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HIGHLIGHTS

Former Same-Sex Partner's Equitable Parentage Claim Is Stymied
The Michigan Supreme Court ends a woman's quest to obtain custody of the children born during her 15-year relationship with their mother. Although a majority of the court votes to deny her leave to appeal the dismissal of her equitable parentage claim for lack of standing, two dissenting justices would review her claim in light of their view that the women were unconstitutionally prohibited from marrying because their relationship predated *Obergefell v. Hodges*. **Page 1459**

Bison Awarded in Property Division Can't Be Source of Alimony
It was legal error to order a man to fund his alimony payments to his ex-wife through the sale of bison he received in their property division, the Oregon Court of Appeals rules. Noting that the 84-year-old man cannot cover his own living expenses, it points out that the alimony statute does not authorize the award of property as support. The judge here effectively did just that by relying on the sale of the bison to pay the alimony award, it says, adding that unlike a business, the herd would not generate new income. **Page 1461**

Best Interests Warrant Jurisdiction Over Child With No Home State
An infant whose mother sent her to a relative in the West Indies shortly after her birth in New Hampshire to evade oversight by Massachusetts authorities who had removed her siblings is subject to the dependency court's jurisdiction, the Massachusetts Appeals Court decides. Looking to the UCCJEA's grant of jurisdiction when such is in the child's best interests and no other state has jurisdiction, it utilizes the Act's significant connection/substantial evidence best interest factors in finding jurisdiction. **Page 1464**

Wife Can't Undo Waiver of Claim to Unvested Military Pension
A woman is bound by a decree-incorporated stipulation waiving her claim to her husband's unvested military pension in exchange for $15,000, which she entered into after the divorce court stated that it could not divide the pension as marital property, the Vermont Supreme Court holds. "[A]ssuming without deciding that the trial court was wrong," it nevertheless rebuffs her attempt to void the stipulation due to a mutual mistake of law, noting that she was represented by counsel throughout the proceeding. **Page 1460**

Also . . .
Judge shouldn't have ordered father to pay portion of GAL fees directly from his child support obligation, Florida court holds (**Page 1466**) . . . Arizona high court says father who timely filed paternity action preserved right to contest child's adoption despite failure to strictly comply with putative fathers' registry statute (**Page 1463**) . . . Cohabitation that ended months before hearing doesn't affect entitlement to alimony, Delaware court rules (**Page 1461**)

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Court Decisions

Parentage

No Review for Denial Of Post-*Obergefell* Equitable Parent Claim

A majority of the Michigan Supreme Court Aug. 2 denied a woman's request for leave to appeal an intermediate court order holding that she lacked standing to bring a custody action as the equitable parent of children born to her partner during their now defunct relationship—which predated *Obergefell* (*Mabry v. Mabry*, 2016 BL 250988, Mich., No. 153082, 8/2/16).

The one-sentence order released by the five-member majority—comprised of Chief Justice Robert P. Young Jr., and Justices Stephen J. Markman, Brian K. Zahra, David F. Viviano and Joan L. Larsen—stated that the application for review was denied "because we are not persuaded that the questions presented should be reviewed by this Court."

In dissenting from that order, Justice Bridget M. McCormack, joined by Justice Richard H. Bernstein, said she would have granted review to address whether *Obergefell v. Hodges*, 135 S.Ct. 2584, 41 FLR 1411 (U.S. 2015), compels application of the common-law equitable parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married at the time of their relationship.

She said the court should consider "whether the Court of Appeals' peremptory order in this case illustrates and perpetuates the troubling effect of this state's unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in *Obergefell*."

Relationship Ended Before *Obergefell*. Prior to 2015, same-sex couples were not allowed to marry in Michigan; nor did the state recognize same-sex marriages from other jurisdictions. (*DeBoer v. Snyder*, 772 F.3d 388, 41 FLR 1016 (6th Cir. 2014)). State law also barred second-parent adoption between unmarried couples.

In this case, the parties' 15-year committed relationship ended in 2010. During that time, they had filed a declaration of domestic partnership, solemnized their relationship in a commitment ceremony, and entered into a religious marriage covenant (ketubah).

