STATE OF MICHIGAN

COURT OF APPEALS

CARRIE PUEBLO,

Plaintiff-Appellant,

v

RACHEL HAAS,

Defendant-Appellee.

UNPUBLISHED
December 28, 2021

No. 357577
Kalamazoo Circuit Court
LC No. 2020-006382-DC

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

Plaintiff, Carrie Pueblo, appeals as of right the trial court's order granting defendant, Rachel Haas, summary disposition under MCR 2.116(C)(5) and (8) of plaintiff's complaint for child custody. We affirm.

I. FACTS

Plaintiff and defendant were in a romantic relationship from sometime in the early 2000s until 2012 or 2014. The parties were not married to each other, nor did they marry after the United States Supreme Court issued its decision in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015).[1] During the relationship, defendant underwent in-vitro fertilization and in November 2008, gave birth to a child. The parties agree that plaintiff has no biological relationship to the child, and that after the child was born plaintiff did not adopt the child. In her complaint, plaintiff alleged that after the child was born both parties parented the child, even after the parties' relationship ended. According to plaintiff, in 2017 defendant demanded that plaintiff have no further contact with the child.

In 2020, plaintiff initiated this action under the Child Custody Act of 1970 (CCA), MCL 722.21 *et seq*., seeking joint legal and physical custody of the child, and arguing that the child's

[1] *Obergefell* struck down Michigan's constitutional and statutory prohibitions on same-sex marriage. *Sheardown v Guastella*, 324 Mich App 251, 256; 920 NW2d 172 (2018).

best interests were supported by the parties sharing custody. In her answer to the complaint, defendant asserted that plaintiff lacked standing to seek custody of the child under the CCA because she had neither a biological nor adoptive relationship with the child. Defendant thereafter moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(5) and (8), asserting that plaintiff lacked standing to seek custody of the child and also had failed to state a claim upon which relief could be granted.

After a hearing, the trial court granted defendant's motion and dismissed plaintiff's complaint without prejudice. Defendant moved for reconsideration, contending that she was entitled to have plaintiff's complaint dismissed with prejudice. Upon reconsideration, the trial court agreed and entered an order dismissing plaintiff's complaint with prejudice. Thereafter, plaintiff moved for reconsideration, contending that this Court's then newly-released opinion in *LeFever v Matthews*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 353106), dictated a finding that plaintiff had standing to bring the custody action. The trial court disagreed, finding *LeFever* to be factually distinct and concluding accordingly that it had not palpably erred by granting defendant summary disposition of plaintiff's claim. Plaintiff now appeals.

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(5) is properly granted when "[t]he party asserting the claim lacks the legal capacity to sue."[2] When reviewing a motion under MCR 2.116(C)(5), this Court considers the pleadings, depositions, admissions, affidavits, and other

[2] We note that standing and legal capacity to sue are distinct concepts. See *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 502; 776 NW2d 387 (2009), citing *Michigan Chiropractic Council v Comm'r of Office of Fin and Ins Servs*, 475 Mich 363, 374 n 25; 716 NW2d 561 (2006) (opinion by YOUNG, J.) (admonishing Michigan courts not to conflate the two concepts for purposes of motions under MCR 2.116(C)(5)), overruled on other grounds by *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 352, 371 & n 18; 792 NW2d 686 (2010). Standing generally is the plaintiff's right initially to invoke the power of the trial court to adjudicate a claimed injury. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). Capacity to sue refers to the absence of a legal barrier, such as infancy or mental incompetency, which deprives a party of the right to bring an action. *Moorhouse v Ambassador Ins Co, Inc*, 147 Mich App 412, 419 n 1; 383 NW2d 219 (1985). This Court has observed that because standing and legal capacity to sue are distinct concepts, a challenge to standing is more appropriately considered under MCR 2.116(C)(8) or (10). See *Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 494 n 2; 948 NW2d 452 (2019). Nonetheless, MCR 2.116(C)(5) often is identified as the appropriate subrule of MCR 2.116(C) under which a party may assert that a plaintiff lacks standing. See *Miller v Chapman Contracting*, 477 Mich 102, 104; 730 NW2d 462 (2007); see also *Pontiac Police & Fire Retiree v Pontiac No. 2*, 309 Mich App 611, 619; 873 NW2d 783 (2015). We may, of course, review an issue under an appropriate subrule regardless of the subrule under which the trial court granted summary disposition.

documentary evidence submitted by the parties. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *El-Khalil*, 504 Mich at 159. When reviewing a motion for summary disposition under MCR 2.116(C)(8), we accept all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving party. *Id*. at 160. A motion for summary disposition is properly granted under MCR 2.116(C)(8) when, considering the pleadings alone, the claims alleged are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*.

