STATE OF MICHIGAN

COURT OF APPEALS

DIANE L. GIANCASPRO

Plaintiff-Appellant,

v.

LISA A. CONGLETON

Defendant-Appellee.

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Court of Appeals No. 283267

Lower Court No. 07-2194-DC-M

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Plaintiff-Appellant Diane L. Giancaspro's Brief

ORAL ARGUMENT REQUESTED

March 10, 2008

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

I. STATEMENT OF BASIS FOR JURISDICTION IN THE COURT OF APPEALS

This is an appeal of right, pursuant to MCR 7.203(A), from a final order of the Berrien County Trial Court – Family Division, dismissing Plaintiff Diane Giancaspro's *Complaint for Custody, Parenting Time and Child Support*. The lower court's *Order Granting Defendant's Motion to Dismiss* was filed on September 14, 2007.

Plaintiff Giancaspro moved for reconsideration pursuant to MRCP 2.119(F) on September 28, 2007, fourteen days after the filing of the order of dismissal. The timely filing of the motion for reconsideration within twenty-one days after the order of dismissal tolled the time for appeal pursuant to MCR 7.204(1)(b).

The family court denied Plaintiff's *Motion for Reconsideration* in an Order filed January 3, 2008. Plaintiff filed her *Claim of Appeal* in this Court and paid the appropriate filing fee fifteen days later on January 18, 2008, within the twenty-one day deadline imposed under MCR 7.204(1)(b).

Defendant Lisa Congleton did not cross-appeal the ruling.

II. STATEMENT OF QUESTIONS INVOLVED

1. Does Michigan law permit the enforcement of Plaintiff Diane Giancaspro's legal parental rights even though she is not married to her children's other parent and even though the parents are of the same sex?

Lower Court's Answer: NO. Plaintiff's Answer: YES.

2. Does Const 1963, art 1, § 25 and Michigan's public policies leave parental rights of unmarried, same-sex parents intact and enforceable in Michigan?

Lower Court's Answer: NO. Plaintiff's Answer: YES.

3. Are the federal constitutional rights of legal parents and their adopted children violated when a Michigan court refuses to allow enforcement of those rights under the Michigan Child Custody Act solely because the parents are unmarried and of the same sex, and are not permitted to marry in Michigan?

Lower Court's Answer: NO. Plaintiff's Answer: YES.

4. Does a Michigan court violate the Full Faith and Credit mandate of the U.S. Constitution when it purports to recognize the validity of a parent-child relationship created by another state's final judgment of adoption, but declines to permit the adoptive parents to enforce those rights under Michigan law?

Lower Court's Answer: NO. Plaintiff's Answer: YES.

5. By refusing to enforce under the Michigan Child Custody Act parental rights created between same-sex couples and their children adopted in other states, does a Michigan court create a barrier or otherwise burden the parents' and children's right to travel, as protected under the privileges and immunities guarantee of the U.S. Constitution.

Lower Court's Answer: NO. Plaintiff's Answer: YES.

6. In denying same-sex couples and their adopted children access to the protections of Michigan's Child Custody Act, does a Michigan court deprive the parties of due process by interfering with or unduly burdening their fundamental parental and familial rights under the U.S. Constitution?

Lower Court's Answer: NO. Plaintiff's Answer: YES.

7. Does a Michigan court deprive same-sex couples and their adopted children of equal protection of the law when it denies enforcement under Michigan law of their parental and familial association rights because of the parents' unmarried status and/or disapproval of the parents' intimate same-sex relationship?

Lower Court's Answer: NO. Plaintiff's Answer: YES.

III. STATEMENT OF FACTS

Plaintiff-Appellant Diane Giancaspro ("Diane" or "Plaintiff Giancaspro") brought this suit pursuant to the Michigan Child Custody Act against Defendant-Appellee Lisa Ann Congleton ("Lisa" or "Defendant Congleton") to determine physical custody, parenting time and child support obligations for the three minor children they adopted and jointly parent.[1] (*Complaint for Custody, Support and Parenting Time,* Aug. 9, 2007). Lisa answered (*Answer to Complaint, Support for Custody and Parenting Time*, Aug. 24, 2007) and, pursuant to MCR 2.116(B)(1), separately moved to dismiss or for summary disposition (*Motion for Summary Judgment/Motion to Dismiss*, Aug. 24, 2007), contending that the parties' adoption of the three minor children by a same-sex couple was not valid. She further contended that both Const 1963, art 1, § 25[2] and MCL 551.1[3] – which relate to marriages – precluded enforcement of such adoptions in Michigan because such action purportedly would violate Michigan's public policy.

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1 Lisa adopted the three minor children from China at a time when she and Diane lived as a couple in Illinois. Subsequently in 2000 and 2004, pursuant to final judgments entered by an Illinois court pursuant to the Illinois Adoption Act, Lisa consented to and Diane became a legal co-parent of all three children. (*Complaint for Custody, Support and Parenting Time* at ¶ 4, August 9, 2007; *Answer to Complaint for Custody, Support and Parenting Time* at ¶ 4, Aug. 24, 2007.) Although the Adoption Decrees were sealed by the Illinois Court, as is typical in protecting the privacy of adopted children, and not made a part of the public record in this case, the parties did not dispute the material facts pertaining to the underlying adoptions and the family court properly relied on the pleadings and the representations of counsel on this point. (*Decision: Order following Request for Reconsideration* at 3, Jan. 3, 2008.)

2 Const 1963, art 1, § 25 provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

3 MCL 551.1 provides: "Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state."

On September 14, 2007, the Berrien County Trial Court – Family Division ("lower court" or "family court") heard Lisa's motion (Transcript: *Motion for Summary Disposition Decision Before The Honorable Mabel Johnson Mayfield*, Sept. 14, 2007 ("*Transcript*")) and made the following findings:

- The court properly assumed jurisdiction over the parties and the subject matter (*Transcript* at 5);
- Lisa adopted the three minor children in the People's Republic of China and was recognized as the sole legal adoptive parent (*Transcript* at 5-6);
- Pursuant to the Illinois Adoption Act, ILL. COMP. STAT. 750/50, *et. Seq* (2004), and with Lisa's express consent, an Illinois court "ordered the minors as children of the [Lisa and Diane] to all legal intents and purposes as if they had been born to the petitioners" (*Transcript* at 6);
- Diane does not lack capacity or standing to bring an this action pursuant to the Michigan Child Custody Act (*Transcript* at 7); and
- The "status of the adoption is intact, recognized by the court, and the co-rights of the [Diane] and [Lisa] to exercise equal parental control [sic]." (*Transcript* at 8.)

These preliminary findings were correct and should have led the court to turn to the merits of custody, parenting and child support. Yet, despite these findings, the court went down another path, opining that the parties could not have obtained the same adoptions under Michigan Law, that the Child Custody Act is merely a mechanism of enforcing the out-of-state judgment, and that Michigan public policy permits the court to withhold ***enforcement*** of parental rights under a final judgment of adoption ***without*** violating the Full Faith and Credit mandate of the U.S. Constitution. Accordingly, the court dismissed the action, finding Diane "does not have the right to request custody under the Child Custody Act in Michigan" (*Order Granting Defendant's Motion to Dismiss*, Sept. 14, 2007).

On September 28, 2007, Diane moved for reconsideration (*Motion to Reconsider* and *Memorandum in Support of Motion to Reconsider*, Sept. 28, 2007), arguing that, by refusing to enforce her parental rights in Michigan, the court not only abdicated its role *parens patriae* to act

in the best interest of the children by adjudicating child custody, it violated the rights of Diane and the minor children under numerous federal constitutional guarantees, including Full Faith and Credit, Equal Protection, Due Process and the right to travel under the Privileges and Immunities Clause of the U.S. Constitution.

On January 3, 2008, the court denied Diane's motion for reconsideration (*Decision: Order following Request for Reconsideration*, Jan. 3, 2008), repeating the court's belief, without further analysis or explanation, that Michigan law limiting marriage to different-sex couples deprives same-sex couples who parent of any right to enforce parent-child relationships that arise from out-of-state adoption decrees. The court also denied in summary fashion that the court's ruling violated any federal rights of Diane or her children.

IV. SUMMARY OF ARGUMENT

Rather than adjudicate visitation, parenting time and child support by determining the best interests of the children in the proceeding below, in which the lower court admittedly had jurisdiction, the court was diverted by deeply flawed considerations about matters that are irrelevant to this proceeding. In the process, by denying the parties access to Michigan's statutory scheme through which Michigan parents may invoke the courts' authority to protect their children and preserve their parent-child relationships, the court rendered the parties' parental status meaningless, leaving them without any ability to act on behalf of their children and protect them in myriad circumstances. The lower court's ruling is not simply incorrect under both Michigan law and federal constitutional law, it also endangers the well-being of children.

Michigan law requires the enforcement of Diane's rights as a parent and does not permit the family court to abdicate its role *parens patriae* to act in the best interest of the children by

adjudicating child custody. Michigan's constitutional amendment and statutes barring same-sex marriage have no bearing on this matter and focus on them led the lower court astray. A child custody determination concerns the children's relationships with adults, not adults' relationships with each other. Court orders to share custody and parental or custodial status are not dependent on a parent's or custodian's marital status, as any custodial grandparent can attest. Further, Michigan courts may not discriminate based on sex, marital status or sexual orientation in awarding child custody.

The lower court's ruling also contravened numerous federal constitutional guarantees. First, it violated the Full Faith and Credit Clause. Although the court acknowledged, as it must, that it was obligated under the dictates of full faith and credit to recognize Diane's Illinois adoption judgments as valid, the court erroneously concluded that it could deny the adoptions any legal effect in Michigan by refusing to enforce Diane's parental rights. The Full Faith and Credit Clause does not permit such a result. Courts of one state may not render the judicial decrees of another state meaningless by refusing to give them any effect whatsoever while paying lip-service to their validity. To the contrary, a court must apply its own forum state's law even-handedly.

The lower court's decision also violates the children's and Diane's right to equal protection of the law. The courts must be open to all legal parents, and to the children who desperately need legal protections when their parents' relationships unravel, without regard to the parents' sexual orientation, sex or marital status. Likewise, the courts must enforce the rights of children who are adopted, whether within or outside of the State, as well as those of their parents, on equal terms as other children and parents receive. There is not even a legitimate, rational reason to deny Diane and her children protections for their parent-child relationships, let

alone an important or compelling one. Denying Diane and her children the same rights commonly afforded other parents and their children in Michigan is devastating to these children's best interests.

Additionally, the decision below infringes on Diane's fundamental liberty interests, including her interest in the care, custody and control of her children, and her constitutionally protected right to enter into an intimate relationship with an adult of the same sex. It likewise infringes on the due process rights of the children by holding that their protected interests in their relationship with their legal parent are unenforceable. Because there is not even a legitimate justification for such an infringement, let alone a compelling one, the court's decision violates the due process guarantee of the U.S. Constitution.

Finally, the decision violates the children's and Diane's right to travel protected under the Fourteenth Amendment Privileges and Immunities Clause. Michigan may not deny this family the same rights to enforce their parent-child relationships, secured when they were residents of Illinois under the Illinois adoption decrees, as are afforded to other citizens of Michigan.

For all of these reasons, the court erred, the dismissal should be reversed and the case should be remanded for a determination on the merits concerning custody, parenting time and child support.

V. ARGUMENT

A. THE LOWER COURT ERRED IN CONCLUDING THAT MICHIGAN LAW PRECLUDES THE ENFORCEMENT OF PLAINTIFF GIANCASPRO'S PARENTAL RIGHTS THROUGH THE CHILD CUSTODY ACT.

Standard of Review: Questions of law involved in the construction and application of a statute, such as Michigan's Child Custody Act, are reviewed *de novo*. *Derderian v Genesys Health Care Systems*, 263 Mich App 364; 689 NW2d 145 (2004). To the extent the applicability of the Child Custody Act to out of state adoptions is subject to more than one interpretation, under the doctrine of constitutional avoidance this Court will choose the one that avoids the constitutional issue except as a last resort. *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960).

Michigan public policy prioritizes providing permanency and stability for adoptive children and strongly disfavors undoing or otherwise failing to give effect to an adoption decree. *See* MCL 710.21a. This State's public policy is to recognize all adoptions, *see, e.g.*, MCL 333.2831; MCL 710.21b, and to accord full faith and credit to other states' orders respecting child custody and other matters of child welfare, MCL 600.2950j (foreign protection orders; full faith and credit; child custody or support provision); MCL 722.1312 (recognition of foreign enforcement order). Courts hearing child custody complaints brought by legal parents must use as their polestar the obligation to protect the best interests of the children. *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004). By ruling that this family falls outside of the protection of Michigan's Child Custody Act, the family court abdicated its responsibility *parens patriae* to act in the children's best interest.

1. THE LOWER COURT'S ULTIMATE CONCLUSION CONFLICTS WITH ITS PRELIMINARY FINDINGS, WHICH PROPERLY REJECTED DEFENDANT CONGLETON'S ATTEMPT TO COLLATERALLY ATTACK AND INVALIDATE THE ILLINOIS ADOPTION DECREES.

The family court's ultimate disposition of this case – dismissing Plaintiff-Appellant's complaint – was completely at odds with the court's preliminary findings, which assumed jurisdiction was proper, properly rejected Lisa's attempt to invalidate the Illinois adoption decrees or deny Diane standing to seek relief, and expressly acknowledged the validity of the parental-child relationships created by the adoption decrees. The Michigan Supreme Court has held that a party may not challenge an adoption years later in a collateral attack. *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993). As the Court there explained, this rule "provides repose to adoptive parents and others who rely upon the finality of probate court decisions." *Hatcher*, p. 444. *See also Hansen v McClellan, unpublished opinion of the Court of Appeals,* entered Dec 7, 2006 (Docket No. 269618) (Appendix A)(joint adoption by unmarried couples, even if precluded by Michigan statute, would not provide a basis for collateral attack on the validity of adoption decrees). Consequently, Lisa's attempt to challenge the Illinois adoption lacked merit.

Michigan law has never permitted a party to relitigate a judgment years later solely because she has second thoughts. Principles of *res judicata* and finality of judgments, particularly as to parental status in adoption cases where courts have a special obligation under the doctrine of *parens patriae* to protect the best interests of children, preclude a party from challenging a court order of adoption years later. The only ground for attacking such an order as void after its entry is lack of subject-matter jurisdiction, *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935), which Defendant cannot allege here as there is no

question that the Illinois adoptions were validly entered. *See, e.g., In re KM,* 274 Ill App 3d 189; 653 NE2d 888 (1995); *In re CMA,* 306 Ill App 3d 1061; 715 NE2d 674 (1999).

Moreover, principles of judicial and equitable estoppel in Michigan law also prevent Lisa from arguing that the adoptions to which she consented, and from which she benefited for years, are invalid or unenforceable. A party may not assume a position in a legal proceeding inconsistent with a position taken in a prior action. *See Hoye v Westfield Ins Co,* 194 Mich App 696, 707; 487 NW2d 838 (1992); *Opland v Kiesgan,* 234 Mich App 352, 358; 594 NW2d 505 (1999) (applying judicial estoppel to prevent a party from abusing judicial system by achieving success on one position, and then arguing the opposite to suit the exigency of the moment). This preclusion extends to a party's position with respect to the validity of or error in prior proceedings. Thus, even when a person accepts benefits under *invalid* judicial proceedings, he or she is estopped from asserting their invalidity, since that would be inconsistent with his or her acceptance of benefits. *See In re Gazella,* 264 Mich App 668, 679; 692 NW2d 708 (2005) ("A litigant may not harbor error, to which he or she consented;" because "respondent benefited from the error[,] she may not now be heard to complain"). Here, Lisa expressly consented to and participated in the children's adoptions and benefited from them since 2000 and 2004. Michigan law does not now permit her to revisit the validity of those adoption orders, as the family court properly found. The conclusions it thereafter reached, however, require correction by this Court.

2. THE LOWER COURT ERRED IN FAILING TO APPREHEND THAT CONST 1963, ART 1, § 25 OF THE MICHIGAN CONSTITUTION AND PUBLIC POLICIES CONCERNING MARRIAGE ARE NOT IMPLICATED BY THIS CASE.

Despite the requisite findings of jurisdiction, standing and valid parent-child relationships, the court failed to turn its attention to the custody, parenting and child support

issues under the Michigan Child Custody Act. Rather, the court went down a different path, holding that adjudicating custody between two legal parents of the same sex somehow would violate Const 1963, art 1, § 25, which concerns marriage, and state marriage statutes and public policy. There are, of course, countless never-married couples and formerly married partners jointly raising children in Michigan and it is hardly an anomaly to protect each one's parental rights despite their marital status. Indeed, Michigan courts are obligated to secure a child's rights without regard to marital status or sexual orientation. *See Schoensee v Bennett*, 28 Mich App 305; 577 NW2d 915 (1998) ("the focus in child custody actions must be the best interests of the child, regardless of the marital status of the parents"); *Hall v Hall*, 95 Mich App 614; 291 NW2d 143 (1980) (homosexuality not presumptive of unfitness); MCL 722.23 (laying out best interest factors).

Const 1963, art 1, § 25 has no relevance to parental or custodial relationships. Section 25 reads, in full:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

This provision concerns only recognition of relationships between adults, limiting recognition of marital relationships in Michigan to those involving different-sex couples. Similarly, MCL 551.1, which defines marriage as a "unique relationship between a man and a woman," has no impact on parent-child relationships. Diane's relationship with her children is not a relationship of adults, nor does it bear any resemblance to a marital relationship. That relationship between parent and child likewise is not derived from any marital relationship. The parent-child relationship accordingly is not addressed or affected by Section 25 or MCL 551.1.

In demanding enforcement of her parental rights, Diane is not seeking marital recognition, but simply the custodial rights available to all parents, married or not.

Nowhere does the Michigan Child Custody Act set forth marital requirements as a prerequisite for seeking relief. Indeed, the Act is triggered by reference to the child, not the parent: "***In all actions involving dispute of a minor child's custody***, the court shall declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act." MCL 722.24(1) (emphasis supplied). "If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control." MCL 722.25(1). Parent is defined to mean the natural or adoptive parent of a child, without regard to marital status, sex or sexual orientation. MCL 722.22(h). To suggest that the protections of the Michigan Child Custody Act may only be invoked to protect children who are parented by married, different-sex couple lacks support in the very language of the Act itself. Clearly, the Act is child centered, not parent centered.

The family court also misapprehended the nature of the adoptions in Illinois. Illinois joint adoption petitions do not hinge on whether the parents are in a "marriage or similar union." *See, e.g., In re KM*, 653 NE2d 888 (Ill App 1995) (unmarried persons permitted to adopt jointly under Illinois law). Consequently, the adoption judgments do not rest on a "marriage" or "similar union" between the parties, and do not trigger the proscriptions of Const 1963, art 1, § 25. It was error for the court below to conclude otherwise.

The lower court confused Michigan's public policy as to relationships between two adults with the State's public policy as to unmarried and same-sex parents and with the State's paramount interest in the welfare of its children. *Schoensee*, p. 305 (parents' marital status irrelevant in custody disputes, which turn on the best interest of the child). A person's sexual

orientation or status is immaterial to custody without a demonstration of actual adverse effects; such a showing would be possible here, if at all, only in application of the best interest factors under MCL 722.23, which the lower court failed to examine. *See Hall*, p. 614; *Ulvund v Ulvund, unpublished opinion of the Court of Appeals*, entered 8/22/00 (No. 224566) (Appendix B).

Michigan public policy mandates enforcement of *all* legal parents' custodial rights so that courts may meet their obligations *parens patriae* to effect what is in the best interest of the children. Marriage public policy is simply irrelevant to this obligation. The court erred in not realizing the difference.

B. THE LOWER COURT'S DECISION VIOLATES THE FEDERAL CONSTITUTION.[4]

Standard of Review: Questions concerning the constitutionality of the lower court's interpretation and application of a statute, such as the Michigan Child Custody Act, are questions of law that are reviewed *de novo*. *Toll Northville Ltd v Twp of Northville*, 480 Mich 6; 743 NW2d 902 (2008).

1. THE LOWER COURT'S REFUSAL TO ENFORCE PLAINTIFF GIANCASPRO'S PARENTAL RIGHTS VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION.

The United States Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state." US Const, art IV, § 1. Congress has decreed that judgments "shall have the same full faith and credit given to them in every court within the United States … as they have by law or usage in the courts of such State … from which they are taken." 28 USC 1738. Thus, the judgment of a state court is

4 Under the doctrine of constitutional avoidance, this court should not address any of the four following constitutional issues if it rules in plaintiff's favor in Argument A. *Taylor*, 360 Mich at 154.

to be given the same credit, validity and effect in every other court of the United States as it is given in the state in which it was entered. *Underwriters Nat'l Assur Co v NC Guar Ass'n*, 455 US 691; 102 S Ct 1357; 71 L Ed 2d 558 (1982).

"The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Finstuen v Crutcher*, 496 F3d 1139, 1152 (CA 10, 2007), quoting *Milwaukee Co v ME White Co*, 296 US 268, 276-77; 56 S Ct 229; 80 L Ed 220 (1935). "The Clause is designed 'to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states.'" *Finstuen*, p. 1152, citing *Pac Employers Ins Co v Indus Accident Comm'n*, 306 US 493, 501; 59 S Ct 629; 83 L Ed 940 (1939).

As the Supreme Court has acknowledged, a state may not disregard the full faith and credit obligation simply because the state finds the policy behind an out-of-state judgment inconsistent with or contrary to its own policies:

> [O]ur decisions support no roving "public policy exception" to the full faith and credit due *judgments*. *See* [*Estin v Estin*, 334 US 541, 546; 68 S Ct 1213; 92 L Ed 1561 (1948)] (Full Faith and Credit Clause "ordered submission … even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Fauntleroy v Lum*, 210 US 230, 237; 28 S Ct 641; 52 L Ed 1039 (1908) (judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law).

Baker v General Motors Corp, 522 US 222, 233-34; 118 S Ct 657; 139 L Ed 2d 580 (1998). *See also Williams v North Carolina*, 317 US 287; 63 S Ct 207; 87 L Ed 279 (1942) (requiring North

Carolina to recognize the change in marital status effected by a Nevada divorce decree that would not have been granted under the laws of North Carolina).

The full faith and credit precedent applicable generally to judicial proceedings is applicable specifically to adoption proceedings. *Finstuen*, p. 1156. Adoption is accomplished through judicial proceedings that result in final decrees that are not susceptible to modification. 1-4 ADOPTION LAW & PRACTICE, § 4.02 (Matthew Bender, 2003). The existence of a final decree of adoption precludes the choice of law problems that might arise in other types of domestic relations disputes. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP UL REV 803, 804 (2003).

In holding that it was not required to enforce Diane's parental rights under the Michigan Child Custody Act, the lower court misinterpreted language in *Finstuen*, p. 1153-54. Specifically, that court erroneously pointed to the *Finstuen* court's statement that, "Enforcement measures do not travel with the sister state judgment as preclusive effects do." To the contrary, the *Finstuen* decision mandates adjudication of Diane's complaint under the Michigan Child Custody Act. By holding that a forum state may apply its own enforcement measures "even-handed[ly]," the *Finstuen* court was stating simply that the forum state is not required to import the substantive law of another state in determining what substantive rights flow from a foreign judgment. In other words, a Michigan court is not required to apply Illinois custody law when adjudicating the custody of children with Illinois adoption decrees. But what ***is*** required is that the Michigan court apply ***Michigan*** custody law to adjudicate the custody of children with Illinois adoption decrees.

The facts in *Finstuen* make clear that Michigan may not develop special and unequal rules for enforcement of parental rights flowing from other states' adoption decrees, but instead

must apply Michigan child custody laws even-handedly to all parents regardless of where they obtained their adoptions or whether those adoptions are consistent with Michigan adoption law. In *Finstuen,* the court invalidated an Oklahoma law upon which the Oklahoma Department of Health relied in refusing to issue birth certificates to families with same-sex parents who had adopted Oklahoma children outside the state under procedures that Oklahoma claimed were contrary to Oklahoma law and public policy. Because an Oklahoma statute of general applicability required the issuance of birth certificates to adoptive parents, Oklahoma was not permitted to create a special rule for foreign adoption decrees it did not like. Thus, *Finstuen* teaches that courts must apply the existing enforcement mechanism available in Michigan – the Michigan Child Custody Act, MCL 722.21, *et seq.* – to all child custody complaints brought pursuant to valid adoption decrees, regardless of whether the complaint concerns an adoption performed in another state, and regardless of whether that adoption could have been performed under Michigan law.

Consequently, even if Diane's adoption of her children would not have been authorized or granted under Michigan law, Michigan must respect the adoptions entered pursuant to Illinois law. Moreover, Michigan courts must enforce Diane's parental rights under those decrees just as it enforces the rights of adoptive parents under decrees issued by Michigan courts. It matters not whether Michigan considers the underlying adoptions contrary to its own public policy,[5] which Diane disputes; the Full Faith and Credit Clause mandates the family court adjudicate Diane's

[5] Whether the parties could have adopted under Michigan law is, of course, beside the point. Adoption is not an issue in this case because these children already have been adopted legally and have extant parent-child relationships with Diane and Lisa.

custody dispute just as it would any other custody dispute between legal parents and their children.[6] This is precisely the "even-handed" enforcement the *Finstuen* court required.

In the end, the court below erroneously believed it could escape the U.S. Constitution's full faith and credit mandate by paying lip service to the validity of the out-of-state judgment while simultaneously denying it any right of enforcement under Michigan law, based on Michigan's perceived public policy. That, of course, is a distinction without a difference that ignores the clear instruction of *Baker* and *Finstuen* and attempts a slight-of-hand the Constitution does not permit.

2. THE LOWER COURT'S REFUSAL TO ENFORCE THE ILLINOIS ADOPTION DECREES IN MICHIGAN DENIES PLAINTIFF GIANCASPRO AND HER CHILDREN THE RIGHT TO TRAVEL PROTECTED UNDER THE PRIVILEGES AND IMMUNITIES GUARANTEE.

By refusing to enforce the Illinois adoption decrees in a Michigan court, the decision below penalizes Diane and her children for traveling to and remaining in Michigan. As a result, Diane and the children face a draconian array of disabilities in Michigan – their current home state – including having no ability to determine and enforce rights of custody, visitation and child support and a host of others vital to the welfare of the children.

This result violates the Privileges and Immunities Clause of the federal Constitution, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." US Const Am XIV, § 2, cl 1. The object of this clause was to

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[6] The logical implication of the lower court's ruling is both far reaching and frightening. If parental rights created by valid out-of-state adoption decrees are unenforceable in Michigan, lack of access to the Child Custody Act is only the tip of the iceberg. Presumably, parents also lack the ability to make and enforce crucial decisions involving their children's education and healthcare, or even to pick up a lost child from a local police department, just to name a few.

"place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin v Orbeck*, 437 US 518, 524; 98 S Ct 2482; 57 L Ed 2d 397 (1978) (citing *Paul v Virginia*, 75 US 168, 180; 19 L Ed 357 (1868)). Protected under this clause "for those travelers who elect to become permanent residents, [is] the right to be treated like other citizens of that State." *Saenz v Roe*, 526 US 489, 500; 119 S Ct 1518; L Ed 2d 689 (1999) (state welfare scheme that discriminated against those who had relocated to the state violated the right to travel). "That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." *Saenz*, p. 502. Denying Diane and her children the ability to enforce the adoption decrees they obtained while Illinois residents puts them at a dramatic disadvantage to other parents and children in this State, without even a legitimate reason for the disparate treatment.

"Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Att'y Gen of NY v Soto-Lopez*, 476 US 898, 901-02; 106 S Ct 2317; 90 L Ed 2d 899 (1986) (holding that New York's restriction of civil service preference for veterans to those who entered armed forces while residing in New York State was an unconstitutional infringement on the right to travel). The principle that United States citizens are free to migrate from one state to another and to settle wherever they choose is central to our national heritage and system of government.

The Supreme Court has made clear that a state law need only interfere in some substantial way with the right to cross state borders to violate the right to travel. *Saenz*, p. 505.[7]

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[7] For example, a law banning travel with an indigent person functions as a barrier to travel. *Edwards v California*, 314 US 160; 62 S Ct 164; 86 L Ed 119 (1941). Likewise, a law depriving African-Americans of the right to use the streets and highways violates the right to go from one place to another. *United States v Guest*, 383 US 745; 86 S Ct 1170; 16 L Ed 2d

continued—

The right to travel from state to state with one's child falls squarely within the right to travel, and any state action that interferes with that right without sufficient legal justification is constitutionally infirm. *See, e.g., Watt v Watt*, 971 P2d 608, 615-617 (Wyo 1999) (depriving a mother of custody because of her decision to move out of state infringed upon her right to travel without sufficient justification; inherent in the right to travel is [the] custodial parent's right to have the children move with that parent); *Jaramillo v Jaramillo*, 113 NM 57; 823 P2d 299, 305-06 (1995), ("[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest for doing so, is as impermissible as one that bans exercise of the right altogether."); *Wohlert v Toal*, 670 NW 2d 432 (Table), 2003 WL 22017200 at *2, entered Aug. 27, 2003 (Docket No. 02-1981) (Appendix C) ("[t]he freedom to travel, including the right to relocate, is a fundamental right" and "[a]ny infringement upon this fundamental right must be justified by a compelling state interest.") (citing *Mem'l Hosp v Maricopa Co*, 415 US 250; 94 S Ct 1076; 39 L Ed 2d 306 (1974)).

The Supreme Court has identified three components of the right to interstate travel: "(1) the right of a citizen of one State to enter and to leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State; and (3) for those travelers who elect to become permanent residents [of a State], the right to be treated like other citizens of that State." *Saenz*, p. 500. The court below failed to consider the third component at all.

—*continuation*

239 (1966). This is true even though the statutory schemes in *Edwards* and *Guest* contained no explicit ban on interstate travel, but simply burdened the right.

A state law violates the right to travel where it (1) deters such travel, (2) has the objective of impeding travel, or (3) uses any classification which serves to penalize the exercise of that right." *Buchwald v Univ of NM School of Medicine*, 159 F3d 487, 497 (CA 10, 1998) (citing *Att'y Gen of NY*)). Clearly, the lower court's determination that Michigan's Child Custody Act excludes same-sex couples from exercising their parental rights to protect their adopted children penalizes Diane in her decision to relocate to Michigan with the three children.

Many states allow same-sex couples to adopt children.[8] It is difficult to imagine a stronger deterrent to same-sex couples and their children relocating to Michigan than excluding them wholesale from Michigan child custody laws that otherwise protect parental rights and look after the best interests of children for all other residents of the State. Certainly, the U.S. Constitution does not permit Michigan to place such a high cost on the right to relocate here from another state.

A state law affecting the fundamental right to travel is subject to strict scrutiny and must be "shown to be necessary to promote a compelling governmental interest." *Shapiro v Thompson*, 394 US 618, 634; 89 S Ct 1322; 22 L Ed 2d 600 (1969), rev'd in part on other grounds, *Edelman v Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974). No such interest can be demonstrated here. For this reason, the lower court's ruling that denies same-sex couples who legally adopt children in other states enforcement of their parental rights under the

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[8] *See, e.g.*, CAL. FAM CODE §§ 8600-01 (2004); *Sharon S v Superior Court of San Diego*, 31 Cal 4th 417; 73 P3d 554 (2003); CONN. GEN. STAT. § 45a-726a (1996); *In re Hart*, 806 A 2d 1179, 1186 (Del Fam Ct 2001); *In re MMD*, 662 A2d 837, 840 (DC 1995); *In re KM*, p. 194; IND CODE ANN § 31-19-2-2 (1997); *In re Infant Girl W*, 845 NE2d 229 (Ind App 2006), *transfer denied*, 851 NE2d 961 (Ind 2006); *In re Tammy*, 416 Mass 205; 619 NE2d 315, 315-316 (1993); NJ STAT ANN § 9:3-43 (2002); *In re Jacob*, 86 NY2d 651; 636 NYS2d 716; 660 NE2d 397, 398 (1995); *In re RBF*, 569 Pa 269; 803 A2d 1195, 1202-03 (2002); & VT STAT tit 15A, § 1-102 (1995).

Michigan Child Custody Act when they move to Michigan violates the parties' and their children's constitutional right to travel.

3. IN REFUSING TO ENFORCE PLAINTIFF GIANCASPRO'S PARENTAL RIGHTS, THE LOWER COURT UNCONSTITUTIONALLY DEPRIVED BOTH HER AND THE CHILDREN OF DUE PROCESS.

The Fourteenth Amendment's Due Process Clause has a substantive component that protects all persons against undue government interference with fundamental rights and liberty interests, and the freedom to create and maintain family relationships is a fundamental right extending both to children and parents. *See* US Const, Am XIV; *Planned Parenthood of Cent Mo v Danforth*, 428 US 52, 74; 96 S Ct 2831; 49 L Ed 2d 788 (1976) ("Minors, as well as adults, are protected by the Constitution" and possess substantive due process rights.). Children have a core, constitutionally-protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life. *Smith v Org of Foster Fams for Equality and Reform*, 431 US 816, 844; 97 S Ct 2094; 53 L Ed 2d 14 (1977). This interest derives not necessarily from a blood relationship but from the role the parental adult plays in a child's life. *See Lehr v Robertson*, 463 US 248; 103 S Ct 2985; 77 L Ed 2d 6114 (1983) (citing *Smith*, p. 844) (holding that it is unwed father's commitment to responsibilities of parenthood that gives his relationship with his child substantial constitutional protection, not biological link alone). "[B]iological relationships are not exclusive determination of the existence of a family," and adoptive relationships are the legal equivalent of biological parenthood. *Smith*, p. 843.

This constitutional interest is shared by all children regardless of whether or how their parents married. *See, e.g., Michael H v Gerald D*, 491 US 110, 123 n3; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (plurality) ("The family unit accorded traditional respect in our society … also includes the household of unmarried parents and their children."); *Michael H*, p. 133 (Stevens, J.,

concurring) ("[Our] cases . . . demonstrate that enduring 'family' relationships may develop in unconventional settings."); *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944) (finding aunt and legal guardian to enjoy parental autonomy rights). Legal protections for parent-child relationships after family dissolution should turn on the best interests of the child, not on the nature of their parents' relationship or the sexes or sexual orientations of the parents. For a court to accord lesser legal protections to children who are part of diverse families infringes upon the fundamental rights of these children.

The lower court's refusal to adjudicate Diane's complaint for custody also violates Diane's fundamental rights as a parent. Parents have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (reviewing the long history of Supreme Court precedent on the subject). Thus, interference with parental autonomy and privacy must be justified by compelling state concern. Additionally, parents and their children share a fundamental right of family privacy. *Planned Parenthood of Se Pa v Casey*, 505 US 833, 847-51; 112 S Ct 2791; 120 L Ed 2d 674 (1992). There is no justification, compelling or otherwise, for depriving Diane of her constitutionally protected right to the care, custody, and control over her children by refusing her access to the extensive legal structure and remedies available to parents seeking custody of their children in Michigan. The interference here with Diane's liberty interest in the care of her children could not be greater, as the lower court's decision has rendered Diane's adoption of her children virtually meaningless by denying her the ability to enforce any of her rights as a parent.

Moreover, Diane has in common with all adults a fundamental right of personal autonomy and self-determination in her intimate consensual relationships. *Lawrence v Texas*,

539 US 558, 573-74; 123 S Ct 2472; 156 L Ed 2d 508 (2003); *Casey*, p. 851. By denying her access to Michigan's laws protecting parents and their relationships with their children, the lower court has impermissibly penalized her for entering into a constitutionally protected relationship with another adult.

Because the lower court's discriminatory classification infringes both Diane's and the children's fundamental liberty interests, *see, Stanley v Illinois*, 405 US 645, 651; 98 S Ct 1208; 31 L Ed 2d 551 (1972), its decision is subject to strict scrutiny, *Dunn v Blumstein*, 405 US 330, 337; 92 S Ct 995; 31 l Ed 2d 274 (1972) (in context of invasion of a fundamental right, discriminatory classification is subject to most stringent analysis). As discussed above, the decision below cannot withstand even rational basis review – it certainly fails this more demanding test.

4. IN REFUSING TO ENFORCE PLAINTIFF GIANCASPRO'S PARENTAL RIGHTS, THE LOWER COURT DENIED BOTH HER AND THE PARTIES' CHILDREN EQUAL PROTECTION OF THE LAW.

The Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person the equal protection of the laws. US Const Am XIV, § 1. Michigan courts may not deprive Diane and the parties' children of the protections of Michigan's child custody laws while permitting other families access to those laws. To refuse to enforce Diane's parental rights under valid adoption decrees simply in order to uphold a purported policy regarding relationships between adults of the same sex would be arbitrary action in service of an illegitimate end. *See Romer v Evans*, 517 US 620; 116 S Ct 1620; 134 L Ed 2d 855 (1996); *City of Cleburne v Cleburne Living Ctr, Inc*, 473 US 432; 105 S Ct 3249; 87 L Ed 2d 313 (1985).

a) THE LOWER COURT'S DECISION UNLAWFULLY DISCRIMINATES AGAINST THE PARTIES' CHILDREN BASED ON THEIR PARENTS' SEXUAL ORIENTATION OR UNMARRIED INTIMATE RELATIONSHIP.

The lower court's refusal to adjudicate the custody dispute between the parties denies legal benefits to their children solely because they are adopted children of unmarried same-sex parents. The Supreme Court has long held that disparate treatment of children of unmarried parents based on the conduct or status of their parents violates the Equal Protection Clause. *See, e.g., Levy v Louisiana*, 391 US 68; 88 S Ct 1509; 20 L Ed 2d 436 (1968) (invalidating provision denying children of unmarried parents the right to claim for wrongful death); *Weber v Aetna Cas & Sur Co*, 406 US 164, 175; 92 S Ct 1400; 31 L Ed 2d 768 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."); *Mathews v Lucas*, 427 US 495, 505; 96 S Ct 2755; 49 L Ed 2d 651 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'"). In this series of cases, the Supreme Court struck down as unconstitutional state laws that burdened or disadvantaged children born to unmarried couples. As the Court explained in *Pickett v Brown*, 462 US 1, 7; 103 S Ct 2199; 76 L Ed 2d 372 (1983)):

> Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual–as well as unjust–way of deterring the parent …. [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where–as in this case–the classification is justified by no legitimate state interest, compelling or otherwise.

See also Gomez v Perez, 409 US 535, 538; 93 S Ct 872; 35 L Ed 2d 56 (1973) ("a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.")

The lower court's decision fits into this sad lineage by penalizing the parties' children, exposing them to countless risks simply because they have unmarried lesbian parents. It cannot be the case that certain adopted children are protected by Michigan's statutory scheme providing for child custody adjudications, but that others – the adopted children of same-sex or unmarried parents – are not. Differential treatment of children based upon their parents' status or conduct triggers heightened scrutiny under which the state must show at least that the classification is substantially related to an important and legitimate state interest. *Pickett*, p. 8.

The family court's refusal to adjudicate child custody cannot meet even the lowest level of scrutiny, let alone the more stringent level of review required here. The court's decision is not rationally related to *any* government interest, let alone a substantial or compelling one. The only justification the court gave for refusing to enforce Diane's parental rights is Michigan's purported public policy disapproving of marriages between persons of the same sex. This does not constitute a legitimate interest justifying the court's ruling. Classifications based on disapproval of a group do not serve legitimate ends and fail even rational basis review. *See Romer*, p. 635; *Cleburne*, p. 448-50.

Moreover, it is simply irrational to address a purported state interest in forbidding certain marriages by penalizing children who were adopted outside of Michigan by same-sex couples. Indeed expressing disapproval of parents by punishing their children is directly contrary to the Michigan Child Custody Act's animating purpose: seeking and protecting the best interests of children. Children who are part of diverse families, including the children here, are constitutionally entitled to the same protections for their parent-child relationships as are guaranteed to other children under Michigan's Child Custody Act.

b) THE LOWER COURT'S DECISION UNCONSTITUTIONALLY DISCRIMINATES AGAINST PLAINTIFF GIANCASPRO BASED ON HER SEX, SEXUAL ORIENTATION, AND MARITAL STATUS.

The Supreme Court strongly has protected parents from disparate treatment based upon personal characteristics. *See, e.g., Palmore v Sidoti*, 466 US 429; 104 S Ct 1879; 80 L Ed 2d 421 (1984) (applying strict scrutiny to reverse a custody decree that divested a mother of custody of her infant child because of her remarriage to a person of a different race). By ruling that Diane's sexual orientation and former membership in a same-sex couple precludes her from being able to enforce her valid adoption decrees and obtain an adjudication of her custodial rights in Michigan, the trial court classified her based on her sex, sexual orientation, and marital status, unconstitutionally singling her out for disfavored treatment. At the very least, such classifications must be rationally related to a legitimate purpose, and should be subject to heightened scrutiny. *See, e.g., United States v Virginia*, 518 US 515, 518; 116 S Ct 2264; 135 L Ed 2d 735 (1996) (classification based on sex must be substantially related to an "exceedingly persuasive justification"). As discussed above, the lower court's ruling cannot meet this test.

On rehearing, the court below went to great pains to point out that "the parties marital status, sex or sexual orientation has in no way been adjudged relative the fitness [sic] of either party or in review of the factors for the purpose of preferring one parent over and above the other as primary custodian or for Parenting Time." (*Decision: Order Following Request for Reconsideration* at 2, Jan. 3, 2008.) Clearly, the family court recognized that, for the purpose of custody and parenting determinations, classifying either legal parent by sex, marital status or sexual orientation is contrary to Michigan law. Yet, in denying Diane access to Michigan's Child Custody Act, the court failed to see the equal protection implications of doing the very same thing.

c) THE LOWER COURT'S RELIANCE ON AN EQUAL APPLICATION RATIONALE TO JUSTIFY PLAINTIFF GIANCASPRO'S DENIAL OF EQUAL PROTECTION WAS ERROR.

On rehearing, the lower court concluded there was no discrimination because neither of these parent's was being "prefer[red] over ... the other," and, since they both are unmarried, lesbian women, one isn't being discriminated against or "adjudged relative [to] the fitness of" the other based on her being female, a lesbian or unmarried. (*Decision: Order following Request for Reconsideration* at 2, Jan. 3, 2008) The lower court's justification is strikingly similar to the long-discredited "equal application" defense in equal protection jurisprudence.

The equal application defense maintains that reliance on any particular classification system is not constitutionally problematic if the discriminatory treatment applies equally to both (or perhaps all) member classes within the system. Laws prohibiting interracial cohabitation and marriage, since held unconstitutional, were said by their proponents not to be discriminatory because they were applied to whites and blacks alike. Likewise, laws prohibiting same-sex couples from marrying have been said not to be discriminatory because they are applied to men and women alike.

Discrimination justified by equal application has long been renounced. In *Loving v Virginia*, the United States Supreme court held that a Virginia law prohibiting interracial marriage constituted impermissible discrimination based on race, notwithstanding that it imposed the same restriction "equally" on whites and non-whites. *Loving v Virginia*, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); *see also McLaughlin v Florida*, 379 US 184, 189-90; 85 S Ct 283; 13 L Ed 2d 222 (1964) (holding that a penalty on interracial cohabitation constituted race discrimination, even though the statute applied "equally" to different races).

The problem is no less significant here, even though *Loving* and *McLaughlin* involved race discrimination. In extending the holding of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90L Ed 2d 69 (1986) (Equal Protection Clause prohibits discrimination in jury selection on the basis of race) to preclude discrimination in jury selection on the basis of sex, the Supreme Court made clear that even if one juror was disqualified based on being a woman and another juror was disqualified based on being a man, there still would be an equal protection violation, because each juror should be selected free from sex discrimination, not just the jury pool as a whole. *JEB v Alabama ex rel TB,* 511 US 127, 140-41; 114 S Ct 1419; 128 L Ed 2d 89 (1994) ("individual jurors themselves have a right to nondiscriminatory jury selection procedures"). In other words, the equal application defense fails constitutional scrutiny because it ignores that protection from discrimination is an individual right, not one of classes. The relevant inquiry under the equal protection clause is whether the law treats an ***individual*** differently. *JEB,* p. 152-153 (Kennedy, J., concurring) (observing that the federal Equal Protection Clause is primarily "concern[ed] with rights of individuals, not groups").[9]

Here, the family court's order discriminates against Diane because she is an unmarried lesbian. While it also would refuse to enforce Lisa's rights on those grounds, that is because the order would discriminate against ***all*** unmarried lesbians and gay men. The issue is not whether the court discriminated against one of these women relative to the other, but whether the lower

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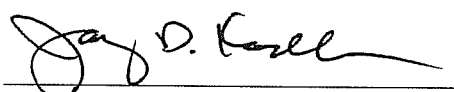
[9] Some courts have accepted the equal application defense in the context of marriage cases, although they have done so by improperly confining *Loving* to instances of racial discrimination without addressing the Supreme Court's clear rejection of the defense in other contexts, such as sex discrimination. *See, e.g.*, *Hernandez v Robles*, 7 NY3d 338, 389-90; 821 NYS2d 770, 798-99; 855 NE2d 1, 29-30 (2006) (Kay, C.J., dissenting) (pointing out that majority fails to acknowledge that the *JEB* Court rejected equal application defense in the context of sex discrimination); *Andersen v King Co*, 158 Wash2d 1, 118-19; 138 P3d 963, 1038-39 (2006) (Bridge, J., concurring in dissent) ("equal application of the DOMA is not enough to remove it from the ERA's absolute prohibition against sex-based classification").

court is treating each of these parties worse than it would other parents who are not lesbians or who were not married to their partners. Clearly, it is.

VI. CONCLUSION AND RELIEF SOUGHT

The lower court misapprehended the requirements of both Michigan law and federal constitutional law. The court erred in dismissing Diane's complaint and refusing to enforce Diane's parental rights. For the foregoing reasons, the lower court's decision below should be reversed and the case remanded with instructions to determine custody, parenting time and child support for the three minor children of Diane and Lisa in accordance with the Michigan Child Custody Act.

Respectfully Submitted,

By: 

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APPENDIX A
Hansen v McClellan

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Hansen v. McClellan
Mich.App.,2006.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Karen Sue HANSEN, Plaintiff-Appellant,
v.
Martha Florence McCLELLAN, Defendant-Appellee.
Docket No. 269618.

Dec. 7, 2006.

Ingham Circuit Court; LC No. 06-000015-CZ.

Before: MURPHY, P.J., and METER and DAVIS, JJ.

PER CURIAM.

***1** Plaintiff appeals as of right an order denying her motion for summary disposition and granting defendant's motion for summary disposition. On the same narrow basis relied on by the trial court, we affirm.

The parties in this case have never been married, but they entered into a committed relationship in 1991. On January 21, 1999, plaintiff gave birth to twins that the parties wished to raise together as a family. Pursuant to a joint adoption procedure in place in the Family Division of the Washtenaw Circuit Court, plaintiff voluntarily terminated her parental rights to the children in orders entered July 14, 1999, making the children wards of the court. The parties then jointly petitioned to adopt the children, and the petitions were granted. Orders of adoption naming both parties as parents were entered on July 14, 1999. The parties and the children resided together as a family for several years before the parties' relationship broke down. Defendant moved out of the residence. The parties apparently encountered difficulties negotiating parenting issues with each other thereafter. In January, 2003, plaintiff filed a petition for custody, parenting time, and support in the Ingham Circuit Court, but that action was dismissed by stipulation of the parties.

Plaintiff commenced the present action on January 4, 2006, seeking declarative judgment that the July 14, 1999, adoptions were void because the Washtenaw Circuit Court lacked subject-matter jurisdiction to enter the orders. Plaintiff also sought to have the termination of her parental rights set aside because that termination "was never based on fitness and was solely incidental to the Adoption."The parties cross-moved for summary disposition. The trial court denied plaintiff's motion and granted defendant's motion on the narrow ground "that the circuit court in the State of Michigan has the subject matter jurisdiction to grant adoptions, the family division of the circuit court."The trial court therefore concluded that the adoption orders could not be collaterally attacked irrespective of their correctness. Plaintiff appeals.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich. 109, 118;597 NW2d 817 (1999). The trial court did not specify the court subrule upon which it based its decision, but because the trial court did not look outside the pleadings, it appears to have granted the motion pursuant to MCR 2.116(C)(8). Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8).*Id* ., 119-120.A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id.*, 119.We review de novo as a question of law whether a court has subject-matter jurisdiction. *Young v. Punturo*, 270 Mich.App 553, 560;718 NW2d 366 (2006).

***2** A court's "jurisdiction" is its power to act and authority to hear and determine a case. *Wayne Co Chief Executive v. Governor*, 230 Mich.App 258, 269;583 NW2d 512 (1998). This does not refer to " ' "the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial." ' " *Bowie v. Arder*, 441 Mich. 23, 39;490 NW2d 568 (1992), quoting *Joy v. Two-Bit Corp*, 287 Mich. 244, 253-254;283 NW 45 (1938), quoting *Richardson v. Ruddy*, 15 Idaho 488, 494-495;98 P 842 (1908). A lack of jurisdiction makes any action by the court other than dismissal absolutely void and subject to collateral attack; conversely, if the court has subject-matter jurisdiction over a matter, it has the jurisdiction to make an error, which may only be challenged by a direct attack on appeal, no matter how grave. *Kaiser v. Schreiber*, 258 Mich.App 357, 363-364;670 NW2d 697 (2003), rev'd on other grounds469 Mich. 944 (2003).

Plaintiff concedes, as she must, that "the family division of circuit court has sole and exclusive jurisdiction" over adoption proceedings. MCL 600.1021(1)(b). Plaintiff contends that the Family Division of the Washtenaw Circuit Court nevertheless lacked subject-matter jurisdiction to grant joint adoptions to unmarried couples. In other words, plaintiff argues that, despite the court's jurisdiction to adjudicate adoptions, the trial court lacked the power to adjudicate *these particular* adoptions. We disagree.

If we were to assume, as plaintiff argues, that MCL 710.24(1) precludes joint adoptions by unmarried couples, an order by the Family Division of the Washtenaw Circuit Court granting such an adoption nevertheless constitutes an exercise of its power to adjudicate adoptions. The trial court would have committed a clear legal error subjecting the order to a direct attack and reversal on appeal. The trial court would not have acted outside the scope of cases it was authorized to adjudicate.

Plaintiff relies in significant part on *In re Adams*, 189 Mich.App 540;473 NW2d 712 (1991), and *Ryan v. Ryan*, 260 Mich.App 315;677 NW2d 899 (2004). However, *Adams* contains no mention of subject-matter jurisdiction. Rather, the *Adams* panel merely indicated in general terms that the jurisdiction, duties, and powers of a court granting an adoption "may not exceed that which is conferred by statute."*Adams, supra* at 542.The Court further noted that all adoption proceedings "must strictly comply with the terms of the authorizing statute."*Id.* This language does not mean that any and all rulings relative to adoptions made pursuant to statute concern subject-matter jurisdiction. Indeed, the Court in *Adams* framed the issue in terms of "who may adopt," rather than whether the court had subject-matter jurisdiction to grant the adoption. *Id.*, 543.

***3** The question presented to us now concerns standing more than subject-matter jurisdiction. "Subject-matter jurisdiction and standing are not the same thing."*Altman v. Nelson*, 197 Mich.App 467, 472;495 NW2d 826 (1992). Again, subject-matter jurisdiction "is the right of the court to exercise judicial power over a class of cases," while "standing relates to the position or situation" of the party or parties seeking relief. *Id.*, 472, 475.In cases governed by statute, standing is bestowed on a party by statute. *Ryan, supra* at 332.Again presuming the correctness of plaintiff's interpretation of MCL 710.24(1), that statute did not allow the parties to adopt because their "position or situation" was that of two unmarried persons jointly seeking to adopt. With respect to the class of cases, MCL 600.1021(1)(b) specifically gives the family division of the circuit court sole and exclusive jurisdiction over "[c]ases of adoption," and this is indeed a "case of adoption." We conclude that *Adams* does not conflict with our ruling, but rather lends support.

In *Ryan, supra* at 332, a minor attempted to

"divorce" her parents, and this Court held that she lacked standing to do so. The *Ryan* panel additionally held that the trial court did not have subject-matter jurisdiction over the plaintiff minor's divorce complaint against her parents, explaining that "a court only has jurisdiction over the dissolution of a marriage between a man and a woman."*Id.*, 332.Because a "marriage" is defined by statute as "inherently a unique relationship between a man and a woman,"MCL 551.1, it necessarily followed that there could be no "divorce" between a child and his or her parents. *Id.*, 331-332.In other words, a "divorce" between a child and his or her parents is a legal impossibility under any circumstances. In contrast, it is beyond dispute here that each of the parties in the present case could have individually adopted the children. The problem is that they joined together to do so. Therefore, there were "adoption proceedings" in this case, although they may have been flawed, whereas in *Ryan*, there technically were no "divorce proceedings" at all, nor could there have been.

To the extent that *Ryan* suggests the result proffered by the dissent, we find that controlling Michigan Supreme Court precedent in *In re Hatcher*, 443 Mich. 426;505 NW2d 834 (1993), dictates our result, wherein the Court held that, consistent with the case law cited above, "subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate...." The jurisdictional class, as provided in MCL 600.1021(1)(b), is "[c]ases of adoption[,]" and this is a case of adoption. The possible error-again presuming the correctness of plaintiff's interpretation of MCL 710.24(1)-related to the exercise of jurisdiction over the adoption proceedings, not the want of jurisdiction. See *Hatcher, supra* at 439-440.The dissent incorrectly gives a more narrow reading of what constitutes a "class" by examining the particular case at bar instead of the "class" of adoption in general as provided by MCL 600.1021(1)(b), which speaks directly to the court's jurisdiction. The dissenting opinion's narrowed focus would provide an analytical framework to collaterally attack adoptions on other grounds beside the one raised today. We note the *Hatcher* Court's closing remarks:

***4** Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available. It should provide repose to adoptive parents and other who rely upon the finality of probate court decisions. *[Hatcher, supra* at 444.]

Our ruling should also provide repose to adoptive parents and others who rely on the finality of adoption decisions now rendered by the family division of the circuit court.

We are further persuaded that our view is the correct one by our Supreme Court's decision in *In re Adoption of Knox,* 381 Mich. 582;165 NW2d 1 (1969), in which the plaintiff challenged the validity of adoption proceedings completed back in 1917. The adopted child's maternal grandmother petitioned for adoption, but her husband, the child's grandfather, did not join in the petition, in contravention of a similarly-worded predecessor statute to MCL 710.24(1), yet an order of adoption was entered. *Id.*, 583.The plaintiff, who was the child's guardian, argued that the adoption order was invalid for the following reasons set forth by the Court:

Plaintiff claims that chapter 64 of the judicature act of 1915 did not permit the adoption of a minor child by a married person alone and that the probate court had no jurisdiction in 1917 to enter an order of confirmation of the adoption because the husband of [the maternal grandmother] did not sign the articles of adoption or consent to them on the record. Plaintiff claims that the order of confirmation was therefore void from its inception. *[Id.*, 586 .]

The Michigan Supreme Court upheld the adoption, finding that the adoption petition and probate court record did not contain any indication that the child's maternal grandmother was married; therefore, resort to extrinsic evidence to establish that fact would be necessary. *Id.*, 588-589.But the Court, relying on 1948 CL 701.23, stated that "[m]ore than 20 years having elapsed since the date

of the adoption proceedings, plaintiff is foreclosed by the presumption of validity imposed by the statute since nothing to the contrary appears on the record. *Knox, supra* at 589.The Court then concluded:All of the extrinsic evidence in this case tends to support the adoption. Assuming we were to accept plaintiff's interpretation of the judicature act, there is only one fact to the contrary-the failure of the husband ... to join in the adoption proceedings. We need not and do not determine the extent to which chapter 64 of the judicature act of 1915 requires that married adopting parents both join in an adoption proceeding under the statute. As stated by the Court of Appeals, the 1917 probate court proceedings here under challenge are regular on their face. The presumption of the statute being applicable, it is conclusive. *[Knox, supra* at 589.]

Given that a jurisdictional challenge was made in Knox, the Supreme Court's decision to let the adoption order stand without the need to determine whether the pertinent statute prohibited the adoption strongly indicates that subject-matter jurisdiction was not at issue in the minds of the Justices. This is particularly convincing because of the Court's assumption that the only problem under the statute was the husband's failure to join in the adoption proceedings. If this were an issue of subject-matter jurisdiction, the Court could not have made that assumption because the assumption would necessarily lead to the conclusion that there was no jurisdiction, thus making the adoption void, yet the adoption was upheld. Further, if subject-matter jurisdiction were at issue in *Knox,* the Court could not have determined that it was unnecessary to reach the issue of whether the husband was required to join in the adoption proceedings under the statute. Such a determination would be necessary to resolve a jurisdictional question. And had the *Knox* Court concluded that there was no subject-matter jurisdiction, it would have had to void the adoption regardless of the presumption statute upon which it relied, because the probate court would not have had authority even to enter an adoption order giving rise to the presumption.

***5** The supposed defect in *Knox, i.e.,* failure of a party to join in an adoption, is comparable to the alleged and assumed defect here, i.e., improper joinder of a party in an adoption. As in *Knox,* we also need not decide whether a similar statute, MCL 710.24(1), allowed for the parties' adoption of the twins because the issue does not concern subject-matter jurisdiction, and only the lack of subject-matter jurisdiction would permit the collateral attack pursued by plaintiff. We therefore agree with the trial court's analysis below: even if we were to presume for the sake of argument that the adoption orders entered by the Family Division of the Washtenaw Circuit Court were impermissible by MCL 710.24(1), the court would have erred, but it did not act outside of its jurisdiction. The orders were therefore subject only to direct attack on appeal, and the window of time in which to do so has long since closed.

Plaintiff additionally argues that the Washtenaw Circuit Court lacked jurisdiction because MCL 710.24(1) further provides that adoption petitions must be filed “with the court of the county in which the petitioner resides or where the adoptee is found.”There is no dispute that all parties and both children have at all relevant times resided in Ingham County. For the same reasons set forth above, we disagree. Again presuming it was error for the adoption adjudication to take place in Washtenaw County instead of Ingham County, the error was in venue, not jurisdiction. See *Morrison v. Richerson,* 198 Mich.App 202, 206-208;497 NW2d 506 (1992). Such an error is not subject to collateral attack.

Affirmed.

METER, J. (dissenting).

I respectfully dissent. I would hold that under the Adoption Code, MCL 710.21*et seq.,* the circuit courts of Michigan do not have subject-matter jurisdiction to grant a joint adoption petition filed by two unmarried persons and that such an adoption, if granted, is subject to collateral attack. I would reverse the trial court's order and remand this case for

entry of judgment in favor of plaintiff.

In *Edwards v. Meinberg,* 334 Mich. 355, 359;54 NW2d 684 (1952), quoting *Jackson City Bank & Trust Co v. Fredrick,* 271 Mich. 538, 544;260 NW 908 (1935), the Supreme Court noted:

"There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal."

Therefore, the pertinent question is whether the Washtenaw Circuit Court, in granting the joint adoption petition, was acting without the power to adjudicate or was simply exercising its power to adjudicate.

For guidance, I turn, initially, to the case of *In re Adams,* 189 Mich.App 540;473 NW2d 712 (1991). In *Adams,* two individuals who were both married, but not to each other, desired to jointly adopt their biological daughter. *Id.* at 541.In support of their adoption petition, they cited MCL 710.24(1), the same provision at issue in the present case. See *Adams, supra* at 541.MCL 710.24(1) states, in pertinent part:

***6** If a person desires to adopt a child or an adult and to bestow upon the adoptee his family name, or to adopt a child or an adult without a change of name, with the intent to make the adoptee his heir, that person, together with his wife or her husband, if married, shall file a petition with the court of the county in which the petitioner resides or where the adoptee is found....

The *Adams* Court noted that "[t]he entire subject of adoption is governed solely by statute."*Adams, supra* at 542.It also noted that "the provisions of the Adoption Code [MCL 710.21*et seq.]* must be strictly construed" and that jurisdiction over adoption proceedings is governed solely by that code *Adams, supra* at 542-543.The Court ultimately held that the petitioners could not jointly adopt their biological daughter, stating:[W]e conclude that the probate court correctly construed the requirement of § 24 that both spouses to a marriage join in the petition to adopt as precluding petitioners ..., who are married, but not to each other, from adopting their natural daughter....*[Id.* at 543.]

Adams is instructive here for two reasons. First, it makes clear that the Adoption Code must be strictly construed and that a court's jurisdiction is derived from that code. Second, in the course of its analysis, the Court touched upon the issue we face today, stating:In the absence of a statutory prohibition, an unmarried person may adopt another person. However, it has been held inconsistent with the general scope and purpose of the adoption statutes to allow two unmarried persons to make a joint adoption.... In *Adoption of Meaux,* 417 So.2d 522 (La App, 1982), the Louisiana Court of Appeals held that under a Louisiana adoption statute which allowed a single person or a married couple to adopt a child, the natural parents of a minor child, who were apparently living together but not married to each other, could not jointly adopt their natural child because they were neither "a single person" nor a married couple. *[Adams, supra* at 544.]

Here, two unmarried persons attempted to jointly adopt the children. However, the Adoption Code, which must be strictly construed, does not provide for a joint adoption by two unmarried persons.[FN1] MCL 710.24(1) states that a "person" may file an adoption petition, "together with his wife or her husband, if married...." There is simply no provision in the Adoption Code for a joint adoption by two unmarried persons. Moreover, such an adoption would run contrary to the statement in *Adams, supra* at 544, that "it has been held inconsistent with the general scope and purpose of adoption statutes to allow two unmarried persons to make a joint adoption."

FN1. I note that if 2005 HB 5399, a pending bill, is adopted, then MCL 710.24(1) would allow for a joint adoption by two unmarried persons.

I conclude that, under the current state of the law in Michigan, the Washtenaw Circuit Court erred in granting the joint adoption petition at issue in this case. Moreover, I conclude that this was not merely an error in the *exercise* of jurisdiction; instead, the court was without the power to adjudicate at all. Again, jurisdiction in adoption cases is solely derived from the Adoption Code, *Adams*, *supra* at 542-543, and the Adoption Code does not provide a court with jurisdiction to grant a joint adoption petition filed by two unmarried persons.

***7** An analogous case is *Ryan v. Ryan*, 260 Mich.App 315;677 NW2d 899 (2004). In *Ryan*, *supra* at 323-324, an individual filed for a divorce from her parents. On the question of subject-matter jurisdiction, the Court held:

"Marriage is inherently a unique relationship between a man and a woman."MCL 551.1. It follows that a court only has jurisdiction over the dissolution of a marriage between a man and a woman. In other words, while the family division of the circuit court has subject-matter jurisdiction over married couples seeking a divorce, it is without jurisdiction over claims filed by children to divorce their parents.... When there is a lack of subject-matter jurisdiction, regardless of what formalities the trial court may have taken, its actions are void. *[Id.* at 332.]

Here, while the family division of the Washtenaw Circuit Court had subject-matter jurisdiction *in general* over adoption proceedings, it lacked subject-matter jurisdiction to grant a joint adoption to two unmarried persons. Therefore, its actions are void. *Id.*[FN2] As stated in *Edwards*, *supra* at 359,"[i]f there is a true jurisdictional defect, the court has acted without authority [and] its judgment is a nullity and is always subject to collateral attack."[FN3]Moreover, it is of no import that the parties consented to the jurisdiction of the Washtenaw Circuit Court. As noted in *Shane v. Hackney*, 341 Mich. 91, 98;67 NW2d 256 (1954), "the parties by consent or conduct cannot give the court jurisdiction over the subject matter where it otherwise would have no jurisdiction[.] (Citations and quotation marks omitted.) Nor, contrary to defendant's argument, can the doctrine of res judicata be used to uphold the adoptions here. As noted in *Reid v. Gooden*, 282 Mich. 495, 498;276 NW 530 (1937), a prior judgment cannot form the basis of a res judicata decision unless the judgment was rendered "by a court having jurisdiction."

FN2. In my opinion, the majority misconstrues the significance of the *Ryan* decision. The majority states that the Washtenaw Circuit Court had "jurisdiction to adjudicate adoptions" and that therefore it had subject-matter jurisdiction over the pertinent proceedings in this case. However, *Ryan* makes clear that even if a court has subject-matter jurisdiction *in general* over a subject like divorce, adoption, marriage, etc., that subject-matter jurisdiction is limited by pertinent statutory authority. See *Ryan*, *supra* at 332.Here, there simply was no statutory authority authorizing the court to grant a joint adoption petition to two unmarried persons. I also note that the case of *In re Adoption of Knox*, 381 Mich. 582; 165 NW2d 165 NW2d 1 (1969), which the majority relies on, is distinguishable from the present case. In upholding the challenged adoption in *Knox*, the Supreme Court relied heavily on the fact that "[n]othing in the probate record shows [the adoptive mother] to be a married woman" and concluded that the plaintiff should not be able to "resort to extrinsic evidence to establish that fact."*Id.* at 589.Here, the operative fact that plaintiff and defendant were not married to each other is plainly evident from a cursory review of the adoption petition, given that they are both women and that marriage between two women is not and has not been, in the past, legally recognized in this state.

FN3.“[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal.”*People v. Howard,* 212 Mich.App 366, 369;538 NW2d 44 (1995).

Defendant cites *Hatcher v. Hatcher,* 443 Mich. 426;505 NW2d 834 (1993), in arguing that the adoptions here are not subject to collateral attack. In *Hatcher, supra* at 428, the Court concluded that a parent cannot challenge a probate court's assumption of subject-matter jurisdiction over a minor child after the parent's parental rights have been terminated. I do not agree with defendant that *Hatcher* requires us to affirm the Ingham Circuit Court's ruling in this case. First, *Hatcher* dealt with the specific and unique circumstances surrounding child protective proceedings. See, generally, *id.* at 433-436.Second, the *Hatcher* Court stated that “a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous.”*Id.* at 444.In the present case, the proceeding before the Washtenaw Circuit Court was *not*“of a class the court is authorized to adjudicate,” because the court lacked jurisdiction to grant a joint adoption to two unmarried persons. Defendant's argument concerning *Hatcher* is unavailing.

***8** In my opinion, the Washtenaw Circuit Court lacked subject-matter jurisdiction to grant the joint petition for adoption, and plaintiff's collateral attack in the Ingham Circuit Court was proper. Therefore, the Ingham Circuit Court erred in granting summary disposition to defendant and denying summary disposition to plaintiff. I would hold that the proceedings that occurred in the Washtenaw Circuit Court are void.[FN4]

FN4. Plaintiff makes the additional argument that the Washtenaw Circuit Court lacked subject-matter jurisdiction because the adoption proceedings should have taken place in a different county. MCL 710.24(1) states that an adoption petition shall be filed in the county “in which the petitioner resides or where the adoptee is found....” Plaintiff argues that she, defendant, and the children had no connection with Washtenaw County at the time of the purported adoptions. However, venue and jurisdiction are distinct concepts. See, generally, *Morrison v. Richerson,* 198 Mich.App 202, 206-208;497 NW2d 506 (1992); see also *Stamadianos v. Stamadianos,* 425 Mich. 1, 5-14;385 NW2d 604 (1986). Under the analogous case of *Morrison, supra* at 206-208, it appears to me that the error complained of by plaintiff here was an error concerning venue, not jurisdiction, and therefore could not be the subject of a collateral attack.

I note, however, that my legal reasoning today is limited to *joint* petitions for adoptions. In *In re Munson,* 210 Mich.App 500, 501;534 NW2d 192 (1995), the petitioner, who was unmarried at the time, attempted to adopt a person, April Munson, who remained the legal child of her biological mother. The Court stated, in part:

Finally, because petitioner is a single person and the Adoption Code permits single persons to adopt, the probate court erred in applying this Court's decision in *Adams, supra,* to the case at bar. *Adams* only addressed situations where more than one person joins in the adoption petition, i.e., where two single people or two married people who are not married to each other attempt to adopt jointly. *[Adams, supra]* at 543-544, 546-547 *Adams* did, however, affirm that the statutory language of § 24 unambiguously limits the “group of persons eligible to adopt to *single persons* and married persons jointly with their spouses.”*Id.* at 547 (emphasis added). Here, petitioner alone is asking the probate court to recognize him as April's legal father. Because *Adams* does not address the instant question whether a single man may adopt an adult adoptee after he divorces the adoptee's biological mother, we hold that the probate court erred in denying petitioner's adoption request on the basis of the hold-

ing in *Adams* .Instead, we find that as a single person, petitioner is entitled to petition for April's adoption under the Adoption Code, thereby becoming April's legal father and terminating the parental rights of respondent, her biological father.

Munson makes clear that there is a distinction between a joint petition for adoption and a petition involving only one potential adopter. Because alternative factual situations are not before us in this appeal, my legal reasoning today encompasses only those situations involving a joint petition for adoption.

I would reverse the trial court's order and remand this case for entry of judgment in favor of plaintiff.

Mich.App.,2006.
Hansen v. McClellan
Not Reported in N.W.2d, 2006 WL 3524059 (Mich.App.)

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APPENDIX B
Ulvund v Ulvund

C
Ulvund v. Ulvund
Mich.App.,2000.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Penny Kay ULVUND, Plaintiff-Appellant,
v.
Bill James ULVUND, Defendant-Appellee.
No. 224566.

Aug. 22, 2000.

Before: SMOLENSKI, P.J., and ZAHRA and COLLINS, JJ.

PER CURIAM.

***1** Plaintiff appeals as of right from an order modifying the parties' judgment of divorce, regarding the custody and support of their minor son. We affirm because we believe that clear and convincing evidence supported a finding that the change of custody was in the child's best interest.

The parties married in 1981 and divorced in 1994. The judgment of divorce ordered joint legal and physical custody of the parties' three children. In 1995, plaintiff moved from Charlevoix County to Jackson County, necessitating a change in the physical custody of the minor children. The parties stipulated to a custody arrangement under which defendant obtained primary physical custody of the two older children, but the parties maintained joint physical custody of the youngest child. That child resided with defendant twelve days out of every month, otherwise resided with plaintiff, and attended pre-school in both locations. When he became old enough to attend kindergarten, it again became necessary to change the physical custody arrangement. The parties filed cross-motions, each seeking physical custody of the youngest child during the school year. Following a three-day evidentiary hearing, the trial court awarded physical custody to defendant during the school year, and to plaintiff during the summer. Plaintiff appeals as of right.

Plaintiff first argues that the trial court erred in determining that an established custodial environment did not exist. The standard of proof applied to motions for change of custody turns on the circuit court's factual determination regarding the existence of an established custodial environment. The Child Custody Act provides that a trial court may change custody of a minor child, when an established custodial environment exists, only upon a showing of clear and convincing evidence that the change of custody is in the child's best interest. MCL 722.27(1)(c); MSA 25.312(7)(1)(c) provides, in pertinent part:

The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Our Supreme Court has interpreted this provision as creating a high standard of proof for changing an established custodial environment. As the Court held:In adopting § 7(c) of the act, the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an “established custodial environment”, except in the most compelling cases. [*Baker v. Baker*, 411 Mich. 567, 576-577;309 NW2d 532 (1981).]

***2** In contrast, when an established custodial environment does not exist, the trial court may or-

der a change of custody upon a showing by a preponderance of the evidence that the change of custody is in the child's best interest.*Hayes v. Hayes,* 209 Mich.App 385, 387;532 NW2d 190 (1995). In this case, the trial court determined that an established custodial environment did not exist, and therefore applied the preponderance of the evidence standard instead of the clear and convincing evidence standard. We will only reverse a trial court's factual determination regarding the existence of an established custodial environment if that determination was against the great weight of the evidence. *Fletcher v. Fletcher,* 447 Mich. 871, 878-879 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Id.;Ireland v. Smith,* 214 Mich.App 235, 242;542 NW2d 344 (1995), aff'd. 451 Mich. 457 (1996). In this case, we conclude that the trial court's finding that no established custodial environment existed was against the great weight of the evidence.

The circuit court found as a matter of fact that the parties' youngest child spent substantial time with each of the parties, attended pre-school out of both homes, and looked to both parties equally for guidance, discipline, the necessities of life, and parental comfort. Furthermore, the circuit court found as a matter of fact that each parent was fully invested in the child's life. Nevertheless, the court concluded that an established custodial environment did not exist *in one parent's home.*The circuit court apparently believed that an established custodial environment may exist in the home of only one divorced parent, and that such an environment cannot exist simultaneously in the homes of both parents, where the parents share joint physical custody. Clearly, where supported by the facts, a circuit court may find that an established custodial environment exists in more than one home. *Jack v. Jack,* 239 Mich.App 668, 671;610 NW2d 231 (2000); *Duperon v. Duperon,* 175 Mich.App 77, 80;437 NW2d 318 (1989); *Nielsen v. Nielsen,* 163 Mich.App 430, 433-434;415 NW2d 6 (1987). Were it the rule that a custodial environment may exist in only one parent's home, then any joint physical custody arrangement could be disturbed by the other parent on a mere preponderance of the evidence, in derogation of M.C.L. § 722.27(1)(c); MSA 25.312(7)(1)(c).

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability and permanence. *Baker, supra* at 579-580;*DeVries v. DeVries,* 163 Mich.App 266, 271;413 NW2d 764 (1987). In this case, the shared physical custody arrangement was in place for most of the child's life. Given the circuit court's factual finding that the child looked to both parties equally for guidance, discipline, the necessities of life, and parental comfort, we find that the circuit court committed error when it held that an established custodial environment did not exist. Absent facts indicating that the custodial environment dissolved, the circuit court could not change custody, in favor of either parent, without a showing of clear and convincing evidence that the change was in the child's best interest. M.C.L. § 722.27(1)(c); MSA 25.312(7)(1)(c).

***3** Plaintiff next argues that the circuit court erred in awarding physical custody of the child to defendant during the school year, contending that defendant failed to demonstrate by clear and convincing evidence that such a change in custody was in the child's best interest. We disagree.

A circuit court's custody award is a discretionary disposition that we may only reverse if the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Fletcher, supra* at 879-880 (Brickley, J.), 900 (Griffin, J.); *Winn v. Winn,* 234 Mich.App 255, 262;593 NW2d 662 (1999); *Fletcher v. Fletcher (After Remand),* 229 Mich.App 19, 24;581 NW2d 11 (1998). Custody disputes must be resolved in the best interests of the child, as measured by the factors set forth in M.C.L. § 722.23; MSA 25.312(3).[FN1] *Deel v. Deel,*

113 Mich.App 556, 559;317 NW2d 685 (1982).

FN1.MCL 722.23; MSA 25.312(3) provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In this case, the trial court carefully considered the best interest factors, and after reviewing the substantial hearing record, we conclude that the court's factual findings were not against the great weight of the evidence. The central thrust of plaintiff's argument is that the trial court's custody determination was infused with bias against her because of her homosexual lifestyle. The court's consideration of plaintiff's homosexual lifestyle where relevant to the statutory factors was not legal error. *Hall v. Hall*, 95 Mich.App 614, 615;291 NW2d 143 (1980). Contrary to plaintiff's contention, the trial court generally considered plaintiff's stable relationship with her partner as a factor in favor of her gaining physical custody of her son during the school year. The court's opinion only mentioned her relationship when discussing four of the twelve best interest factors. In discussing factor c, plaintiff's capacity and disposition to provide for the child's material needs, the court included her partner's income. In discussing factor e, the permanence of the family unit, the court observed that plaintiff and her partner may face societal pressures because of their relationship, but concluded that they are sufficiently mature and wise to deal with the burden. The court concluded that the parties were equal concerning both these factors.

In discussing factor b, the capacity and willingness of the parties to provide affection, guidance, education, and religious training, the court found both parties fully and equally competent, except that it concluded that defendant will be more readily able to raise the child in his religion. The court found defendant to be extensively involved in his church, and that finding is supported by the record. The court found that although plaintiff attends church, she will eventually have to deal with the conflict between church doctrine and her choice of a homosexual lifestyle. The existence of the conflict was supported with evidence at the hearing, and plaintiff acknowledged that she will someday have to deal with it. The evidence does not preponderate against the court's finding that this factor favored defendant. *Fletcher*, *supra* at 879-880 (Brickley, J.), 900 (Griffin, J.).

***4** In discussing factor l, the catch-all factor, the court stated that it could not find that plaintiff's

homosexual lifestyle had directly harmed the child. It is true that the decision by plaintiff and her partner not to physically express their affection in the child's presence affected the court's determination that the child's best interests were better served by an award of custody to defendant, who testified that he and his wife do express affection for each other in their home. However, this was but one concern of several that inclined the court toward defendant under this factor. The court also explicitly compared: (1) plaintiff's continuing cigarette smoking in the child's presence, after receiving direction from a health professional that she must stop doing so, and the lack of cigarette smoking in defendant's home; (2) the availability of other siblings in defendant's home for companionship and the diminishing frequency of visits by plaintiff's older children to Jackson; (3) the child's television exposure in plaintiff's home as compared to more monitored and restricted viewing in defendant's home; (4) the availability of extended family in Boyne City and lack thereof in Jackson; and (5) defendant's more flexible work hours and more limited use of daycare. We must give considerable deference to the superior vantage point of the trial judge respecting issues of credibility and preferences under the statutory factors.*Thames v. Thames,* 191 Mich.App 299, 305;477 NW2d 496 (1991); *Lewis v. Lewis,* 138 Mich.App 191, 193;360 NW2d 170 (1984). The trial court's findings of fact were supported by the evidence, as were its findings on the custody factors. *Fletcher, supra* at 879-880 (Brickley, J.), 900 (Griffin, J.). The placement of the child with defendant did not defy logic or indicate a perversity of will, a defiance of judgment, or an exercise of passion or bias.*Id.*

As the circuit court noted, this is a close case. The child has two good parents who live several hours apart, and the child must attend school in just one location. The existing, joint physical custody arrangement simply could not continue, and had to be changed in favor of one parent or the other. We believe, under the circumstances of this case, that the evidence in the record supports a finding by clear and convincing evidence that the change of custody was in the child's best interests.

Further, we note that plaintiff's argument assumes that the trial court should have awarded her custody during the school year if defendant was unable to satisfy the clear and convincing evidence standard. In this case, the trial court considered cross-motions for physical custody of the child during the school year. In order to gain custody of the child during the entire school year, plaintiff was also required to prove by clear and convincing evidence that such a change from the existing joint custody arrangement was in the child's best interests. Plaintiff has not shown that she satisfied this burden of proof on her cross-motion.

***5** Affirmed.

Mich.App.,2000.
Ulvund v. Ulvund
Not Reported in N.W.2d, 2000 WL 33407372 (Mich.App.)

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APPENDIX C
Wohlert v Toal

H

Wohlert v. Toal
Iowa App.,2003.
(The Court's decision is referenced in a "Decisions Without Published Opinions" table in the North Western Reporter. See FI IA R 6.14(5) for rules regarding the use and citation of unpublished opinions.)

Court of Appeals of Iowa.
Justin W. WOHLERT, Appellee/Cross-Appellant,
v.
Kathleen R. TOAL, Appellant/Cross-Appellee.
No. 02-1981.

Aug. 27, 2003.

Mother appealed decision of the District Court, Black Hawk County, George L. Stigler, J., granting physical custody of child to mother, conditioned on mother's residing in the County with the child. The Court of Appeals, Vogel, P.J., held that: (1) grant of custody conditioned on mother's residing in the county violated mother's right of interstate travel, but (2) court was authorized to require mother to provide sixty-day written notice to father of any proposed move out of county so that father could have opportunity to be heard on motion to modify physical care.

Affirmed as modified.

Mahan, J., concurred specially and filed opinion.

West Headnotes

[1] Child Custody 76D 261

76D Child Custody
76DVI Geographical Limitations
76Dk261 k. Removal from Jurisdiction. Most Cited Cases

Constitutional Law 92 1286

92 Constitutional Law
92XII Freedom of Travel and Movement
92k1286 k. Child Custody and Visitation. Most Cited Cases
(Formerly 92k83(5))
Trial court's grant of child custody to mother conditioned on mother's residing in the county with the child violated mother's fundamental right of interstate travel, even though mother had a history of abrupt moves of great distances with little or no notice to father.

[2] Child Custody 76D 261

76D Child Custody
76DVI Geographical Limitations
76Dk261 k. Removal from Jurisdiction. Most Cited Cases
Trial court was authorized to order mother to provide sixty-day written notice to father of any proposed move out of county so that father could have the opportunity to be heard on a motion to modify child's physical care, where mother had a history of abrupt moves of great distances with little or no notice to father, and both father and mother had strong bonds with child.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.
Respondent appeals a custody order. AFFIRMED AS MODIFIED.
Thomas Walter of Johnson, Hester, Walter, Breckenridge & Duker, L .L.P., Ottumwa, for appellant.
Paul Shinkle, Cedar Falls, for appellee.

Considered by VOGEL, P.J., and MAHAN and ZIMMER, JJ.

VOGEL, P.J.
***1** Kathleen Toal appeals a custody order granting her physical custody of her and Justin Wohlert's daughter upon the condition she moves with their child to Black Hawk County.[FN1] We affirm as modified.

FN1. Justin filed a notice of cross-appeal

seeking physical care; however, no cross-appeal argument was included in his brief. In the prayer for relief, Justin merely made a plea for custody if we did not affirm the trial court ruling. Therefore, we will not address Justin's purported cross-appeal.

Background Facts.Kathleen and Justin met in New Orleans, where Kathleen's family originates. Kathleen later visited Justin in California where he was working in Yosemite National Park. Kathleen became pregnant soon thereafter, but the couple never married. During the pregnancy the couple moved to Mississippi to stay with Kathleen's mother and then to Waterloo, Iowa, where their daughter, Charly, was born in January 1998. After a couple of years, the family moved to June Lake, California. Kathleen and Justin were employed by a resort, Justin as a maintenance person and Kathleen as a massage therapist.

After a year and a half in June Lake, without informing Justin of where she was going, Kathleen moved, taking Charly with her. Justin eventually tracked Kathleen and Charly to a residence in Boulder, Colorado, and drove from California to Boulder to see his daughter. Kathleen was gone before he arrived, leaving instructions with her friends not to give him information on Kathleen and Charly's whereabouts. Kathleen and Charly then moved to Hotchkiss, Colorado, to live on a communal farm. From there, Kathleen moved to Denver with a man she had met in Hotchkiss. Justin relocated to Denver to be close to Charly. Once again, without informing Justin, Kathleen and Charly moved to Mississippi to stay with Kathleen's mother. In May 2001, Kathleen decided to move back to Waterloo, Iowa, with Charly; Justin followed a week later.

On February 1, 2002, Justin filed a petition for custody of Charly. The court issued a temporary order prohibiting either parent from removing Charly from the State of Iowa without written consent from the other parent or upon further order of the court. In August 2002, with three days notice to Justin, Kathleen moved to Fairfield, Jefferson County, Iowa, with Charly to attend Maharishi University of Management. Kathleen was in her first semester of course work at the time of hearing. The hearing was held on November 13, 2002, and the court granted joint legal custody with physical care of Charly to Kathleen. However, the court, clearly disapproving of Kathleen's many moves taking Charly away from Justin, attached the following condition:

Kathleen R. Toal shall move with the child back to Black Hawk County, Iowa, by December 31, 2002. Thereafter, she shall not move her residence from Black Hawk County, Iowa to any other location in the state or outside of the state of Iowa except upon service of certified restricted mail to ... Justin W. Wohlert, giving [him] at least 60 days advanced notice of her intent to move outside Black Hawk County or outside the state of Iowa. Thereafter, should [Justin] desire, he may have the matter litigated prior to any move by [Kathleen] and the child. A failure by [Kathleen] to live up to these orders shall constitute cause to switch physical placement of the child.

***2** Kathleen appeals this order.

Scope of Review.We conduct a de novo review of decisions regarding custody and physical care. *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999); Iowa R.App. P. 6.4. We give deference to, but are not bound by, the findings of the district court. *In re Marriage of Forbes,* 570 N.W.2d 757, 759 (Iowa 1997). This is particularly true regarding issues of credibility, given the district court's opportunity to directly observe witness demeanor.*Id.*

[1]***Merits.***We are concerned, as was the district court, with Kathleen's history of abrupt moves with little or no notice to Justin, resulting in Justin relocating several times in order to maintain his close relationship with his daughter. Kathleen, however, views the court's granting her physical care of Charly on the condition that she reside in Black Hawk County to be a violation of her right of inter-

state travel. The freedom to travel, including the right to relocate, is a fundamental right. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254, 94 S.Ct. 1076, 1080, 39 L.Ed.2d 306, 312 (1974). Any infringement upon this fundamental right must be justified by a compelling state interest. *Id.* at 258, 94 S.Ct. at 1082, 39 L.Ed.2d at 315. There is no Iowa case law which directly addresses whether a court may preface a grant of custody upon the condition that the physical custodian relocate to a specific location. It is, however, well settled Iowa case law that the parent with physical care determines where a child will live, which may include a move away from the non-custodial parent. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct.App.1996); *In re Marriage of Frederici*, 338 N.W.2d 156, 159-60 (Iowa 1983). To temper the custodial parent's decision to move following the entry of the initial decree Iowa code section 598.21(8A) provides that a move one hundred fifty miles or more from the residence of the child at the time of the original decree may be considered a substantial change of circumstances. Iowa Code § 598.21(8A) (2001). The purpose of this section is to maintain the relationship of the child with the non-custodial parent. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct.App.1998).

[2] Both Kathleen and Justin have strong bonds with Charly and neither should engage in behavior which tends to weaken those bonds or makes contact with the other more difficult. *See In re Marriage of Downing*, 432 N.W.2d 692, 694-95 (Iowa Ct.App.1988) (considering mother's interference with father's relationship with children in determining custody). In this case, Kathleen demonstrated to the district court that she has on several occasions, without regard to Charly's relationship with Justin, packed up and moved great distances. As a prophylactic measure, and citing the best interests of the child, the district court simply attempted to put a stop to this pattern of behavior. However, we do not agree with two provisions and therefore vacate those portions of the district court's decree, 1) forcing Kathleen to move to Black Hawk County to retain physical care of Charly, and 2) that, "A failure by [Kathleen] to live up to these orders shall cause to switch physical placement of the child."However, we do agree that under these facts a subsequent move by Kathleen requires a sixty-day written notice to Justin of the proposed move so that he may have the opportunity to be heard on a motion to modify Charly's physical care. See *In re Marriage of Welbes*, 327 N.W.2d 756, 758 (Iowa 1982), stating, [w]e should not, however, foreclose in advance the right of a custodial parent to move elsewhere. All we can do is to protect the rights of the non-custodial parent in such an event. Should that situation arise, the district court will determine whether a substantial change of circumstances exists which may trigger a change of physical care, a modification of visitation or any other relevant provision under the decree.

***3** Kathleen seeks attorney's fees on appeal. Such an award is discretionary and is determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Kathleen's request for attorney's fees is denied. Cost of the appeal is assessed one-half to each party.

AFFIRMED AS MODIFIED.

ZIMMER, J., concurs.
MAHAN, J., specially concurs.

MAHAN, J. (concurring specially).

I specially concur. The majority focused on the issue of whether the travel restrictions placed on Kathleen were reasonable. I agree with the majority that Justin's purported cross-appeal cannot be addressed, and I agree with the majority decision concerning the restrictions. However, the physical placement of Charly with Kathleen is disturbing and demands further comment.

The parties never married. However, our physical care analysis is the same regardless of whether

the parties were married. *Lambert v. Everist,* 418 N.W.2d 40, 42 (Iowa 1988). Therefore, the parties start out on a level playing field. The district court noted several problems with both parties but awarded physical placement to Kathleen based upon her being the parent "most involved in the day-to-day care of the child."At the same time, the district court found that Kathleen's actions do not "serve the long-range best interests of the child and works as a detriment to the best interests of the child in that it denies the child and father continuous maximum opportunities to know one another."Indeed, Kathleen has pursued a course directly aimed at undermining Justin's relationship with the child. Kathleen's actions made it next to impossible for Justin to take part in the day-to-day care of Charly. These actions, along with other negative behavior set out in the record, would lead me to award physical care to Justin if this court had that option. Justin would provide the environment most likely to bring Charly to a healthy physical, mental and social maturity. *See id.*

Iowa App.,2003.
Wohlert v. Toal
670 N.W.2d 432, 2003 WL 22017200 (Iowa App.)

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STATE MICHIGAN

COURT OF APPEALS

DIANE L. GIANCASPRO,

Plaintiff-Appellant,

v.

LISA A. CONGLETON

Defendant-Appellee.

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Court of Appeals No.:

Lower Court No.: 07-2194-DC-M

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CERTIFICATE OF SERVICE

Brenda Bove certifies that she is employed by the ACLU Fund of Michigan and that she served a copy of Plaintiff-Appellant Diane L. Giancaspro's Brief, and Certificate of Service in the above-captioned case on Rebecca B. Sanford, Attorney for Defendant-Appellee, by First Class Mail, postage pre-paid, to 2724 Niles Ave., St. Joseph, MI 49085 on the 10th day of March, 2008.

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