even a mere stepfather. The facts here demonstrate how different it is when a child is born into a marriage, even though (unknown to the father) it is conceived outside it. The relationship between the husband and child in such a situation is highly likely to be much closer than those between a child and a man whose relationship is derived only as an adjunct to that man's relationship with the child's mother. Where both the child and the husband reasonably believe they share a biological relationship, the bonding should--and can be expected to--develop to such a stage that its rupture might be devastating to both. Devastation to the child is of course the first and paramount concern because the best interest of the child is the dominating consideration in all child custody disputes." *In re the Marriage of Gallager*, 539 N.W.2d 479, 481 (1995 Iowa Sup.).

In this instant case, as the record reflects, G.M was born into the marriage of his parents and his relationship with the Plaintiff-Appellant is precisely because of that relationship, much like many children of same-sex partnerships in Michigan.

Accordingly, and also for the reasons already argued in the Intervenor-Appellant's Brief in Support of Motion to Intervene (*see* Argument §I(A)*, passim*); the Child Custody Act, *et seq* requires that the inherent rights of G.M. be declared and that the rights and duties as to his custody, care and support be established in accordance with MCL 722.23. This can be accomplished by affording the Plaintiff-Appellant standing in a custody proceeding according to her status as a parent under the equitable parent doctrine. Leave to appeal should be granted so that this Honorable Court may reexamine its holding in *Van* in light of the conflicting decisions of other state courts of last resort on this same issue.

RELIEF REQUESTED

WHEREFORE, the Intervenor-Appellant respectfully requests that this Court grant leave to appeal and reverse the Court below with remand for a best-interests determination as to the custody, visitation and support of G.M.

Respectfully submitted,

BENJAMIN J. ASHMORE, SR.,
CHAIRMAN
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Dated: December 23, 2013

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