Whether a party has standing is a legal question that we review de novo. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013). Similarly, whether a party has sufficient basis to assert parental rights under the equitable-parent doctrine is a question of law that we review de novo. *Lake v Putnam*, 316 Mich App 247, 250; 894 NW2d 62 (2016). We also review de novo questions of statutory interpretation and constitutional questions. *LeFever*, ___ Mich App at ___; slip op at 3. We review a trial court's decision to grant or deny reconsideration for an abuse of discretion, which occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018). We also observe that with regard to the resolution of a child custody dispute under the CCA, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Lake*, 316 Mich App at 250.

B. STANDING

Plaintiff contends that the trial court erred by granting defendant summary disposition of plaintiff's custody claim on the basis that plaintiff lacks standing to seek custody because she is not a parent of the child. Plaintiff argues that she has standing to seek custody under the CCA because the parties were "equitably married" at the time the child was conceived and born, and she therefore is the child's "natural father." Plaintiff thus urges that we extend the existing equitable-parent doctrine to create a new legal concept of "equitable marriage." We decline to extend existing law in that manner.

Generally, the term "standing" refers to the plaintiff's right initially to invoke the power of the trial court to adjudicate a claimed injury. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). A party generally has standing if the party has a real interest in the cause of action or the subject matter of the cause of action. *Lake*, 316 Mich App at 250. In the context of child custody, however, the concept of standing is less broad when considering disputes involving a party other than a parent. *Id*.

In Michigan, the CCA governs custody, parenting time, and child support issues for minor children; it is the exclusive means by which to pursue child custody rights. MCL 722.24(1); *LeFever*, ___ Mich App at ___; slip op at 3. The CCA is equitable in nature and is to be liberally construed. MCL 722.26(1). The CCA provides the following parental presumption:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall

> presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. [MCL 722.25(1).]

The CCA defines "parent" as "the natural or adoptive parent of a child." MCL 722.22(i). The CCA does not define "natural parent," but this Court has defined that term as meaning that the person is a parent related to the child by "blood" rather than by adoption. See *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 236; 882 NW2d 194 (2015). More recently, this Court has expanded the meaning of natural parent as used in the statute to include a parent related to the child "by birth," regardless of a genetic connection. See *LeFever*, ___ Mich App at ___; slip op at 4 (including in the definition of natural parent a woman who gives birth to a child as a surrogate).

In addition, a person may also be deemed a natural parent under the equitable-parent doctrine. Under the equitable-parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock nevertheless may be considered that child's natural father if (1) the husband and the child mutually acknowledge their father-child relationship, or the child's mother cooperated in the development of that father-child relationship before the divorce proceedings commenced, (2) the husband expresses a desire to have parental rights to the child, and (3) the husband is willing to accept the responsibility of paying child support. *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999). Our Supreme Court in *Van*, however, specifically declined to extend the equitable-parent doctrine outside the context of marriage. *Id*. at 331.

The CCA defines a "third person" as "an individual other than a parent." MCL 722.22(k). Under the CCA, a third person "does not have standing by virtue of the fact that he or she resides with the child and has a 'personal stake' in the outcome of the litigation." *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992); see also *Lake*, 316 Mich App at 250-251. Further, a third person may not "create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the child's best interests." *In re Anjoski*, 283 Mich App 41, 51; 770 NW2d 1 (2009) (quotation marks and citation omitted). The CCA limits the standing of a third person to bring a custody action to guardians or limited guardians under certain circumstances, MCL 722.26b, and to a third person when (1) the minor child's biological parents were never married to each other, (2) the parent who has custody of the child dies or is missing and the other parent does not have legal custody of the child, and (3) the third person seeking custody is related to the child "within the fifth degree by marriage, blood, or adoption." MCL 722.26c(1)(b); *Lake*, 316 Mich App at 251. Thus, if plaintiff in this case is not a parent, she is a third person who was obligated to satisfy the requirements of either MCL 722.26b or MCL 722.26c(1)(b) to demonstrate standing to initiate this custody action. See *Lake*, 316 Mich App at 251.