They also decided to start a family. To that end, defendant Johanna Mabry conceived three children between 2001 and 2008 using anonymous donor sperm. The women raised the children together until 2011, when the defendant prohibited plaintiff Deanna Mabry from seeing them.

After *Obergefell* was decided, the plaintiff filed for custody pursuant to the state's common-law equitable parent doctrine. See *Atkinson v. Atkinson*, 408 N.W.2d 516, 13 FLR 1484 (Mich. Ct. App. 1987).

The trial court's denial of the defendant's motion for summary disposition was peremptorily vacated on interlocutory appeal, with the appellate court holding that the doctrine is available only to married parties. (No. 329786, 12/18/15 (unpublished)).

In her unsuccessful application for review of that order, the plaintiff had argued that the failure to apply the doctrine to non-biological parents who were unconstitutionally prohibited from marrying their child's biological parent violated her equal protection and due process rights as well as those of the children.

Fit Parent. Attorney Anne Argiroff, Farmington Hills, represented the defendant. In an Aug. 8 e-mail to Bloomberg BNA, she said that the supreme court majority's decision to deny leave to appeal "was the proper result."

"The parties never married. The parties never participated in an adoption," Argiroff said.

The defendant, she continued, "has always been and is the only legally responsible adult for her children. As a fit parent, she makes the decisions she feels are in their best interest, welfare, and safety," Argiroff concluded.

Hollow Commitment. Counsel for the plaintiff, Christine A. Yared, Grand Rapids, said that the court's decision to deny leave to appeal "is devastating" for her client "and many other non-biological lesbian mothers in Michigan."

In an Aug. 8 e-mail to Bloomberg BNA, Yared said that "Michigan law denying lesbian and gay parents, along with their children, the right to continue their parent-child relationship represents a hollow commitment to the well-being of children."

The question in this case, she stated, is "whether a state which unconstitutionally denied same-sex couples the right to marry, can use those actions to destroy parent-child relationships where the couple separated prior to the marriage equality case, *Obergefell v. Hodges*."

"In effect, the government is permanently breaking-up families and denying children their natural right to have the ongoing love, emotional, physical, financial, educational and spiritual support of one of their parents," Yared stated.

Noting that state law requires all custody cases to be decided consistent with the best interest of the subject child, Yared said that in Michigan, "the non-biological or non-adoptive parents of children with same-sex parents who separated prior to having the right to marry, are being denied the opportunity to have a family law court consider and determine the best interest of their children."

"This second-class status is somewhat analogous to the way our government previously treated 'illegitimate' children born to unwed parents," she said, adding that "while many Americans enthusiastically supported the marriage equality case, it is important to generate awareness about other laws which do not support the lives of lesbians and gay men."

When asked about the next step, Yared said that "we are exploring federal court options with the ACLU of Michigan [which] is also working on initiating legislation to address this vital issue."

Constitutional Harms. In her dissenting opinion, McCormack contended that the plaintiff's constitutional challenges merited further review. *Obergefell* "reflects a long-recognized constitutional principle that children born to unmarried parents are entitled to the same benefits as children born to married parents," she said.

Saying that the appellate court's order "overlooks this general principle," she said its ruling also "potentially violated" the plaintiff's "fundamental right to parent her children."

"Denying individuals who were unconstitutionally prohibited from marrying access to the equitable-parent doctrine perpetuates the constitutional harms inflicted by the state's unconstitutional prohibition of same-sex marriage," McCormack said, noting that the appeals court ruling may also contravene the "direction in *Obergefell* that same-sex couples have a fundamental right to marriage and the benefits of marriage."

She distinguished this case from *Van v. Zahorik*, 597 N.W.2d 15, 25 FLR 1423 (Mich. 1999) (holding that equitable parenthood has no place outside marriage), pointing out that there, "the parties had the option to get married, but chose not to."

"[W]e should consider whether the constraint that makes it impossible for the children of same-sex parents to benefit from the equitable-parent doctrine is constitutionally viable post-*Obergefell*," McCormack said.

'Not *Any* Person.' The defendant's argument that application of the doctrine to the plaintiff would enable any third party to gain parental rights "is not powerful," McCormack said, because the plaintiff "is not *any* person. She acted as a parent[.]"

"I think that this Court might fashion a rule to ensure that the plaintiff's and the children's constitutional rights are protected without opening the doctrine to any third party seeking parental rights," she said.

Other states grappling with the implication of *Obergefell* on similar equitable doctrines have "provided guidance and workable rules," McCormack said, citing *In re Madrone*, 350 P.3d 495, 41 FLR 1328 (Or. Ct. App. 2015); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015); and *Conover v. Conover*, 2016 BL 217903, 42 FLR 1411 (Md. 2016).

(In a footnote, McCormack added that "[m]any other states" had addressed the issue before *Obergefell*. See, e.g., *Bethany v. Jones*, 378 S.W.3d 731, 37 FLR 1183 (Ark. 2011); *ENO v. LMM*, 711 N.E.2d 886, 25 FLR 1408 (Mass. 1999); *Mullins v. Picklesimer*, 317 S.W.3d 569, 36 FLR 1136 (Ky. 2010); *In re LB*, 122 P.3d 161, 32 FLR 1015 (Wash. 2005).

She also noted that "some other states" have resolved similar issues based on their statutes. See, e.g., *McGaw v. McGaw*, 468 S.W.3d 435, 41 FLR 1508 (Mo. Ct. App. 2015); *Russell v. Pasik*, 178 So.3d 55, 41 FLR 1595 (Fla. Dist. Ct. App. 2015); *Sheets v. Mead*, 356 P.3d 341, 41 FLR 1514 (Ariz. Ct. App. 2015).)

The plaintiff was represented by Christine A. Yared, Grand Rapids, and Jay Kaplan, American Civil Liberties Union of Michigan. Anne Argiroff, Farmington Hills, appeared for the defendant.

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*Full text at http://www.bloomberglaw.com/public/document/Mabry_v_Mabry_No_SC_153082_2016_BL_250988_Mich_Aug_02_2016_Court_*

Military Benefits

Wife Who Gave Up Claim to Unvested Pension After Meeting With Judge Is Bound by Waiver

A woman is bound by a decree-incorporated stipulation waiving any claim to her ex-husband's unvested military retirement benefits that she agreed to after the divorce court advised the parties that the benefits were not subject to division, the Vermont Supreme Court ruled Aug. 5 (*Coons v. Coons*, 2016 BL 255093, Vt., No. 2015-272, 8/5/16).

When the final hearing was held in the parties' 2015 divorce proceeding, the husband was 10 months shy of a full 20 years of military service. During an in-chambers meeting with the parties' attorneys, the trial court stated that it "would not and could not" distribute his unvested retirement benefits.

After the meeting, the wife agreed to accept $15,000 and waive any claim to the husband's expected military pension. She affirmed her satisfaction with that stipulation on the record, and it was incorporated into the May 7 divorce decree.

On May 21, the wife moved to alter or amend that final order on the ground that the trial court had been mistaken in finding that the unvested military benefits were not subject to equitable distribution.

She cited *Golden v. Cooper-Ellis*, 924 A.2d 19, 33 FLR 1207 (Vt. 2007) (stock options that are deferred compensation for past and present performance must be considered marital property even though vesting occurs in the future).

The trial court denied the motion, saying that she could have rejected the proposed stipulation, argued that the benefits should be included in the property settlement, or reserved the right to litigate or appeal the benefits issue.

Represented by Counsel. In rejecting the wife's argument that the stipulation should be set aside because it was based on a mutual mistake of law, Justice Beth Robinson said that "we have recognized that where parties enter into a binding final stipulation, they forfeit the ability to challenge rulings of the court that preceded that stipulation."

Adding, however, that "we have recognized that divorce stipulations 'may be subject to reformation on the grounds of mutual mistake'," she said that the moving party must show that the stipulation was entered into under a mutual mistake regarding a material fact, or was based on a mutually assumed state of facts that later proved erroneous.

"At least in cases in which a party is represented by counsel, a legally erroneous ruling by the trial court, whether on the record or off the record, is generally not the kind of mistake that supports setting aside a divorce

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