We conclude that plaintiff in this case is not a parent of the child. In *Lake*, the parties were in a romantic relationship for several years, during which the defendant underwent artificial insemination and gave birth to a child. After the parties' relationship ended, the defendant denied the plaintiff parenting time with the child and the plaintiff initiated a custody action. The defendant sought summary disposition on the basis that the plaintiff was an unrelated third person who lacked standing under the CCA to seek parenting time. The trial court denied the motion. This Court reversed the trial court's decision and determined that the plaintiff lacked standing. Relying in part on *Van*, this Court explained:

> On appeal, plaintiff argues that "she has standing to bring this suit" because she "asserts a right to custody and parenting time . . . under Michigan's equitable-parent doctrine." Under the equitable-parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock may, nevertheless, be considered that child's natural father if three requirements are satisfied: (1) the husband and the child must mutually acknowledge their father-child relationship, or the child's mother must have cooperated in the development of that father-child relationship before the divorce proceedings commenced, (2) the husband must express a desire to have parental rights to the child, and (3) the husband must be willing to accept the responsibility of paying child support. *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999); *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987). "Once it is determined that a party is an equitable parent, that party becomes endowed with both the rights and responsibilities of a parent." *York v Morofsky*, 225 Mich App 333, 337; 571 NW2d 524 (1997). Plaintiff claims that because she satisfies the three requirements in *Van* and *Atkinson*, she is the child's equitable parent. She is incorrect.
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> While plaintiff claims that she satisfies all requirements under the equitable-parent doctrine, she ignores one crucial, and dispositive, requirement for the equitable-parent doctrine to apply—*the child must be born in wedlock*. *Van*, 460 Mich at 330 (stating that the equitable-parent doctrine applies only "to a child born or conceived during the marriage"). The child at issue in this case was not born or conceived during a marriage. In fact, it is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply. [*Lake*, 316 Mich App at 252.]

Thus, Michigan's equitable-parent doctrine applies only to married couples. *Id*. at 254. In this case, as in *Lake*, because the parties were never married, plaintiff's argument that she is an equitable parent fails. See *Lake*, 316 Mich App at 250-253.

Plaintiff argues, however, that she has standing under the "elastic definition" of natural parent adopted by this Court in *LeFever*. In *LeFever*, the parties were in a domestic relationship during which they decided to have children together using plaintiff's eggs, fertilized by a sperm donor, and implanted in defendant's womb, which resulted in the defendant giving birth to twins. The parties separated in 2014, but continued jointly to parent the children. In 2016, the defendant experienced serious health concerns, and the plaintiff became the twins' primary caretaker until a custody dispute arose in 2018. *Id*. at ___; slip op at 1-2. The plaintiff initiated a custody action asserting that she was the "natural parent" of the children because she was genetically related to the children while the defendant had been only a gestational surrogate. The trial court awarded plaintiff sole legal and physical custody of the children, finding that the defendant had not established a biological relationship to the children. On appeal, this Court determined that the defendant was a natural parent because, despite lacking a genetic connection to the twins, she was related to them by virtue of having given birth to them. *Id*. at ___; slip op at 4. In other words, the defendant in *LeFever* did not demonstrate that she was a natural parent under the equitable-parent doctrine; rather, the defendant was determined to be a natural parent of the twins by virtue of her own physical relationship to the children because she had given birth to them.

Plaintiff here argues that the facts of this case mirror those of *LeFever*. In *LeFever*, however, unlike this case, although the twins were the product of the plaintiff's eggs and donor sperm, the defendant gave birth to the twins, which this Court equated with the physical connection of being a parent by virtue of genetic relationship. Here, plaintiff lacks the physical connection to the child that this Court in *LeFever* found determinative to being a natural parent. Nor is plaintiff an adoptive parent of the child. Because plaintiff is not related to the child genetically or by birth, she could only be determined to be a parent if under the equitable-parent doctrine she met the requirements for being a natural parent.

As discussed, a person is only a natural parent under the equitable-parent doctrine if he or she was married to the child's mother at the time of the child's conception or birth, and the other requirements of the doctrine are met. Relying upon the reasoning of the concurring opinion in *Lake*, however, plaintiff asserts that the parties were "equitably married" because, although at the time of their relationship same-sex marriages were not permitted under Michigan law, the fact that the parties participated in a commitment ceremony in 2007 demonstrates that the parties would have married had they been permitted to do so in Michigan. But in contrast to the view advocated by the concurring opinion in *Lake*, the majority opinion in that case declined to extend the equitable-parent doctrine by imposing the status of marriage upon a couple who had never married. This Court explained:

> [I]t is undisputed that the parties were never married. Therefore, the equitable-parent doctrine does not apply. Had the parties married in another jurisdiction, for example, our conclusion might be different. See, e.g., *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 240-241; 882 NW2d 194 (2015). While we acknowledge that the issue presented in this case is complex, we simply do not believe it is within courts' discretion to, at the request of one party and in light of the United States Supreme Court decision in *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), retroactively transform an unmarried couple's past relationship into marriage for the purpose of custody proceedings. Stated differently, it is, in our view, improper for a court to impose, several years later, a marriage on a same-sex unmarried couple simply because one party desires that we do so. [*Lake*, 316 Mich App at 252-253.]

Here, because plaintiff was not married to defendant, she cannot achieve the status of natural parent under the equitable-parent doctrine. Plaintiff thus is a third person under the CCA with respect to the child. Because plaintiff has not established the requisite factors for standing under MCL 722.26b or MCL 722.26c(1)(b), plaintiff is not entitled as a third person to initiate this custody action. See *Lake*, 316 Mich App at 251. The trial court therefore did not err by granting defendant summary disposition of plaintiff's complaint.

C. DUE PROCESS/EQUAL PROTECTION

Plaintiff also contends that the trial court's dismissal of her complaint violates her constitutional right to due process and equal protection. Plaintiff argues that the trial court failed to recognize her as the child's natural parent because of the procreation method used to conceive the child, thereby failing to protect her constitutional right to custody and parenting time. We disagree.

"The Fourteenth Amendment of the United States Constitution provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' " *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014), quoting US Const, Am XIV, § 1 (alteration in *Sanders*.). "The Due Process Clause requires, procedurally, 'notice and a meaningful opportunity to be heard before an impartial decision-maker,' . . . and substantively, 'the statute need only be rationally related to a legitimate government interest.' " *Lake*, 316 Mich App at 254-255 (citations omitted). "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Michigan's equal-protection provision is treated as coextensive with the Equal Protection Clause of the federal Constitution. *Id.*

On appeal, plaintiff refers to the rights to procreate and to maintain relationships between children and parents, briefly mentioning gender, sexual orientation, and the use of artificial insemination. Plaintiff does not explicitly argue, however, that she was denied equal protection or due process on the basis of sex, gender, or sexual orientation, and does not establish that she was treated differently than a heterosexual person or homosexual male would be under the same circumstances. Rather, plaintiff asserts that the trial court's decision violates her right to procreate in the manner she chooses by failing to ensure her right to co-parent a child born to her partner during a non-marital relationship, who is not biologically related to plaintiff, and whom plaintiff has not adopted. Plaintiff's argument lacks merit, however. The trial court did not dismiss plaintiff's complaint because of the method the parties used to become pregnant; the trial court dismissed the complaint because plaintiff lacked standing to seek custody of the child, being neither a natural nor adoptive parent of the child under the CCA. The trial court reasoned that the parties were never married, plaintiff has no biological relationship with the child, and plaintiff did not adopt the child, and therefore was not a parent of the child under the CCA.

We note that the definition of parent under MCL 722.22(i) does not violate the equal protection considerations of *Obergefell*[3] because "that definition applies equally to same-sex and opposite sex married couples." *Sheardown v Guastella*, 324 Mich App 251, 256; 920 NW2d 172 (2018). Plaintiff cannot assert an equal protection violation because she was not subjected to dissimilar treatment under the statute as compared to a heterosexual unmarried individual. See *id.* at 258. We also reject plaintiff's contention that the trial court's decision violates the child's constitutional right to equal protection; a person does not have standing to assert the constitutional rights of another person. *Lake*, 316 Mich App at 256.

D. RECONSIDERATION

Plaintiff also contends that the trial court abused its discretion by granting defendant's motion for reconsideration, and dismissing plaintiff's complaint with prejudice. Defendant fails to cite relevant authority or to explain the basis of her argument, however, thereby abandoning the issue. See *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019).

[3] *Obergefell* requires states to afford the same marriage-related benefits to same-sex married couples that are afforded to heterosexual married couples. *Sheardown*, 324 Mich App at 258-259.

Affirmed.

/s/ Michael F. Gadola
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron