ADVANCE SHEET HEADNOTE
January 11, 2021

2021 CO 2

No. 19SC234, *In re Estate of Yudkin*—Common Law—Divorce—Marriage and Cohabitation.

In this case, the supreme court applies the updated common law marriage test announced today in *In re Marriage of Hogsett & Neale*, 2021 CO 1, __ P.3d __, emphasizing that a common law marriage finding depends on the totality of the circumstances, and no single factor is dispositive. The court determines that it is unclear from the record whether the parties mutually agreed to enter into a marital relationship. Moreover, the court notes that while the magistrate's treatment of certain evidence may have been appropriate under *People v. Lucero*, 747 P.2d 660 (Colo. 1987), it does not account for the legal and social changes to marriage acknowledged in *Hogsett*. The court therefore vacates the judgment of the court of appeals and remands with instructions to return the case to the probate court to reconsider whether the parties entered into a common law marriage under the refined test we announce today in *Hogsett*.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 2

Supreme Court Case No. 19SC234
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA1996

In re the Estate of Viacheslav Yudkin, deceased.

Petitioner:

Svetlana Shtutman,

v.

Respondent:

Tatsiana Dareuskaya.

Judgment Vacated
en banc
January 11, 2021

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.
CHIEF JUSTICE BOATRIGHT concurs in the judgment only.
JUSTICE SAMOUR concurs in the judgment only.

¶1 When Viacheslav Yudkin died intestate, his ex-wife, Petitioner Svetlana Shtutman, was appointed personal representative of his estate. Respondent Tatsiana Dareuskaya sought Shtutman's removal, asserting that she (Dareuskaya) should have had priority for that appointment as Yudkin's common law wife. A probate court magistrate found that although Yudkin and Dareuskaya cohabitated and held themselves out to their community as married, other factors weighed against a finding of common law marriage, including that the couple did not file joint tax returns, own joint property or accounts, or share a last name. The court of appeals reversed the magistrate's order, concluding that the magistrate abused his discretion by misapplying the test for a common law marriage set out in *People v. Lucero*, 747 P.2d 660 (Colo. 1987). *Estate of Yudkin*, 2019 COA 25, ¶ 18, __ P.3d __. Shtutman petitioned this court for certiorari review, which we granted.[1]

¶2 Today, this court decides a trio of cases addressing common law marriage in Colorado. *See In re Marriage of Hogsett & Neale*, 2021 CO 1, __ P.3d __; *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __. In the lead case, *Hogsett*, we

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[1] We granted certiorari to review the following issue:

1. Whether the court of appeals erroneously applied *People v. Lucero*, 747 P.2d 660 (Colo. 1987), in holding that decedent and respondent were married under common law at the time of decedent's death.

refine Colorado's common law marriage test to better reflect the social and legal changes that have taken place since *Lucero* was decided, acknowledging that many of the traditional indicia of marriage identified in *Lucero* are no longer exclusive to marital relationships, while at the same time, genuine marital relationships no longer necessarily bear *Lucero's* traditional markers. *Hogsett*, ¶¶ 2, 41–60.

¶3 Under the updated test, "a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that agreement." *Id.* at ¶ 3. "The core query is whether the parties intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation." *Id.* While the factors we identified in *Lucero* can still be relevant to the inquiry, they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. *Id.* As we make clear in this case, a common law marriage finding depends on the totality of the circumstances, and no single factor is dispositive.

¶4 Here, it is unclear from the record whether the magistrate found that Yudkin and Dareuskaya mutually agreed to enter into a marital relationship. Further, the magistrate's treatment of certain evidence—such as the fact that the parties maintained separate finances and property, and that Dareuskaya never took Yudkin's name—may have been appropriate under *Lucero*, but does not

necessarily account for the legal and social changes to marriage acknowledged in *Hogsett*. Finally, under both *Lucero* and *Hogsett*, the court of appeals division erred to the extent it suggested that evidence of Yudkin and Dareuskaya's cohabitation and reputation in the community as spouses mandated the conclusion that they were common law married regardless of any other evidence to the contrary. *See Yudkin*, ¶ 11.

¶5 For these reasons, we vacate the judgment of the court of appeals and remand with instructions to return the case to the probate court to reconsider whether the parties entered into a common law marriage under the refined test we announce today in *Hogsett*.

I. Facts and Procedural History

¶6 Viacheslav Yudkin and Tatsiana Dareuskaya lived together in Yudkin's home for eight years, along with Dareuskaya's children from a prior relationship. Yudkin died suddenly and intestate. Svetlana Shtutman, Yudkin's ex-wife, sought appointment as the personal representative of his estate. Dareuskaya objected to the appointment and sought Shtutman's removal, asserting that she (Dareuskaya) was Yudkin's common law wife and should have had priority in appointment as personal representative of his estate under section 15-12-203(1)(b)–(e), C.R.S. (2020).

¶7 At a hearing before a magistrate to determine whether a common law marriage existed between Yudkin and Dareuskaya, Dareuskaya testified that over six years before his death, Yudkin presented her with a wedding ring and told her they could be husband and wife if she agreed; that she did agree; and that after that day she wore the ring and the couple held themselves out as married.

¶8 In addition to Dareuskaya's testimony, the magistrate considered testimony from Shtutman and many of Dareuskaya's and Yudkin's family members, friends, acquaintances, neighbors, and coworkers. Except for Yudkin's father and Shtutman, everyone stated that they thought Yudkin and Dareuskaya were spouses, and some said they were surprised by this litigation. Some testified that the pair wore what the witnesses assumed were wedding rings. In contrast, Yudkin's father testified he was unaware of any ring exchange between the two. The magistrate found most of the community members' testimony credible and was "convinced [Yudkin] and [Dareuskaya] agreed to and did hold themselves out to be married to the community of their non-family coworkers, friends and neighbors but family knew they were not ceremonially married."

¶9 The magistrate nevertheless concluded that other evidence weighed against a finding that a common law marriage existed. For example, although the couple paid bills jointly, they maintained accounts in separate names. There was no evidence that the couple had joint ownership of any vehicles, real estate, or credit

accounts. A car insurance policy covered both Yudkin and Dareuskaya but also covered Yudkin's father.

¶10 Notably, the magistrate found "extremely relevant" and "g[ave] tremendous weight" to the fact that Yudkin and Dareuskaya had filed their state and federal taxes separately in every year of their purported common law marriage, despite the fact that the IRS permits common law spouses to file jointly. Dareuskaya testified that they did not file joint returns because she believed she could not represent to the government that she was married. Based on this and other testimony, the court indicated several times that it thought Dareuskaya lacked credibility.

¶11 Ultimately, the magistrate concluded that Dareuskaya had not proven a common law marriage under the factors set forth in this court's decision in *Lucero*. There, we held that "[a] common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." 747 P.2d at 663. Recognizing that "in many cases express agreements [to be married] will not exist," *id.* at 664, we set out a non-exhaustive list of factors that trial courts can consider to infer the parties' agreement to be married; namely, "maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the

parties; and the filing of joint tax returns," *id.* at 665. Applying these factors here, the magistrate concluded that Yudkin and Dareuskaya were not common law married:

> [A]lthough [Yudkin] and [Dareuskaya] loved each other, agreed to and did cohabitate[] for at least 8 years and held themselves out to their co-workers, friends and neighbors as married[,] *they were not at the time of [Yudkin's] death [c]ommon [l]aw [m]arried* based specifically on the facts that they did not maintain joint banking or credit account(s); they did not purchase and jointly own any vehicles or real property; [Dareuskaya] did not use [Yudkin's] surname; the children of [Dareuskaya and Yudkin] did not use the other['s] surname nor were any child(ren) born between [Dareuskaya and Yudkin] to take the surname; and most convincing is they failed to file any joint Federal or State Tax Returns during the 8 years they were living together including for 2015 which was the last full tax year [Dareuskaya and Yudkin] were still living together.

(Emphasis added.)

¶12 Dareuskaya appealed, arguing, as relevant here, that the magistrate erred in concluding a common law marriage did not exist despite finding that the couple cohabitated and had a reputation in the community as married.

¶13 The court of appeals agreed and held that the magistrate misapplied *Lucero*. *Yudkin*, ¶¶ 8–18. The division interpreted *Lucero*'s statement that "[t]he two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation . . . that the parties hold themselves out as husband and wife," *id.* at ¶ 10 (emphasis omitted) (quoting *Lucero*, 747 P.2d at 665), to mean that where "there is an agreement to be married and the two essential

factors—cohabitation and a reputation in the community as husband and wife—are met, the inquiry ends there; a common law marriage has been established," and the court may not consider the parties' other conduct, *id.* at ¶ 11. The division reasoned that any other actions taken (or not taken) by the parties are legally irrelevant if those two essential factors are established, and that to conclude otherwise might dictate the existence of common law divorce, which Colorado does not recognize. *Id.* at ¶ 16 n.4.

¶14 Applying this interpretation of *Lucero* to the facts of this case, the division reasoned that "[o]nce the magistrate determined . . . that decedent and putative wife agreed to be married, cohabitated, and had a reputation in their community as husband and wife, the inquiry should have ended, and the magistrate was compelled to enter a decree of common law marriage." *Id.* at ¶ 15. The division thus reversed and remanded with directions to enter a decree of common law marriage. *Id.* at ¶ 18.

¶15 Shtutman petitioned this court for certiorari review, arguing that the court of appeals misapplied the *Lucero* test and that the magistrate never factually found that Yudkin and Dareuskaya agreed to be married. We granted certiorari review and heard arguments in *Yudkin* along with *Hogsett* and *LaFleur*, which are also announced today.

II. Analysis

¶16 "A determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the trial court's discretion." *Lucero*, 747 P.2d at 665. Accordingly, we review the magistrate's factual findings for clear error and his common law marriage finding for an abuse of discretion.

¶17 Shtutman argues that the division of the court of appeals erred by treating cohabitation and reputation in the community as necessarily dispositive of the parties' agreement to be common law married. We agree. In looking only to those few factors it deemed "essential," the division failed to appreciate the comprehensive nature of the common law marriage analysis.

¶18 As was true under *Lucero*, and remains true under *Hogsett*, courts must consider all factors that might manifest the parties' agreement, or lack of agreement, to be married. *Compare Lucero*, 747 P.2d at 665 ("[T]here is no single form that any such evidence [of agreement] must take. Rather, any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred."), *with Hogsett*, ¶ 50 ("Our refinement retains the core parts of the *Lucero* test: . . . a flexible inquiry into the totality of the circumstances that relies on the factfinder's credibility determinations and weighing of the evidence."). Moreover, although we noted in

Lucero that cohabitation and reputation in the community were "[t]he two factors that most clearly show an intention to be married," 747 P.2d at 665, we also made clear that evidence of cohabitation and reputation in the community do not create a presumption of a common law marriage, *id.* at 664 n.5.

¶19 As we clarify today in *Hogsett*, "a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement." *Hogsett*, ¶ 49. "The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation." *Id.* While the factors we identified in *Lucero* can still be relevant to the inquiry, they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. *Id.* Ultimately, a common law marriage finding depends on the totality of the circumstances, and no single factor is dispositive.

¶20 Here, the magistrate's findings are somewhat ambiguous regarding whether Yudkin agreed to be married to Dareuskaya. In summarizing Dareuskaya's testimony, the magistrate stated that "Yudkin gave [Dareuskaya] a wedding ring and said [the pair] could be husband and wife if she agreed. There was no planning or ceremony. . . . She agreed and she wore the ring all the time after that . . . ." Based on that testimony, the magistrate was "convinced Mr.

Yudkin and Tatsiana A. Dareuskaya *agreed to and did hold themselves out to be married* to the community of their non-family coworkers, friends and neighbors but family knew they were not ceremonially married." (Emphasis added.) Although it is clear from this statement that the magistrate was convinced Yudkin and Dareuskaya agreed to *hold themselves out* as married, it is unclear from the phrasing whether the magistrate separately concluded that Yudkin and Dareuskaya agreed to *be* married.

¶21 On remand, the district court must determine whether Yudkin and Dareuskaya in fact agreed to be married. In deciding whether the couple agreed to enter into a "*marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation," *Hogsett*, ¶ 3—the court must undertake a "flexible inquiry into the totality of the circumstances," *id.* at ¶ 50. In particular, the court "should accord weight to evidence of the couple's express agreement to marry." *Id.* at ¶ 54. "[I]n the absence of such evidence, the couple's mutual intent may be inferred from their conduct, albeit judged in context." *Id.* Relevant conduct includes, but is not limited to,

> cohabitation[;] reputation in the community as spouses[;] maintenance of joint banking and credit accounts[;] purchase and joint ownership of property[;] filing of joint tax returns[;] . . . use of one spouse's surname by the other or by children raised by the parties[;] . . . evidence of shared financial responsibility, such as leases in both partners' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, beneficiary and emergency contact designations; . . . symbols of

> commitment, such as ceremonies, anniversaries, cards, gifts, and the couple's references to or labels for one another[;] . . . [and] the parties' sincerely held beliefs regarding the institution of marriage.

Hogsett, ¶ 55–56. The court's analysis of these factors should also take into account the nuances of individuals' relationship or family histories, and their religious or cultural beliefs and practices. *See Hogsett*, ¶ 59 ("[T]he significance of a given factor will depend on the individual, the relationship, and the broader circumstances, including cultural differences.").

¶22 Here, if credited, Dareuskaya's testimony that Yudkin asked her to be his wife; that she accepted; and that he provided her with a ring could be evidence of the couple's express agreement to marry even without a more formal ceremony or the presence of some of the other supporting factors. *See id.* at ¶ 47 ("[Not] every marriage ceremony involve[s] an officiated exchange of vows before family and friends at a place of worship."). At the same time, under *Hogsett*, the facts that Dareuskaya and Yudkin did not share a last name and that Dareuskaya's children did not take Yudkin's last name no longer necessarily weigh against a finding of common law marriage. *See Hogsett*, ¶ 45 ("[T]here may be any number of reasons, including cultural ones, that spouses and children do not take one partner's name at marriage."). That Yudkin and Dareuskaya did not have children together who would take Yudkin's last name also does not weigh against a finding of common law marriage. *See id.* at ¶ 44 ("[J]ust as having shared biological or genetic children

is not an indicator of marriage, it is also not a requirement of marriage."). And although a couple's decision to maintain separate finances remains relevant, it is not necessarily indicative of the lack of the parties' intent to be married. *See id.* at ¶ 46 ("A couple's financial arrangements may also be less telling these days than before.").

¶23 The purpose of examining the couple's conduct is not to test the couple's agreement to marry against an outdated marital ideal, but to *discover* their intent. That is why under *Hogsett*, "the inferences to be drawn from the parties' conduct may vary depending on the circumstances," *Hogsett,* ¶ 49, and "the factfinder[] [must make] credibility determinations and weigh[] . . . the evidence" in context, *id.* at ¶ 50.

III. Conclusion

¶24 For the foregoing reasons, we vacate the judgment of the court of appeals and remand with instructions to return the case to the probate court for its capable reconsideration in light of *Hogsett*. Dareuskaya's request for attorney's fees and costs is denied pursuant to this court's discretion under C.A.R. 39.1.

CHIEF JUSTICE BOATRIGHT concurs in the judgment only.
JUSTICE SAMOUR concurs in the judgment only.

CHIEF JUSTICE BOATRIGHT, concurring in the judgment only.

¶25 For the reasons stated in my concurrence in the judgment only to *In re Marriage of Hogsett & Neale*, 2021 CO 1, __ P.3d __ (Boatright, C.J., concurring in the judgment only), I disagree with the majority's decision to announce new factors for establishing common law marriage on the facts of that case. In so doing, the majority also potentially broadens the definition of marriage in a way that I fear will only further confuse the already complex concept of common law marriage. Therefore, I cannot join the majority in its discussion of the new factors or directions to apply the same on remand in this case. The new factors aside, however, I agree with the majority that a remand is appropriate here because "it is unclear from the record whether the magistrate found that [the parties] mutually agreed to enter into a marital relationship," maj. op. ¶ 4, and I would further direct the trial court to determine a specific date or at least an approximate timeframe for when the parties would have formed such an intent, if at all. Thus, I respectfully concur in the judgment only.

¶26 The intent to be married remains the central requirement for common law marriage under either *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987), or *Hogsett*, ¶ 3. Thus, an explicit finding about the parties' intent remains necessary to establish whether they entered into a common law marriage. The magistrate here did not make such a finding. The evidence on the record, meanwhile, reasonably

supports both a finding of intent to enter into a common law marriage and a finding of intent to enter into a non-marital relationship. On the one hand, the couple cohabitated and held themselves out as married. On the other hand, the couple maintained separate finances, did not file joint taxes, and the magistrate commented that they "knew they were not ceremonially married." Therefore, I agree with the majority that a remand is appropriate for the trial court to make a finding as to the parties' intent to be married.

¶27 The equivocal evidence on the record reinforces—as I explain in my concurrence in part to *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __ (Boatright, C.J., concurring in part and concurring in the judgment)—the importance of establishing a specific date or at least an approximate timeframe for when the parties would have formed a mutual intent to be married and, therefore, entered into a common law marriage. This will help inform the court and the parties as to what evidence is potentially relevant to the establishment of a common law marriage, particularly in cases where, as here, the parties' conduct could be found both consistent and inconsistent with marriage. Any conduct *after* the marriage began is not relevant to determining whether a common law marriage existed in the first place. Therefore, I would further direct the trial court to determine, if supported by the facts, a specific date or at least an approximate timeframe for when the parties would have formed an intent to be married.

¶28 Because the magistrate here made neither a finding as to the parties' intent to be married nor a finding about the specific date or approximate timeframe for when the parties would have formed such an intent, if at all, a remand is appropriate for these findings. Thus, I respectfully concur in the judgment only.

JUSTICE SAMOUR, concurring in the judgment only.

¶29 The majority correctly notes that "a common law marriage may be established" in Colorado "by the mutual consent or agreement of the couple to enter the *legal* and social institution of marriage, followed by conduct manifesting that agreement." Maj. op. ¶ 3 (quoting *In re Marriage of Hogsett & Neale*, 2021 CO 1, ¶ 3, __ P.3d __, __) (emphasis added). But in the next breath, the majority alters the first part of this test by explaining that what really matters is that the parties mutually "intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation." *Id*. Though the majority characterizes this last statement as merely identifying the test's "core query," conspicuously absent from it is the word "legal," as in mutual intent and agreement "to enter the legal . . . institution of marriage." *Id.* And, as my dissenting opinion in the companion case of *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __ (Samour, J., dissenting), demonstrates, the requirement of mutual intent and agreement to enter into a *legal* marital relationship can make a world of difference. Yet, the majority nowhere gives that aspect of the test meaningful effect. Indeed, for all intents and purposes, the majority retires it from consideration today.

¶30 To determine whether Yudkin and Dareuskaya were common law married, I would inquire whether they mutually intended and agreed to enter into the *legal*

relationship of marriage, and I would look for conduct manifesting that intent. In evaluating the parties' conduct, in turn, I would apply the factors from *People v. Lucero*, 747 P.2d 660 (Colo. 1987), as refined by the majority today in *Hogsett*. In the end, I would arrive at the same decision as the majority because in this case requiring mutual intent and agreement to *legally* marry versus merely requiring mutual intent and agreement to marry (whether legally or not) makes no difference. I therefore concur in the judgment only.

ADVANCE SHEET HEADNOTE
January 11, 2021

2021 CO 1

No. 19SC44, *In re Marriage of Hogsett & Neale*—Common Law—Divorce—Marriage and Cohabitation.

The supreme court revisits the test for proving a common law marriage that the court articulated over three decades ago in *People v. Lucero*, 747 P.2d 660 (Colo. 1987). Because many of the indicia of marriage identified in *Lucero* have become less reliable, particularly in light of the recognition of same-sex marriage and other social and legal changes, the court refines the test and holds that a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The core inquiry is whether the parties intended to enter a marital relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation.

In this case, the court applies the refined *Lucero* test and concludes that no common law marriage existed. The court therefore affirms the judgment of the court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 1

Supreme Court Case No. 19SC44
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA1484

In re the Marriage of

Petitioner:

Edi L. Hogsett,

v.

Respondent:

Marcia E. Neale.

Judgment Affirmed
en banc
January 11, 2021

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.
JUSTICE HART specially concurs.
CHIEF JUSTICE BOATRIGHT concurs in the judgment only.
JUSTICE SAMOUR concurs in the judgment only.

¶1 In this case and two others announced today, *In re Estate of Yudkin*, 2021 CO 2, __ P.3d __, and *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __, we revisit the test for proving a common law marriage that we articulated over three decades ago in *People v. Lucero*, 747 P.2d 660 (Colo. 1987). In *Lucero*, we held that a couple could establish a common law marriage "by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." *Id.* at 663. We directed that evidence of such agreement and conduct could be found in a couple's cohabitation; reputation in the community as husband and wife; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; and use of the man's surname by the woman or by children born to the parties. *Id.* at 665.

¶2 Each of the three cases before us involves a disputed common law marriage claim. Together, they illustrate how much has changed since our decision in *Lucero*. Notably for purposes of this case and *LaFleur*, same-sex couples may now lawfully marry, *see Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that states cannot deprive same-sex couples of the fundamental right to marry), though their right to do so was not recognized in Colorado until October 2014, *see LaFleur*, ¶ 30 (describing the timeline of same-sex marriage recognition in Colorado). Yet the gender-differentiated terms and heteronormative assumptions of the *Lucero* test

render it ill-suited for same-sex couples. More broadly, many of the traditional indicia of marriage identified in *Lucero* are no longer exclusive to marital relationships. At the same time, genuine marital relationships no longer necessarily bear *Lucero*'s traditional markers. The lower court decisions in these cases reflect the challenges of applying *Lucero* to these changed circumstances.

¶3 In this case, we refine the test from *Lucero* and hold that a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The core query is whether the parties intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation. In assessing whether a common law marriage has been established, courts should accord weight to evidence reflecting a couple's express agreement to marry. In the absence of such evidence, the parties' agreement to enter a marital relationship may be inferred from their conduct. When examining the parties' conduct, the factors identified in *Lucero* can still be relevant to the inquiry, but they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. Finally, the manifestation of the parties' agreement to marry need not take a particular form.

¶4 Having refined the *Lucero* test in this case, we clarify in *Yudkin* that whether a common law marriage exists depends on the totality of the circumstances, and no single factor is dispositive. *Yudkin*, ¶ 3. We remand that case to the probate court for reconsideration of the common law marriage claim under the updated framework we announce today. *Id.* at ¶ 24. In *LaFleur*, we hold that a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' right to marry. *LaFleur*, ¶¶ 3–5. There, we apply the refined *Lucero* test and conclude that the parties did enter a common law marriage, but we set aside the property division and spousal maintenance award and remand for further proceedings. *Id.* at ¶ 6.

¶5 In this case, we apply the refined *Lucero* test and conclude that the record supports the district court's conclusion that no common law marriage existed. Accordingly, we affirm the judgment of the court of appeals.

I. Facts and Procedural History

A. Initial Petition and Separation Agreement

¶6 Edi L. Hogsett and Marcia E. Neale were in a thirteen-year relationship from November 2001 to November 2014. The two women never formally married (and

could not have done so in Colorado until October 2014).[1] Nevertheless, in January 2015, they jointly filed a pro se petition for dissolution of marriage in Arapahoe County District Court. The parties mediated a separation agreement stating that they had entered a common law marriage on December 1, 2002, and that their marriage was irretrievably broken.

¶7 The separation agreement included a division of the parties' purported marital property, including their home, furniture and household goods, bank accounts, stock purchase plans, retirement plans, vehicles, pets, and other miscellaneous assets, and provided for the division of their debts and obligations. It also required Neale to pay Hogsett $1,000 in monthly "spousal maintenance" for about seven years.

¶8 At the initial status conference, the court explained that it would have to find that a marriage existed before it could address the petition for dissolution. The parties reported that they did not have a marriage or civil union license and stipulated to dismissal of the petition, explaining that, through mediation, they had "fully settled all issues they had wanted to address in a dissolution case," and

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[1] *See LaFleur*, ¶ 30 (describing the timeline of cases invalidating Colorado's constitutional and statutory same-sex marriage exclusions).

that they "would be able to implement their [agreement] between themselves [without] court involvement." The case was dismissed.

¶9 Hogsett later sought certain retirement assets and maintenance she believed Neale owed her under their separation agreement. Neale communicated to Hogsett her position that no marriage existed between them. Hogsett then filed a second petition for dissolution of marriage that is the subject of this case. Neale moved to dismiss, asserting, as relevant here, that the parties were never married under common law.

B. District Court's Ruling

¶10 At a hearing on Neale's motion to dismiss, the district court heard testimony from Neale, Hogsett, and several of their friends, relatives, and associates. The court also considered documentary and photographic evidence of the parties' relationship. It ultimately concluded that Hogsett had not met her burden to prove a common law marriage under the test in *Lucero*, 747 P.2d at 663–65.

¶11 In its detailed oral ruling, the district court first acknowledged what we confirm today in *LaFleur*: that it could recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental

right to marry. *See LaFleur*, ¶ 3.[2] But the court also acknowledged the difficulty of applying *Lucero* to the parties' same-sex relationship:

> [T]he elements set forth in *Lucero* for the [c]ourt to consider, in many ways, do not reflect the reality of the situation for same-sex couples prior to [*Obergefell*]. Gay marriage was illegal so no matter if a couple intended to be married, they couldn't take advantage of the many privileges that were afforded to heterosexual couples. They couldn't use the word spouse on taxes; on financial documentation; they couldn't mark the other partner as spouse or wife on medical forms.

The court remarked that additional guidance from higher courts in these circumstances would be "very helpful," but in the absence of such guidance, the court proceeded to apply *Lucero*.

¶12 In doing so, the court observed that certain *Lucero* factors were of limited or no use in the context of a same-sex relationship, while others were less relevant today than when *Lucero* was decided. The court acknowledged, for example, that the parties bought a custom home together, but it accorded that factor less weight given that cohabitation between unmarried partners is far more prevalent today. The court also observed that in a same-sex marriage, there would be no use of a husband's surname by a wife, but it reasoned that this factor was not particularly relevant in any event, given that many spouses today elect not to change their

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[2] Because neither party here contests *Obergefell*'s retroactive application, that question is not before us in this case.

names. The court further noted that it did not believe the parties had any option to file joint tax returns before same-sex couples could legally marry.

¶13 The court then turned to conflicting evidence related to a marriage ceremony and exchange of rings. Hogsett testified that she and Neale exchanged custom wedding rings in a "very intimate close marriage ceremony" at a bar. In contrast, Neale testified that she believed they were merely exchanging commitment rings, and that there were no family members or friends present. The court concluded there was "evidence of [an] agreement of a committed relationship" but reasoned that the parties might have had different understandings of the significance of the ceremony and exchange of rings. The court noted that neither party referred to the other as wife or mentioned marriage in the letters and cards they exchanged. The question, the court reasoned, was whether the parties did not use the words "married" or "wife" because of the state of the law at the time, or because they had no intention of being married.

¶14 Turning to other evidence, the court observed that the parties had joint ownership of property, had joint banking and credit card accounts, and had worked with a financial advisor as a couple to manage and preserve their assets. It also found that Hogsett had listed Neale as a primary beneficiary and domestic partner on her 401(k) and as next of kin and life partner on a medical record. But Hogsett had also certified on a health insurance form that she was "not married."

¶15 The court disagreed with Hogsett's argument that the parties' initial joint petition for dissolution of marriage served as conclusive evidence that the parties were married. It credited Neale's testimony that she had acted on bad advice that she had to file for divorce in order to separate the parties' significantly intertwined finances. The court also noted that the date of marriage specified on the petition did not match the date the parties had consistently celebrated as their anniversary and found it significant that the parties jointly dismissed the case shortly after filing it. Ultimately, the court concluded that the original petition for dissolution "cut[] both ways."

¶16 Turning to reputation in the community, the court found that only Hogsett had described the relationship as a marriage or had ever referred to Neale as her wife. However, the court again wondered whether this could have been attributable to marriage being unrecognized for same-sex couples at the time.

¶17 In the end, the court found "credible evidence . . . that [Hogsett] believed that she was married to [Neale]." But it also found "credible evidence that [Neale] did not believe that she was married" to Hogsett. It noted that Neale testified that she "do[esn't] believe in marriage" because she "do[esn't] believe two people can promise each other that they're going to love each other for the rest of their lives." Moreover, Neale "never referred to [Hogsett] as her wife; never told anyone she was married; [and] never listed married or intent to be married on any legal,

financial, or medical documents." Accordingly, although it acknowledged the case was "extremely difficult," the court held that Hogsett had not met her burden to establish a common law marriage by a preponderance of the evidence and granted Neale's motion to dismiss.

C. Court of Appeals' Ruling

¶18 The court of appeals affirmed, concluding that the district court did not err in applying *Lucero* to find that no common law marriage existed. *In re Marriage of Hogsett & Neale*, 2018 COA 176, ¶¶ 3, 11, __ P.3d __.

¶19 The division noted that record evidence supported both Hogsett's belief that she was married and Neale's belief that she was not. *Id.* at ¶ 20. It acknowledged Hogsett's argument that many indicia of marriage were present, including the parties' intertwined finances, the existence of joint accounts, and their joint ownership of a home. *Id.* at ¶ 21. But it also pointed out that other evidence showed there was no common law marriage, including the parties' joint dismissal of the initial petition for dissolution, Neale's testimony that she didn't believe in marriage, and the absence of references to marriage in the parties' private correspondence. *Id.* at ¶¶ 19, 21. It also noted that the parties did not attempt to marry in a state where same-sex marriage had been legalized. *Id.* at ¶ 21. Ultimately, the division affirmed the lower court's judgment, reasoning that the

district court had discretion in weighing this evidence and that its findings were supported by the record. *Id.* at ¶¶ 15, 21.

¶20 In reaching this conclusion, the division reasoned that *Obergefell* applies retroactively in determining the existence of a common law marriage. *Id.* at ¶¶ 22–25. It also acknowledged that "the only reason that many of *Lucero*'s indicia of marriage were unavailable to the parties is because of unconstitutional laws forbidding same-sex marriage." *Id.* at ¶ 22. But it concluded that the district court had "appropriately recognized and accorded less weight to [the *Lucero*] factors that were less relevant" in the context of the parties' same-sex relationship, *id.* at ¶ 20, and that competent record evidence supported the crucial finding that Neale did not consent to a marriage, *id.* at ¶ 25.

¶21 In a special concurrence, Judge Furman wrote separately "to encourage our legislature to abolish common law marriage, in conformity with the majority of jurisdictions." *In re Marriage of Hogsett & Neale*, 2018 COA 176, ¶ 35, __ P.3d __ (Furman, J., specially concurring). He argued that common law marriage determinations place a needlessly heavy burden on the parties and our courts. *Id.* He also reasoned that, because Colorado citizens have physical and legal access to licensed marriage and because children born to unmarried parents are now afforded the same rights and privileges as those born to married parents, common law marriage is no longer practically or legally necessary. *Id.* at ¶ 36.

¶22 We granted Hogsett's petition for a writ of certiorari to address how courts should determine the existence of a common law marriage between same-sex partners.[3] In considering that question and those posed by the two other cases before us, we necessarily revisit our common law marriage jurisprudence more broadly.

II. Analysis

¶23 We begin by observing that marriage carries not only a great array of legal rights, benefits, and obligations, but also bears personal, social, expressive, and religious meanings. We next explain the two legal paths to marriage in Colorado, distinguishing common law marriage from licensed marriage. We acknowledge that Colorado is one of the few remaining states to recognize common law marriage and that there is some skepticism of its current utility. After reviewing the test for proving a common law marriage set forth in *Lucero*, we examine how social and legal changes since that decision have eroded its usefulness in distinguishing marital from nonmarital unions. Finally, we refine the *Lucero* test

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[3] We granted certiorari to review the following issues:

1. What factors should a court consider in determining whether a common law marriage exists between same-sex partners?
2. Whether the court of appeals erred in affirming the trial court's conclusion that no common law marriage existed between the same-sex couple here.

to account for these changed circumstances and, applying the new framework here, we conclude that there was no common law marriage in this case.

A. Background

1. The Significance of Marriage

¶24 Marriage touches both life and death. Courts have catalogued the numerous significant protections, benefits, and obligations that flow from civil marriage. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 771–74 (2013) (discussing some of the more than 1,000 federal laws and regulations referencing marriage); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003) (discussing benefits and obligations that turn on marital status under Massachusetts law). Indeed, the legal ramifications of a couple's marital status are abundant; they arise under federal, state, and local law and span the civil and criminal realm. A couple's marital status has implications in civil, domestic, and probate cases, and even plays a role in some criminal offenses.[4]

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[4] For just a few examples of the legal consequences of marriage, see 8 U.S.C. § 1154 (2018) (permitting married U.S. citizens to petition for immigration status for their foreign-born spouses); 26 U.S.C. § 6013 (2018) (allowing married couples to file federal taxes jointly); 42 U.S.C. § 416 (2018) (providing federal old-age, survivors, and disability insurance benefits to spouses); § 13-90-107(1)(a), C.R.S. (2020) (establishing scope of the marital privilege); § 14-10-113, C.R.S. (2020) (requiring equitable division of marital property upon divorce); § 15-11-102, C.R.S. (2020) (providing for spousal intestate succession); § 18-5-102(1)(d), C.R.S. (2020) (prohibiting forgery of false tax returns); § 18-6-201(2), C.R.S. (2020) (specifying

¶25 Of course, "marriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 570 U.S. at 769. The right to marry has been recognized as fundamental, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and marriage has been the wellspring of other constitutionally protected rights, *see, e.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (procreation); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (contraception). As "a far-reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 570 U.S. at 769, marriage "bestows enormous private and social advantages on those who choose to marry," *Goodridge*, 798 N.E.2d at 954. Marriage represents "a deeply personal commitment to another human being . . . and the decision whether and whom to marry is among life's momentous acts of self-definition." *Id.* at 954–55. Indeed, for many couples, marriage is a sacred religious bond. *Obergefell*, 576 U.S. at 656–57 ("Marriage is sacred to those who live by their religions and offers unique fulfilment to those who find meaning in the secular realm.").

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that bigamy is a class 6 felony); § 18-6-301(1), C.R.S. (2020) (making it a class 4 felony to knowingly marry an ancestor or descendant); § 19-4-105, C.R.S. (2020) (presuming parentage of both spouses for child born to married couple); and Denver Rev. Mun. Code § 18-412 (providing group health insurance coverage for retirees' spouses).

¶26 Because marriage triggers a cascade of legal rights, benefits, and obligations, and is laden with great historical, social, religious, and personal meaning, the determination of a couple's marital status is of great consequence.

2. Licensed Marriage and Common Law Marriage

¶27 Courts have long viewed marriage as a civil contract requiring the parties' mutual agreement. *Meister v. Moore*, 96 U.S. 76, 78 (1877) ("Marriage is everywhere regarded as a civil contract."); *Taylor v. Taylor*, 50 P. 1049, 1049 (Colo. App. 1897) ("By the statutes of Colorado, marriage is declared to be a civil contract; and there is only one essential requirement to its validity, between parties capable of contracting, viz. the consent of the parties.").

¶28 In Colorado, a legally recognized marriage can be achieved two ways: formally, by fulfilling the statutory requirements of licensed marriage, or informally, by entering a common law marriage through mutual agreement of the parties followed by assumption of a marital relationship. *See In re Peters' Est.*, 215 P. 128, 129 (Colo. 1923) ("The statutes provide a method of contracting marriage. That method is not exclusive."); *see also Lucero*, 747 P.2d at 665 (setting forth essential requirements of a common law marriage). Couples seeking a licensed marriage must pay a marriage license fee, obtain approval of the license, and return the marriage certificate and license within sixty-three days of

solemnization. §§ 14-2-105 to -109, C.R.S. (2020). Common law marriage, by contrast, lacks these formalities solemnizing the relationship.

¶29 Historically, recognition of common law marriage allowed children of such unions to be treated as legitimate and prevented abandoned or widowed women from turning to the public fisc for their support. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev. 957, 969–71 (2000). The doctrine protected vulnerable spouses, typically women, who invested in and relied on long-term relationships that were never formalized and whose "contributions of labor and commitment . . . were not embodied in money, property, or title." Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 711 (1996); *see also Lucero*, 747 P.2d at 664 (observing that common law marriage "serves mainly as a means of protecting the interests of parties who have acted in good faith as husband and wife").

¶30 Common law marriage also provides a path to marriage for marginalized groups such as undocumented immigrants who, as noted by amicus curiae Colorado Legal Services in *Yudkin*, may wish to avoid divulging information to government authorities implicating their immigration status. And as pointed out by amici the Colorado LGBT Bar Association, et al. in *LaFleur*, common law marriage may be particularly important for same-sex partners who lived as married couples for years but could not marry formally.

¶31 Conversely, as Judge Furman described in his special concurrence below, many believe the doctrine has outlived its usefulness given the general accessibility of licensed marriage, the trend toward more egalitarian marriages, and the law's equal treatment of children born to unmarried parents. *See Hogsett*, ¶¶ 35–36 (Furman, J., specially concurring); *see also Stone v. Thompson*, 833 S.E.2d 266, 267 (S.C. 2019) (concluding that the foundations of common law marriage "have eroded with the passage of time"). Certainly, as the record here reflects, the inquiry is fact-intensive and invasive and forces judges to assess the degree to which a couple's conduct conforms to a marital ideal. Indeed, the common law marriage doctrine holds relationships to standards that some licensed marriages might not meet if similarly scrutinized.[5]

¶32 Although abolition of common law marriage is not before us today, we note that a majority of states have abolished the doctrine. *See, e.g.*, Ala. Code § 30-1-20(a) (1975) (prohibiting parties from entering into a common law marriage on or after January 1, 2017); 23 Pa. Cons. St. § 1103 (declaring that common law

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[5] The substantive limitations on licensed marriage are few: Colorado prohibits marriages between parties under eighteen years of age (except with judicial approval), § 14-2-106(1)(a)(I), C.R.S. (2020), and marriages that involve one party who is in another valid marriage or civil union; marriages between a descendant and ancestor; marriages between siblings; and marriages between an uncle or aunt and their niece or nephew, § 14-2-110, C.R.S. (2020). Beyond these limitations, the state simply accepts a licensed marriage as valid.

marriages contracted after January 1, 2005 are invalid); *Stone*, 833 S.E.2d at 87 (prospectively abolishing common law marriage in South Carolina through judicial decision). Indeed, Colorado and only nine other jurisdictions continue to allow for the formation of common law marriages.[6]

B. *People v. Lucero*

¶33 We set forth the prevailing test for establishing a common law marriage in Colorado more than three decades ago in *People v. Lucero*, a criminal case in which the defendant objected to the admission of testimony from his alleged common law wife on grounds that it violated the marital privilege codified at section 13-90-107(1)(a), C.R.S. (1973). 747 P.2d at 661–62. Although the defendant made an offer of proof consisting of his putative wife's testimony that she considered herself married to him and that the couple held themselves out as married, the trial court overruled the objection, deeming the proffered testimony insufficient to prove the common law marriage. *Id.* at 662.

¶34 On review, we held that a common law marriage is established by "the mutual consent or agreement of the parties to be husband and wife, followed by a

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[6] Eight other states (Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, Utah, and Texas) and the District of Columbia still recognize common law marriage. 1 Karen Moulding & National Lawyers Guild, *Sexual Orientation and the Law* § 2:9 n.15 (2020 Update).

mutual and open assumption of a marital relationship." *Id.* at 663. We observed that the "very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist," and thus held that when "the agreement is denied or cannot be shown, its existence may be inferred from evidence of cohabitation and general repute." *Id.* at 664.

¶35 Our opinion emphasized that "[a] determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the trial court's discretion." *Id.* at 665. For guidance, we identified certain conduct reflecting a couple's agreement, pointing foremost to cohabitation and the couple's general reputation in the community as husband and wife. *Id.* at 664. We explained that courts may also consider other behavior, including "maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns." *Id.* at 665. We nevertheless made clear that "any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof." *Id.* Because it was unclear by what criteria the trial court evaluated the existence of the common law marriage, we remanded the case for reconsideration under the clarified standard. *Id.*

C. Challenges Presented by *Lucero*

¶36 Although *Lucero* sought to provide a flexible framework for evaluating the existence of a common law marriage, the factors we identified in 1987 have become, over time, less reliable markers to distinguish marital from nonmarital relationships. Of particular relevance here, some of the evidence called for in *Lucero* is of limited use in evaluating a same-sex relationship, particularly one predating Colorado's recognition of same-sex marriage. But more broadly, as the three cases before us today make clear, many of the traditional indicia of marriage identified in *Lucero* are no longer exclusive to marital relationships, while at the same time, bona fide marriages today do not always bear *Lucero*'s traditional markers. In short, social and legal changes since *Lucero* make its factors less helpful in sorting out who is "acting married," and who is not.

1. *Lucero* Is Underinclusive of Common Law Same-Sex Marriages

¶37 First, by its gendered language, *Lucero* precludes recognition of same-sex relationships. It requires a finding that the parties agreed to be "husband and wife" and, for evidence of such agreement, looks to factors including the parties' reputation in the community as "husband and wife" and the use of the "man's surname by the woman" or by children born to the parties. *Id.* at 663–65. *Lucero*'s heteronormative view of marriage can no longer stand. *Obergefell*, 576 U.S. at 675–76 (holding invalid state laws "to the extent they exclude same-sex couples

from civil marriage on the same terms and conditions as opposite-sex couples"); *LaFleur*, ¶ 5 (holding *Obergefell* applies retroactively). To their credit, the lower courts in this case and in *LaFleur* took pains to apply *Lucero* to the same-sex relationships before them in gender-neutral terms.

¶38 But the mismatch between the *Lucero* test and the claims of same-sex spouses is not limited to its gendered terms. We agree with amici the Colorado LGBT Bar Association, et al. that several of the *Lucero* factors raise a barrier to the recognition of bona fide common law same-sex marriages given the history of same-sex couples' inability to marry and the continuing risks faced by many individuals for being in a same-sex relationship openly. Moreover, our holding today in *LaFleur* that same-sex partners may show that they entered a common law marriage before the state recognized their right to marry does not alter the reality that such a marriage may be difficult to prove under the factors identified in *Lucero*.

¶39 For example, same-sex couples will be unable to show that they filed taxes as a married couple or listed their partners as "spouses" on beneficiary designations or other formal documents before same-sex marriage was legally recognized. And although other *Lucero* criteria are not impossible for same-sex couples to meet, they may be unrealistic, impracticable, or even dangerous. Most notably, *Lucero*'s "holding out" requirement that couples publicly affirm their

marital status fails to account for the precarious legal and social status LGBTQ people and their relationships have occupied for most of this nation's history.[7]

¶40 Given this reality, for some same-sex couples, "[a] truthful declaration . . . of what was in their hearts had to remain unspoken," *Obergefell*, 576 U.S. at 660, or their marital intent was conveyed in non-traditional ways, *see, e.g.*, Br. for Resp't at 3, *Windsor v. United States*, 570 U.S. 744 (2013), (No. 12-307) (noting that Windsor had proposed to her late wife with a diamond brooch instead of a diamond ring to "avoid unwelcome questions about the identity of [her] 'fiancé'"). In short, the

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[7] As the U.S. Supreme Court recognized in *Obergefell*, until recently, "[s]ame-sex intimacy remained a crime in many [s]tates. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." 576 U.S. at 661. Same-sex intimacy was not decriminalized across the country until 2003, *see Lawrence v. Texas*, 539 U.S. 558, 578 (2003); nationwide recognition of same-sex marriages came only in 2015, *see Obergefell*, 576 U.S. at 644; and it was not until this past summer that the Court ruled that to fire someone on the basis of their sexual orientation or gender identity violates Title VII, *see Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

Colorado is no exception to this history. In 1992, Colorado voters approved an amendment to the state constitution, later invalidated by the U.S. Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), that sought to prevent any branch or political subdivision of the state from protecting persons against discrimination based on sexual orientation. It was not until 2008 that LGBTQ Coloradans found protection in state law from discrimination in employment, housing, and public accommodations, *see* § 14-15-102, C.R.S. (2020), and not until the Designated Beneficiaries Agreements Act of 2009 that same-sex relationships were bestowed any formal recognition by the state, *see* § 15-22-102, C.R.S. (2009).

Lucero test is ill-adapted to assess whether a same-sex couple has entered into a common law marriage.

2. The *Lucero* Factors No Longer Mark a Reliable Boundary Between Marital and Nonmarital Unions

¶41 Second, and more broadly, public norms have evolved since 1987. As a result, the factors we offered in *Lucero* to distinguish between marital and nonmarital relationships have become less reliable markers of that boundary.

¶42 Today, many unmarried couples live together. *Stone*, 833 S.E.2d at 269 ("[N]on-marital cohabitation is exceedingly common and continues to increase among Americans of all age groups."). Indeed, this court recognized the growing frequency of nonmarital cohabitation two decades ago. *Salzman v. Bachrach*, 996 P.2d 1263, 1267 (Colo. 2000) (noting the number of unmarried-couple households had increased 571% from 1970 to 1993 (citing Bureau of the Census, *Marital Status and Living Arrangements: March 1993*, VII–VIII, tbl.D (May 1994))). In response to that sea change in social norms, we announced the enforceability of contracts between unmarried cohabitating couples, *id.*, while at the same time cautioning that "mere cohabitation does not trigger any *marital* rights," *id.* at 1269 (emphasis added). In other words, since *Lucero*, we have recognized that cohabitation is no longer synonymous with marriage.

¶43 The trend we observed two decades ago in *Salzman* has continued: The share of adults living with an unmarried partner has more than doubled since 1995, and

majorities across age groups now share the view that it is acceptable for a couple to live together even if they never plan to marry. Juliana Menasce Horowitz, Nikki Graf, & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, Pew Rsch. Ctr., (Nov. 6, 2019), https://www.pewsocialtrends.org/2019/11/06/marriage-and-cohabitation-in-the-u-s/#fn-26816-1 [https://perma.cc/RR6Z-25MK]. At the same time, it is becoming more common and technologically feasible for spouses to live apart. Sue Shellenbarger, *The Long-Distance Marriage That's Built to Last*, Wall St. J. (Aug. 14, 2018), https://www.wsj.com/articles/the-long-distance-marriage-thats-built-to-last-1534252845 [https://perma.cc/8F87-RZUB] (describing recent census data indicating the practice of married people living apart has risen 44% since 2000 to 3.96 million). In sum, we can no longer assume that cohabitation "clearly show[s] an intention to be married," *Lucero*, 747 P.2d at 665, or that living apart necessarily disproves the existence of a marriage.

¶44 Nor is marriage today necessarily a prerequisite to procreation. Childrearing outside marriage has become increasingly common. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, Pew Rsch. Ctr., (April 25, 2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/NFH9-ALM9] ("One-in-four parents living with a child in the United States today are unmarried."). And, as Judge Furman observed, children born to unmarried parents are no longer denied the

rights of children born to married parents. *Hogsett*, ¶ 36 (Furman, J., specially concurring); *see also, e.g.*, § 19-4-103, C.R.S. (2020) (providing that for purposes of the Uniform Parentage Act, "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents"); ch. 96, sec. 1, 2018 Colo. Sess. Laws 752, 752 ("eliminat[ing] and moderniz[ing] the outdated use of the terms 'illegitimate child' or 'legitimate child' or related terms" in the Colorado Revised Statutes). For that matter, parentage today takes many forms; married or not, many parents have children through adoption, §§ 19-5-201 to -203, C.R.S. (2020) (permitting individual, marital, stepparent, and second-parent adoption), or assisted reproductive technologies, *see In re Marriage of Rooks*, 2018 CO 85, 429 P.3d 579. Finally, just as having shared biological or genetic children is not an indicator of marriage, it is also not a requirement of marriage. *See Obergefell*, 576 U.S. at 646 ("Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate."). In short, whether a couple has or raises children together is not necessarily indicative of a marriage.

¶45 The same is true for couples' name-changing practices. The custom cited in *Lucero* of a woman adopting her husband's surname dates back to the doctrine of coverture, wherein "the very being or legal existence of the woman [was] suspended during the marriage." 1 William Blackstone, Commentaries *430.

Today, the choice to take a partner's surname, combine surnames, or share a newly created surname together remains common and meaningful among both different-sex and same-sex spouses. *See, e.g.*, Vicki Valosik, *For Same-Sex Couples, Changing Names Takes on Extra Significance*, The Atlantic (Sept. 27, 2013), https://www.theatlantic.com/national/archive/2013/09/for-same-sex-couples-changing-names-takes-on-extra-significance/279841/ [https://perma.cc/LBA3-LNVV]; Suzannah Weiss, *Creating a Name for Themselves*, N.Y. Times (March 11, 2020), https://www.nytimes.com/2020/03/11/fashion/weddings/name-change-after-marriage-not-always-easy.html [https://perma.cc/F6HC-WT72]. But there may be any number of reasons, including cultural ones, that spouses and children do not take one partner's name at marriage. *See* Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 Ind. L.J. 893, 910–12 (2010) (discussing studies demonstrating that major determinants of name change upon marriage include age at marriage, geographical region, gender role traditionalism, career orientation, and educational attainment).

¶46 A couple's financial arrangements may also be less telling these days than before. "[C]ouples make varying arrangements regarding their finances, such that the maintenance of 'largely separate finances' is a far less salient consideration than it might have been in years past." *Gill v. Nostrand*, 206 A.3d 869, 882 (D.C. 2019); *see also* Caroline Kitchener, *Why More Young Married Couples Are Keeping*

Separate Bank Accounts, The Atlantic (Apr. 20, 2018), https://www.theatlantic.com/family/archive/2018/04/young-couples-separate-bank-accounts/558473/ [https://perma.cc/4ZTG-8J6P] (discussing generational changes in spouses' choices to intermingle finances). Moreover, as noted by amicus curiae Colorado Legal Services in *Yudkin*, low-income individuals may not have bank accounts or own a home and therefore may be unable to prove a common law marriage through a joint deed or mortgage. Similarly, low-income couples may choose to title property in only one spouse's name because of credit issues.

¶47 Finally, the traditions and symbols that mark marital and nonmarital commitments are not uniform. Not every expression of commitment to a partner constitutes an agreement to enter a *marital* relationship. Nor does every marriage ceremony involve an officiated exchange of vows before family and friends at a place of worship.[8]

¶48 In sum, the markers identified in *Lucero* have become less reliable indicators of a marital relationship. On the one hand, the *Lucero* factors may be overinclusive

[8] In Colorado, for example, a couple could formally marry by self-solemnizing at the top of Sugarloaf Mountain, placing their pet's paw print on the witness signature to the union, and identifying the wedding location on the marriage certificate in GPS coordinates.

of couples who lack intent to be married yet engage in conduct once associated only with spouses. On the other hand, the factors may be underinclusive of genuine marriages that don't conform to a traditional model.

D. Proving a Common Law Marriage in Colorado

¶49 Given these significant social and legal developments since our decision in *Lucero*, the test and its factors require refinement. We therefore hold that a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation. In assessing whether a common law marriage has been established, courts should give weight to evidence reflecting a couple's express agreement to marry. In the absence of such evidence, the parties' agreement to enter a marital relationship may be inferred from their conduct. When examining the parties' conduct, the factors identified in *Lucero* can still be relevant to the inquiry, but they must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. Finally, the manifestation of the parties' agreement to marry need not take a particular form.

¶50 Our refinement retains the core parts of the *Lucero* test: the centrality of the couple's mutual consent or agreement to marry, the requirement of some manifestation of that consent, and a flexible inquiry into the totality of the circumstances that relies on the factfinder's credibility determinations and weighing of the evidence. We emphasize that, as was true under *Lucero*, a mutual agreement to marry does not alone suffice; there must be some evidence of subsequent conduct manifesting that agreement. *See* 747 P.2d at 663.

¶51 But in light of the Supreme Court's decision in *Obergefell*, we discard *Lucero's* gendered language. In addition, we conclude that the conduct manifesting the parties' agreement to marry need not take the form of "mutual public acknowledgment," *id.*, or "open marital cohabitation" in every case, *id.* at 664 (quoting Homer Clark, *Law of Domestic Relations* 48 (1968)). There may be cases where, particularly for same-sex partners, a couple's choice not to broadly publicize the nature of their relationship may be explained by reasons other than their lack of mutual agreement to be married. We are satisfied that in such cases, a general requirement to introduce "some objective evidence of the relationship" will sufficiently guard against fraudulent assertions of marriage. *Id.* (quoting Clark, *supra*, at 48).

¶52 Finally, the refined test reflects that it is more difficult today to say that a court will know a marriage when it sees one. Indeed, Colorado recognizes in civil

unions a legal relationship wholly separate from marriage notwithstanding that civil unions entail virtually the same "benefits, protections, and responsibilities afforded by Colorado law to spouses." § 14-15-102, C.R.S. (2020).

¶53 Given this reality, the refined test emphasizes the importance of the parties' *mutual* agreement to enter a *marital* relationship. Whatever deep transformations marriage has undergone, *see Obergefell*, 576 U.S. at 660, we have consistently recognized it as a civil contract requiring the mutual assent of the parties.

¶54 Parties asserting a common law marriage need not prove that they had detailed knowledge of and intent to obtain all the legal consequences that attach to marriage. As we hold today in *LaFleur*, ¶¶ 32, 37, a same-sex couple in particular need not show intent to enter a marriage the state would have recognized at the time as lawful. Instead, the essential inquiry is whether the parties mutually intended to enter a marital relationship. As noted, courts should accord weight to evidence of the couple's express agreement to marry, but in the absence of such evidence, the couple's mutual intent may be inferred from their conduct, albeit judged in context.[9]

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[9] Discerning the intent of a same-sex couple may require particular care. Before formal same-sex marriage was recognized, many same-sex couples expressed their commitment through the exchange of rings or in ceremonies ranging from the simple to the elaborate. But such acts of commitment varied widely; to

¶55 The conduct we identified in *Lucero* can still be relevant to this inquiry. Although we disavow *Lucero*'s heteronormative terms like "husband and wife," other factors, such as the parties' cohabitation, reputation in the community as spouses, maintenance of joint banking and credit accounts, purchase and joint ownership of property, filing of joint tax returns, and use of one spouse's surname by the other or by children raised by the parties may still be considered as evidence manifesting the couple's intent to be married.

¶56 In addition, a court should consider: evidence of shared financial responsibility, such as leases in both partners' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, beneficiary and emergency contact designations; and symbols of commitment, such as ceremonies, anniversaries, cards, gifts, and the couple's references to or labels for one another. Courts should also consider the parties' sincerely held beliefs regarding the institution of marriage.

¶57 While the inquiry should focus on the couple's conduct and attitude during the relationship, a party's behavior when a relationship ends may be instructive. For example, a partner who asserts a common law marriage years after the couple

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automatically ascribe marital intent to them without examining other circumstances of the relationship fails to appreciate the diversity of attitudes in the LGBTQ community toward the institution of marriage.

broke up has a less credible claim than one who promptly asserts spousal status for dissolution or probate purposes. In addition, conduct inconsistent with marriage that occurs as a relationship is breaking down does not negate a finding of common law marriage where there is evidence of the parties' earlier mutual agreement to be married. In other words, infidelity, physical separation, or other conduct arising as the relationship is ending does not invalidate a couple's prior mutual agreement to enter a common law marriage.

¶58 Finally, a court generally must establish the date of any common law marriage. We note that ordinarily, where a legal impediment prevents an otherwise valid marriage (e.g., where one of the parties is already married to another person), the effective date of the marriage is the date the legal impediment is removed. However, the former exclusion of same-sex couples from marriage cannot constitute a legal impediment because that exclusion has been held unconstitutional. *See LaFleur*, ¶¶ 4, 33–35.

¶59 In sum, courts may continue to look to the parties' conduct for evidence of an implied agreement to marry. But *Lucero*'s assumption that the presence of a particular factor necessarily supports a finding of marriage (or that its absence necessarily weighs against a finding of marriage) can no longer hold. Instead, the inferences to be drawn from the parties' conduct will vary depending on the circumstances. In some cases, the presence of a factor is persuasive evidence of

marriage (e.g., the taking of a partner's last name following a ceremony), while its absence is of no significance. In other cases, the absence of a factor is telling (e.g., the fact that a couple *never* cohabitated), while the presence of that factor is unhelpful. Finally, the significance of a given factor will depend on the individual, the relationship, and the broader circumstances, including cultural differences. For example, one same-sex couple's use of the label "partner" may convey "spouse," while another's may not. In Spanish-speaking communities, a person's use of the reference "mujer" may or may not convey "wife." *Mujer*, Real Academia Española, *Diccionario de la Lengua Española*, 23d ed., https://dle.rae.es/mujer [https://perma.cc/84A9-4YNQ] (defining "mujer" as both "person of the female sex" and "wife or female partner"). The court must consider the evidence in all its context. *See, e.g.*, *Gill*, 206 A.3d at 879–80 (explaining the trial court's finding that the absence of a ceremony or honeymoon supported an inference against marriage, not because those celebrations are traditional, but in light of evidence of how the parties and their community signified important events).

¶60 We recognize that common law marriage determinations present difficult, fact-intensive inquiries. But we have full faith that our judges, who interact daily with Colorado families in all their diversity, can fairly make these sensitive assessments.

E. Applying the Refined Framework, the Parties Did Not Mutually Intend to Enter into a Common Law Marriage

¶61 Applying our revised framework for evaluating a common law marriage to this case, we conclude that the record supports the trial court's conclusion that the parties did not mutually intend to enter a marital relationship and thus, Hogsett failed to meet her burden to establish the existence of a common law marriage.

¶62 We begin by reviewing evidence of an express agreement to marry. Hogsett testified that the parties exchanged custom wedding rings before friends and patrons at a bar, but later "backtracked and agreed" that only bar patrons were present. She was unable to confirm the exact date of the ring exchange. Neale, in contrast, testified that the parties merely exchanged rings "[t]o express commitment to the relationship," that it was "nothing significant," and that there were no family or friends present. As noted above, the traditions and symbols that mark marital commitments are not uniform; it is possible that an impromptu, intimate exchange of rings in a bar can be a marriage ceremony if the parties mutually intend it to be. Here, the district court found the evidence of this ceremony only partially helpful; it found there was evidence of a committed relationship but that the parties had different interpretations of the significance of the ring exchange.

¶63 Because the evidence of an express agreement to marry is inconclusive, we turn to evidence of the parties' conduct to determine if such an agreement may be

inferred. Considering the totality of the circumstances and viewing the evidence in context, we conclude that the record supports the district court's determination that there was no mutual agreement of the parties to enter into a marital relationship.

¶64 Hogsett and Neale never celebrated the date of the ring exchange as an anniversary; they did not wear their rings consistently; and they never referred to each other as wife or mentioned marriage in letters and cards they exchanged. True, it is possible that the couple did not celebrate the ring exchange as an anniversary or refer to each other as spouses because they were not and could not be formally married at the time. But they never privately celebrated the ring exchange as a key date in their relationship, and in communications with third parties, including family and long-time friends, only Hogsett ever referred to Neale as her wife or described the relationship as a marriage. Here, there is no evidence that the parties chose to hide the true nature of their relationship for fear of disapproval or discrimination.

¶65 The parties did cohabitate and bought a custom home together, had joint banking and credit accounts, and went to a financial advisor to manage and preserve their assets as a couple. This evidence tends to demonstrate a committed relationship of mutual support and obligation, but it is not necessarily dispositive proof of a marital relationship, given the modern trends noted above regarding

unmarried couples' varying financial arrangements. Hogsett also listed Neale as a primary beneficiary and domestic partner on her 401(k) and as next of kin and life partner on a medical record, indicating an intent to have a legally recognized relationship. Neale, however, did not make any similar designations.

¶66 Some of the evidence does not point in either direction. For example, Hogsett's certification on a health insurance form that she was "not married" is of little significance, as the option to be formally married in Colorado was not legally available at the time. For the same reason, the parties' failure to file joint tax returns during that time contributes little to the inquiry. Notably, we disagree with the court of appeals' suggestion that the parties' failure to attempt to get married in a state where same-sex marriage was legal weighs against a finding of common law marriage. *Hogsett*, ¶ 21. A couple's decision not to formally marry does not reflect lack of intent to enter a common law marriage.

¶67 As discussed above, the parties' behavior after the relationship ends may be instructive. Here, Hogsett points to the parties' petition for dissolution of marriage and their mediated separation agreement as evidence that they had agreed to be married. It is true that Neale was the one to suggest "divorce" to Hogsett and that Neale signed the petition and separation agreement without refuting the existence of a marriage. That said, the district court credited Neale's testimony that she "was given bad advice" and thought she was required to file

for dissolution in order to separate their finances. Moreover, the parties acknowledged at their initial status conference in that proceeding that they had "no marriage or civil union license" and then jointly and promptly dismissed the action. In short, the filing of the initial petition for dissolution and the parties' separation agreement is not conclusive evidence that the parties intended to enter a common law marriage.[10]

¶68 Returning to the core query, it is clear that both parties were in a committed, intimate relationship for thirteen years. Nevertheless, to establish a common law marriage, there must be mutual intent to enter a marital relationship. Although Hogsett testified that she had such intent, the record reflects that Neale did not.

¶69 Neale testified that she "do[es]n't believe in marriage. [She] do[es]n't believe two people can promise each other that they're going to love each other for the rest of their lives." And importantly, Hogsett confirmed that Neale expressed to her that "she doesn't believe in marriage because she believes that there's . . . a higher power than that." The district court thus made a credibility determination that Neale "never asked to be married, . . . doesn't believe in

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[10] We reject Hogsett's reliance on appeal on the parol evidence rule. The court of appeals declined to consider this contention because it was raised for the first time on appeal. *Hogsett*, ¶¶ 26–27. Even assuming that this contention was preserved, the trial court properly considered the extrinsic evidence proffered by both parties to determine whether there was a mutual agreement to be married.

marriage[, and] doesn't believe that two people can be in . . . love their whole life." In sum, while Hogsett may have intended to be married, there is insufficient evidence to conclude such intent was mutual, despite both parties' clear commitment to each other and other indicia of a marital relationship. Accordingly, we conclude that there was no common law marriage and affirm the court of appeals' judgment.[11]

III. Conclusion

¶70 Today we refine the test from *Lucero* and hold that a common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The key inquiry is whether the parties intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation. In assessing whether a common law marriage has been established, courts should accord weight to evidence reflecting a couple's express agreement to marry. In the absence of such evidence, the parties' agreement may be inferred from their conduct. When examining the parties' conduct, the factors identified in *Lucero* can still be relevant

[11] We decline to consider Hogsett's "estoppel by contract" argument as we agree with the court of appeals that this contention was not properly preserved. *Hogsett*, ¶ 27.

to the inquiry but must be assessed in context; the inferences to be drawn from the parties' conduct may vary depending on the circumstances. Finally, the manifestation of the parties' agreement to marry need not take a particular form. Applying this refined test here, we hold the record supports the trial court's conclusion that there was no mutual intent of the parties to enter into a common law marriage. Accordingly, we affirm the judgment of the court of appeals. Hogsett's request for attorney's fees and costs is denied.

JUSTICE HART specially concurs.
CHIEF JUSTICE BOATRIGHT concurs in the judgment only.
JUSTICE SAMOUR concurs in the judgment only.

JUSTICE HART, specially concurring.

¶71 I fully join the majority opinion in this case, as well as in *In re Estate of Yudkin*, 2021 CO 2, __ P.3d __, and *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __, because the opinions offer helpful refinement of the common law marriage test to be applied to those common law marriages that have already been entered. I write separately to express my concerns regarding the validity of common law marriage going forward. The historic conditions that once justified the need for the doctrine are no longer present, its application is often unpredictable and inconsistent, and it ties parties and courts up in needlessly costly litigation. It is my view that Colorado should join the overwhelming majority of states and abolish it.

¶72 Common law marriage travelled to colonial America from England, where it had been a creature of English common law. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 719–20 (1996). While not recognized in every jurisdiction, it was recognized in many American states and territories, including Colorado. There are numerous explanations for the wide acceptance of common law marriage in the early decades of the nation. Many posit that frontier America was difficult to travel and sparsely populated, making it unduly complicated for a couple wishing to marry to reach a religious or government official who could perform a formal wedding. *See id.* at 722–24. Common law marriage was also deemed necessary because of prevailing

moral judgments about unwed mothers and children born out of wedlock. And it was used as a way to situate financial responsibility for indigent women with their common law husbands rather than with the "public fisc." *See* maj. op. ¶ 29.

¶73 Today's world looks very different—socially, legally, and practically—than the world did when common law marriage was a majority rule among the states. "The paternalistic motivations underlying common-law marriage no longer outweigh the offenses to public policy the doctrine engenders." *Stone v. Thompson*, 833 S.E.2d 266, 269 (S.C. 2019). Acceptance in society is no longer dependent on one's marital status or that of one's parents. *See Marriage of Hogsett*, 2018 COA 176, ¶ 36, __ P.3d __ (Furman, J., specially concurring). And Colorado is hardly the frontier state it once was. Even residents in our most rural counties have ready access to the legal infrastructure for a licensed marriage. The process is quick and simple with minimal cost. *See* §§ 14-2-104 to -109, C.R.S. (2020).

¶74 As the justifications for common law marriage have receded, social norms surrounding romantic relationships and childrearing have changed and the acceptance of non-marital cohabitation and co-parenting has increased. *See* maj. op. ¶¶ 42–43. Moreover, many couples choose to cohabit or otherwise enter long-term partnerships that look very much like marriages, but with absolutely no desire or intention to participate in the institution of marriage. The majority opinion refines our common law marriage analysis to account for these and other

developments. *Id.* at ¶¶ 49–59. But there is no doubt these modern trends have made it more difficult for a layperson to understand what constitutes a common law marriage. In prospectively abolishing common law marriage in its state, the South Carolina Supreme Court noted that this confusion has transformed the doctrine into a "mechanism which imposes marital bonds upon an ever-growing number of people who do not even understand its triggers." *Stone*, 833 S.E.2d at 270; *see also* Br. of Amicus Curiae Colorado Legal Services, at 24, *In re Estate of Yudkin*, 2021 CO 2 (noting the confusion surrounding common law marriage, as a result of which "common law marriage is 'over-diagnosed' by many supportive services entities, who may recommend that individuals be safe and file a court case that may necessitate court and lawyers' fees that might never have been required"). As modern relationship trends evolve, the incongruity between the doctrine and the behavior and expectations of the public will become only greater and it will grow increasingly difficult "to say that a court will know a marriage when it sees one." Maj. op. ¶ 52.

¶75 Perhaps not surprisingly, then, although many states once recognized common law marriage, today Colorado is one of only ten jurisdictions to do so. *See id.* at ¶ 32. Most of those states have prospectively eliminated common law marriage through legislative enactment, though in some states the courts have weighed in to disapprove this common law doctrine. *See id.*; *see, e.g.*, *Stone*,

833 S.E.2d at 270 (noting both that many states had abolished the doctrine legislatively and that the elimination of common law marriage in South Carolina would be prospective only); *PNC Bank Corp. v. Workers' Comp. Appeal Bd.*, 831 A.2d 1269, 1279 (Pa. Commw. Ct. 2003) (explaining the court's view that common law marriage should no longer be recognized). In Colorado, common law marriage has been incorporated into statutory law only to the limited extent that section 14-2-109.5, C.R.S. (2020), requires that parties to a common law marriage be at least eighteen years old and that the marriage not violate any of the prohibitions set forth in section 14-2-110, C.R.S. (2020). Given these limited statutory provisions, I believe that the courts could take up the question of whether to continue to recognize common law marriage. The better course, however, would be for the General Assembly to consider whether the doctrine should be prospectively abolished in the state. *See Marriage of Hogsett*, ¶¶ 35–36.

¶76 A guiding principle of our system of justice should be to promote consistent, predictable, and just outcomes. *First Nat'l Bank v. Rostek*, 514 P.2d 314, 318 (Colo. 1973). Our common law marriage analysis is often at odds with this commitment. As we see in the trilogy of cases we decide today, "courts struggle mightily to determine if and when parties expressed the requisite intent to be married." *Stone*, 833 S.E.2d at 269. Further, the fact-intensive inquiry required is lengthy and expensive and delves into sensitive areas of the parties' lives. Requiring those who

wish to be married in Colorado to obtain a marriage license would remedy these issues and provide a bright-line rule for courts to rely on.

¶77 For these reasons, I urge the legislature to abolish the common law marriage doctrine.

CHIEF JUSTICE BOATRIGHT, concurring in the judgment only.

¶78 "[T]he cardinal principle of judicial restraint [is that] if it is not necessary to decide more, it is necessary not to decide more." *PDK Lab'ys Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). Today, the majority announces new factors for establishing common law marriage even though those factors are ultimately irrelevant under the circumstances of this case: Both Marcia Neale and Edi Hogsett testified that Neale *did not intend to be married*, and the district court made a credibility determination that Neale "never asked to be married, . . . doesn't believe in marriage[, and doesn't] believe that two people can be in . . . love their whole life [sic]." Therefore, the couple's relationship indisputably did not satisfy the fundamental common law marriage requirement of "mutual intent to enter a marital relationship," maj. op. ¶ 68, and no factors—new or old—can change that reality. Thus, in my view, the majority decides more than is necessary because the record clearly evinces—without considering any factors—that no common law marriage existed. And in deciding what it need not, the majority also potentially broadens the definition of marriage in a way that I fear will only further confuse the already complex concept of common law marriage. Because I agree, however, with the majority's ultimate conclusion that Neale and Hogsett did not enter into a common law marriage, I respectfully concur in the judgment only.

¶79 The majority repeatedly affirms the long-held principle that a common law marriage exists only with "mutual consent or agreement of the couple to enter the legal and social institution of marriage." *Id.* at ¶ 3; *see also* 52 Am. Jur. 2d Marriage § 39 (2020) ("For a common-law marriage to be formed, there *must* be a mutual intent to be married, as well as a mutual consent." (emphasis added) (footnote omitted)). Intent to be married forms the cornerstone of every marriage, common law or otherwise—in fact, it is "[t]he core query" in proving a common law marriage. Maj. op. ¶ 3. In that regard, the majority is correct.

¶80 Despite the majority's repeated emphasis on the vital nature of marital intent, however, it glosses over the reality that the factors for establishing common law marriage need only be employed when there exists credible disagreement as to the parties' intent. Indeed, the very purpose of using factors to examine the parties' conduct is to ascertain their intent. *See id.* at ¶ 54 ("[I]n the absence of [an express agreement to marry], the couple's mutual intent [to enter a marital relationship] may be inferred from their conduct . . . ."); *see also Estate of Yudkin*, 2021 CO 2, ¶ 23, __ P.3d __ ("The purpose of examining the couple's conduct is . . . to *discover* their intent."). If one party claims, for example, that both she and her partner intended to be married, but her partner denies such intent, then a court should look at the parties' relevant conduct to determine whether the denying partner actually possessed such intent. In other words, the factors for establishing

common law marriage become relevant only when there exists a credible disagreement between the parties about their intent to be married. If, however, there exists no credible disagreement, then the factors are irrelevant.

¶81 Here, the record makes clear that there exists no credible disagreement about Neale and Hogsett's mutual intent to be married—a fact the majority acknowledges when it says that the court "found 'credible evidence that [Neale] did not believe that she was married' to Hogsett." Maj. op. ¶ 17. In point of fact, Neale testified that she never believed in marriage, and Hogsett admitted that she was aware of this belief throughout the duration of her relationship with Neale, testifying that "[Neale] doesn't believe in marriage because she believes that there's something, a higher power than that." Although many of the factors under the now-superseded *Lucero* standard weighed in favor of finding a common law marriage, the district court correctly concluded that no common law marriage existed because it found credible Neale's assertion that she "never asked to be married, . . . doesn't believe in marriage[, and doesn't] believe that two people can be in . . . love their whole life [sic]."

¶82 In my view, the district court's finding should obviate any further inquiry into whether Neale and Hogsett entered into a common law marriage. This is particularly true considering that the determination of parties' intent to marry "relies on the factfinder's credibility determinations and weighing of the

evidence." Maj. op. at ¶ 50. The district court made those credibility determinations, weighed the evidence, and found no mutual intent to be married. That absence of mutual intent to be married is dispositive. The inquiry should end. The majority, however, presses on.

¶83 The structure of the majority's analysis, itself, speaks against applying the factors on these facts. After finding evidence of an express agreement to marry "inconclusive," the majority evaluates evidence under several of the new factors. *Id.* at ¶¶ 63–67. This exercise yields little: only the undisputed conclusion that "both parties were in a committed, intimate relationship for thirteen years." *Id.* at ¶ 68. Then, circling back to the beginning and "[r]eturning to the core query," the majority re-emphasizes that "there must be mutual intent to enter a marital relationship." *Id.* Then, relying *not on the factors* but on Neale's testimony that she did not believe in marriage and Hogsett's testimony acknowledging Neale's views, the majority ultimately explains that, "while Hogsett may have intended to be married, there is insufficient evidence to conclude such intent was mutual, despite both parties' clear commitment to each other and other indicia of a marital relationship." *Id.* at ¶ 69. Therefore, the majority finds that Neale and Hogsett did not enter into a common law marriage. *Id.*

¶84 To announce new factors on these facts—which, as the majority demonstrates, do not require application of the factors—violates the cardinal

principle of judicial restraint. To be clear, I take no issue with the new factors announced by the majority, themselves, and I appreciate the majority's desire to update the test for establishing common law marriage. But what I do take issue with is that the majority's announcement of those factors *on these facts* obscures and confuses the purpose of applying common law marriage factors: to help a court determine whether the parties intended to be married. It is a futile exercise to apply factors to determine such intent when every party—including the party who has the burden of proving common law marriage—agrees that the intent to be married never existed. I worry that the majority needlessly directs courts to engage in a factor-based analysis, even in cases with—as here—an undisputed lack of "mutual consent or agreement of the couple to enter the legal and social institution of marriage." *Id.* at ¶ 3.

¶85 I also worry that the majority potentially broadens the definition of marriage in a way that will cause additional confusion. The majority equates intent to enter into a marital relationship with intent to be together "in a committed, intimate relationship of mutual support and obligation." *Id.* But while a marital relationship and a "committed, intimate relationship of mutual support and obligation" certainly overlap, they are not necessarily the same. In fact, relationships in which one or both of the parties do not intend to be married could potentially satisfy this definition of marriage. The majority, itself, acknowledges

as much. Indeed, while reasoning that Neale and Hogsett's cohabitation, purchase of a home, and joint financial accounts "tend[] to demonstrate" a "committed, intimate relationship of mutual support and obligation," the majority ultimately concludes that these factors "[are] *not necessarily dispositive* proof of a marital relationship," *id.* at ¶ 65 (emphasis added), and finds that the parties did not enter into a common law marriage. *Id.* at ¶ 69.

¶86 In addition to causing confusion, further defining marriage is also unnecessary. As the Supreme Court of New Jersey recognized, when partners announce they are married, no further explanation is necessary, because "[w]hen you say that you are married . . . everyone can instantly relate to you and your relationship [and others] don't have to wonder what kind of relationship it is or how to refer to it or how much to respect it." *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006). In other words, marriage is marriage.

¶87 In sum, I do not think it appropriate for the majority to announce new factors for establishing common law marriage on these facts. Neale and Hogsett's relationship indisputably did not satisfy the fundamental requirement of mutual intent, and I worry that the factors announced by the majority as well as the potential broadening of the definition of marriage will only further confuse the already complex concept of common law marriage. Because I agree, however,

with the majority's ultimate conclusion that Neale and Hogsett did not enter into a common law marriage, I respectfully concur in the judgment only.

JUSTICE SAMOUR, concurring in the judgment only.

¶88 For the reasons articulated in my dissenting opinion in the companion case of *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __ (Samour, J., dissenting), I respectfully concur in the judgment only. I recognize that *Obergefell v. Hodges*, 576 U.S. 644 (2015), requires us to treat our state's ban on same-sex marriage during the relevant timeframe as though it never existed. But even so, and even assuming, alternatively, *Obergefell*'s retroactive application, I would conclude that Edi L. Hogsett and Marcia E. Neale could not have mutually intended or agreed to enter into the *legal* relationship of marriage in Colorado between December 2002 and November 2014. *See LaFleur*, ¶ 76. Because *Obergefell* was not announced until June 2015, Hogsett and Neale could not have intended or agreed to be in a legally sanctioned marriage. As a matter of law, neither *Obergefell*'s effect on our state law nor *Obergefell*'s retroactive application can transform Hogsett and Neale's mutual intent and agreement at the time they exchanged rings in 2002.

¶89 Only after *Obergefell* rendered our state's prohibition on same-sex marriage unconstitutional in June 2015 could Hogsett and Neale have mutually intended and agreed to enter into the *legal* relationship of marriage.[1] *See LaFleur*, ¶ 77. And,

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[1] The majority notes in *In re Marriage of LaFleur & Pyfer*, 2021 CO 3, __ P.3d __, that in 2014, eight months before *Obergefell*, two Tenth Circuit cases out of Utah and

because common law marriage in Colorado requires mutual intent and agreement to enter into the *legal* relationship of marriage, I would hold that, as a matter of law, Hogsett and Neale could not have entered into a common law marriage during the relevant timeframe. *See id.* at ¶¶ 76–77.

¶90 I would therefore affirm the court of appeals' judgment on different grounds than the majority. Accordingly, I concur in the judgment only.

Oklahoma had effectively declared Colorado's prohibition on same-sex marriage unconstitutional. *Id.* at ¶ 30 (indicating that "Colorado began to recognize same-sex marriages" in October 2014, just days before Hogsett and Neale ended their relationship). Be that as it may, given the way we framed the question we agreed to review in *LaFleur*, I assume for purposes of this dissent that Colorado's prohibition on same-sex marriage became unconstitutional when *Obergefell* was penned in June 2015.

ADVANCE SHEET HEADNOTE
January 11, 2021

2021 CO 3

No. 19SC1004, *In re Marriage of LaFleur & Pyfer*—Common Law Marriage—Void Ab Initio—Retroactivity.

The supreme court reviews whether a common law same-sex marriage entered in Colorado may be recognized as predating Colorado's recognition of formal same-sex marriages. The court holds that state law restrictions on same-sex marriage deemed unconstitutional in *Obergefell v. Hodges*, 576 U.S. 664 (2015), cannot serve as an impediment to the recognition of a same-sex marriage predating that decision. The court therefore affirms the district court's conclusion that the parties here were not, as a matter of law, barred from entering into a common law marriage. The court also affirms the district court's determination that the parties in fact entered into a common law marriage in 2003. The court reverses the district court's division of property and award of spousal maintenance, however, and remands with instructions to make further findings in accordance with sections 14-10-113 and -114, C.R.S. (2020).

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 3

Supreme Court Case No. 19SC1004
C.A.R. 50 Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA2252
Jefferson County District Court Case No. 18DR30057
Honorable Margie L. Enquist, Judge

In re the Marriage of

Petitioner:

Dean LaFleur,

v.

Respondent:

Timothy Pyfer.

Judgment Affirmed in Part and Reversed in Part
en banc
January 11, 2021

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.
CHIEF JUSTICE BOATRIGHT concurs in part and concurs in the judgment.
JUSTICE SAMOUR dissents.

¶1 In 2018, Respondent Timothy Pyfer filed a dissolution of marriage petition, alleging that he had entered into a common law marriage with his same-sex partner, Petitioner Dean LaFleur, when they held a ceremony before family and friends on November 30, 2003, and exchanged vows and rings. LaFleur countered that Pyfer's claim was legally impossible because at the time of the 2003 ceremony, Colorado did not recognize same-sex marriages. In the interim, however, the U.S. Supreme Court held that same-sex couples may exercise the fundamental right to marry and struck down state laws that excluded same-sex couples from civil marriage as unconstitutional. *Obergefell v. Hodges*, 576 U.S. 644, 674–75 (2015). We accepted jurisdiction over this case under C.A.R. 50 to address whether, in light of *Obergefell*, a same-sex couple may prove a common law marriage entered in Colorado *before* the state recognized same-sex couples' fundamental right to marry.

¶2 This case is one of three we announce today addressing common law marriage in Colorado. *See In re Marriage of Hogsett & Neale*, 2021 CO 1, __ P.3d __; *In re Estate of Yudkin*, 2021 CO 2, __ P.3d __. In *Hogsett,* we refine the test for establishing a common law marriage first articulated in *People v. Lucero*, 747 P.2d 660 (Colo. 1987), to reflect changed circumstances since that decision, including the recognition of same-sex marriage. Like this case, *Hogsett* involves a same-sex relationship predating *Obergefell*. But this case raises a threshold question that no

party contested in *Hogsett*: whether a same-sex couple may be deemed to have entered into a common law marriage pre-*Obergefell*.[1]

¶3 We hold that a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry. We reach this conclusion for two reasons.

¶4 First, as stated, *Obergefell* struck down state laws that excluded same-sex couples from civil marriage as unconstitutional. 576 U.S. at 674–75. The general rule is that a statute that is declared unconstitutional is void ab initio; it is inoperative as if it had never been enacted. Consequently, state law restrictions held unconstitutional in *Obergefell* cannot serve as an impediment to the recognition of a same-sex marriage predating that decision. Indeed, recognition of a same-sex marriage is the remedy for a state's earlier violation of the couple's constitutional rights. Moreover, because *Obergefell* held that states must allow same-sex couples to enter marriages on the same terms and conditions as different-sex couples, and because Colorado recognizes common law marriages between

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[1] As discussed in this opinion, *infra* ¶¶ 30–31, Colorado recognized same-sex marriage approximately eight months before *Obergefell* did so nationwide. We nevertheless use the phrase "pre-*Obergefell*" in this opinion as shorthand to refer generally to the time predating states' (including Colorado's) recognition of same-sex couples' fundamental right to marry.

different-sex couples, it therefore must also recognize such marriages between same-sex couples—including those entered into pre-*Obergefell*. Of course, to be recognized as a bona fide common law marriage, the relationship must satisfy the updated test we articulate today in *Hogsett*. ¶ 49 ("[A] common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation.").

¶5 Second, to the extent *Obergefell* did not merely recognize an existing fundamental right to marry but announced a new rule of federal law, we conclude that the decision applies retroactively to marriages (including common law marriages) predating that decision. Under the Court's retroactivity jurisprudence in the civil law context, when the Supreme Court "applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993). Because the *Obergefell* Court applied its rule of federal law to the litigants before it, we conclude that the Court's holding in

Obergefell that restrictions on same-sex marriages are unconstitutional must be given retroactive effect.

¶6 Accordingly, we agree with the district court that the parties here were not, as a matter of law, barred from entering into a common law marriage in 2003. Applying the refined test announced today in *Hogsett* for determining whether a couple has entered into a common law marriage, we uphold the district court's determination that the parties entered into a common law marriage. However, we reverse the court's division of property and award of spousal maintenance and remand for further findings in accordance with sections 14-10-113 and -114, C.R.S. (2020).

I. Facts and Procedural History

¶7 On January 19, 2018, Timothy Pyfer filed a dissolution of marriage petition, alleging that he and his same-sex partner, Dean LaFleur, had entered into a common law marriage on November 30, 2003, when they held a ceremony.

¶8 LaFleur argued that, as a matter of law, the couple could not have entered into a common law marriage because "same sex marriages were not recognized or protected under Colorado law" at that time. LaFleur further argued that, as a matter of fact, he and Pyfer did not mutually agree to enter into a common law marriage, as required under the test articulated in *Lucero*.

¶9 Following an evidentiary hearing during which the court heard testimony from the parties and several of their family members and friends, the district court held that Pyfer and LaFleur entered into a common law marriage on November 30, 2003, the date of the ceremony. The court acknowledged that same-sex marriage was not recognized in Colorado until at least 2014. It reasoned, however, that same-sex couples' ability to marry was eventually "recognized as a fundamental right that could not be denied" and that this right was not "suddenly created" but "existed prior to 2014." Thus, the court concluded, Pyfer and LaFleur could enter into a common law marriage before Colorado recognized same-sex couples' right to marry.

¶10 The court acknowledged that it had to decide "whether one can exhibit the intent to be married [for purposes of establishing a common law marriage] when such a relationship is not cognizable under the law." The court then weighed the evidence from the hearing to determine the parties' intent to enter a marital relationship. It found that Pyfer proposed marriage to LaFleur and that Pyfer intended to be married. LaFleur accepted the proposal in front of Pyfer's sister, and the parties later participated in a ceremony in which they exchanged vows and rings before family and friends. The court noted that this ceremony "certainly appear[ed] to be a wedding." The court highlighted photographs in evidence showing that "[t]here were rings, tuxes, attendance [by friends and family], [a]

toast, vows, [and] a reverend," and it observed that Pyfer and LaFleur signed a document titled "Certificate of Holy Union." Moreover, after the ceremony, Pyfer "held himself out as married to family and friends" and listed LaFleur as his spouse on an HR form in 2016 and on a vehicle in 2017. LaFleur financially supported Pyfer and they cohabitated, sharing the same room until "the last couple of years" before the dissolution petition was filed.

¶11 LaFleur testified that he never intended to be married and would not have gone through with the ceremony had he thought it would be legally binding with respect to his assets. However, the court found that LaFleur knew that Pyfer was listing him as a spouse on documents and was telling his family and friends they were married, and there was no evidence that LaFleur ever confronted Pyfer about doing so.

¶12 The court acknowledged that neither Pyfer nor LaFleur "really wore their wedding rings"; that they "did not share bank accounts"; that LaFleur's family "denied that the parties were married" and "minimized the impact of the ceremony"; and that LaFleur did not "tell his co-workers he was married," although the court also heard testimony that LaFleur worked in an environment that was "not welcoming" of same-sex couples.

¶13 After weighing all of this evidence, the court ultimately found that, even if he "did not want all of the legal obligations that come with a marriage," LaFleur

"acquiesced when he accepted [Pyfer's marriage] proposal and went through with their ceremony" and "intended to be joined with [Pyfer] for the rest of his life" on the date of the ceremony. The court therefore concluded that Pyfer and LaFleur entered into a common law marriage on November 30, 2003.

¶14 The court then proceeded with the dissolution proceedings and entered a dissolution decree and permanent orders. The court awarded the entirety of the marital value of the home to LaFleur. It awarded $50,000 of LaFleur's Roth IRA to Pyfer and ordered each party to pay the debts accrued in his name. The court acknowledged that the spousal maintenance guidelines provided for an award of $734 per month for seven and a half years. However, it deviated downward from the guidelines and ordered $700 per month for four years, reasoning that Pyfer "lived rent-free" with LaFleur and, toward the end of the relationship, was engaged in an extramarital affair.

¶15 Pyfer appealed, arguing that the division of property was inequitable and not supported by sufficient findings; that the maintenance award was an unjustified downward deviation from the guidelines; and that both rulings constituted abuses of discretion. LaFleur cross-appealed, challenging the court's ruling that the parties had entered into a common law marriage.

¶16 After this court granted certiorari to review *Hogsett* and *Yudkin*, LaFleur petitioned this court under C.A.R. 50 to review this case along with the other two.

We accepted jurisdiction and directed the parties to focus their oral argument on the question of whether a common law same-sex marriage entered in Colorado may be recognized as predating Colorado's recognition of formal same-sex marriages.

II. Timeliness of Cross-Appeal

¶17 As a threshold matter, Pyfer challenges LaFleur's notice of cross-appeal as untimely filed and asserts that this court has no jurisdiction to consider the question LaFleur raises regarding the retroactive effect of *Obergefell*. Pyfer argues that the district court issued a final judgment concerning the existence of a common law marriage on July 31, 2018, and that under C.A.R. 4(a), LaFleur had forty-nine days from the entry of that judgment to file a notice of appeal.

¶18 We have previously characterized a final judgment for purposes of an appeal "as one that ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceedings." *People v. Guatney*, 214 P.3d 1049, 1051 (Colo. 2009). Here, after entering the order concluding that Pyfer and LaFleur were common law married, the district court retained jurisdiction over the case and entered a decree of dissolution and permanent orders. The decree entered on October 15, 2018, was a final judgment ending the action. Pyfer filed his notice of appeal on November 30, 2018, which was within forty-nine days of

the entry of that order, and LaFleur filed his notice of cross-appeal fourteen days later. *See* C.A.R. 4(a) ("If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal is filed . . . ."). Accordingly, LaFleur's cross-appeal was timely, and we may address his claim.

III. Analysis

¶19 We begin by explaining the development of marriage laws in Colorado, detailing the history of race- and gender-based restrictions on marriage. We then address the question of whether a court may recognize a common law same-sex marriage entered in Colorado before *Obergefell*. Applying the general rule that an unconstitutional statute is void ab initio, we conclude that state law restrictions on same-sex marriage cannot serve as an impediment to the recognition of a same-sex marriage predating *Obergefell*. Moreover, we conclude that, under *Harper*, *Obergefell* applies retroactively to marriages—including common law marriages—predating that decision.

¶20 Having concluded that Pyfer and LaFleur were not, as a matter of law, barred from entering into a common law marriage, we apply the refined framework announced in *Hogsett* and conclude that the parties did in fact enter into a common law marriage. Finally, we review the division of property and award of spousal maintenance and determine that the district court abused its

discretion in failing to follow the proper procedure or make appropriate findings as required by sections 14-10-113 and -114.

A. Development of Marriage Laws in Colorado

¶21 Colorado is one of a minority of states that still recognizes common law marriages. As early as 1897, the court of appeals explained that "in this state[,] a marriage simply by agreement of the parties, followed by cohabitation as husband and wife, . . . may be valid and binding." *Taylor v. Taylor*, 50 P. 1049, 1049 (Colo. App. 1897).

¶22 As with statutory marriage, Colorado historically imposed restrictions on common law marriage that were later deemed to be unconstitutional. Until the mid-twentieth century, for example, common law marriage in Colorado was subject to anti-miscegenation laws. In *Jackson v. City & County of Denver*, 124 P.2d 240, 241 (Colo. 1942), an interracial couple who "liv[ed] together as though married" were convicted of vagrancy, which was defined under the Denver municipal code as "lead[ing] an . . . immoral . . . course of life." (Omissions in original.) The couple challenged their convictions, arguing on appeal that they were not vagrants because they had entered into a common law marriage. *Id.* This court rejected that argument, relying on a statute that had been in force from Colorado's territorial days providing that "[a]ll marriages between negroes or mulattoes, of either sex, and white persons, are . . . absolutely void." *Id.* We

reasoned that the "defendants could not, either ceremonially *or by common law*, be married," and therefore "they were, if living together, leading 'an immoral course of life.'" *Id.* (emphasis added).[2]

¶23 Fifteen years later, in 1957, the Colorado legislature repealed the statute imposing racial restrictions on ceremonial and common law marriage. Ch. 124, sec. 1, § 90-1-2, 1957 Colo. Sess. Laws 334, 334. And in *Loving v. Virginia*, 388 U.S. 1 (1967), the U.S. Supreme Court deemed such anti-miscegenation laws unconstitutional. There, the Court held that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival," *id.* at 12 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)), and that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause," *id.*

¶24 Although this court was never asked to determine whether *Loving* applied to marriages predating that decision, courts presented with the issue either expressly held that the ruling applied retroactively to both ceremonial and

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[2] Though the couple challenged the statute on equal protection grounds, we rejected their argument. *Jackson*, 124 P.2d at 241 (concluding that the statute did not discriminate on the basis of race because "[t]he statute applies to both white and black" persons). Today, we disavow our decision in *Jackson* and our failure in that case to recognize the racism animating Colorado's anti-miscegenation statute.

common law marriage, or assumed as much. *See, e.g.*, *Dick v. Reaves*, 434 P.2d 295, 298 (Okla. 1967) (holding that, in accordance with the U.S. Supreme Court's "clear mandate" in *Loving*, Oklahoma's anti-miscegenation laws violated equal protection and due process, and an interracial couple's 1939 marriage was therefore valid); *see also Prudential Ins. Co. of Am. v. Lewis*, 306 F. Supp. 1177, 1183–84 (N.D. Ala. 1969) (holding that an interracial couple could validly enter into a common law marriage where one spouse died prior to the decision in *Loving*); *Vetrano v. Gardner*, 290 F. Supp. 200, 203–06 (N.D. Miss. 1968) (assuming, without expressly deciding, that *Loving* operated retroactively, but nonetheless finding that the interracial couple in that case did not enter into a common law marriage before Mississippi abolished common law marriage in 1956).

¶25 Just as interracial marriages were prohibited in Colorado, so too were marriages between same-sex couples, though that legal history is more recent. In the early 1970s, after the Minnesota Supreme Court ruled that a state statute restricting marriage to different-sex couples was constitutional, *see Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), the U.S. Supreme Court dismissed the appeal of the case "for want of a substantial federal question," *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (mem.).

¶26 At that time, Colorado statutes did not expressly restrict marriage to different-sex couples, which led to a dispute about whether Colorado would

recognize marriages between same-sex couples. In 1975, three years after the Supreme Court dismissed *Baker*, Clela Rorex, the Boulder County Clerk, issued the nation's first marriage license to a same-sex couple. *County Clerk Changes History*, PBS Independent Lens, (June 14, 2015), https://www.pbs.org/independentlens/videos/county-clerk-changes-history/ [https://perma.cc/9C7X-ZTRE]. The Boulder County District Attorney's office advised Rorex that Colorado law did not require marriage licenses to be between a man and a woman, and she issued several marriage licenses to same-sex couples until the Colorado Attorney General's office directed her to stop. *Id.*

¶27 The issue of same-sex marriage re-emerged in 1993, when the Hawaii Supreme Court ruled that the state's statutory ban on such marriages was presumed unconstitutional under Hawaii's equal protection clause. *Baehr v. Lewin*, 852 P.2d 44, 67–68 (Haw. 1993). The *Baehr* decision, which signaled the possibility that other jurisdictions might have to recognize same-sex marriages entered in Hawaii,[3] prompted Congress to pass the Defense of Marriage Act, Pub.

[3] Ultimately, Hawaii voters approved an amendment to the state constitution empowering the legislature to "reserve marriage to opposite-sex couples." Haw. Const. art. I, § 23. The Hawaii Supreme Court subsequently concluded that the state constitutional amendment rendered the challenge to the marriage statute moot. *Baehr v. Miike*, No. 91-1394-05, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999).

L. No. 104-199, 110 Stat. 2419 ("DOMA"). DOMA defined marriage as "a legal union between one man and one woman" for all federal purposes, 1 U.S.C. § 7, *invalidated by United States v. Windsor*, 570 U.S. 744, 775 (2013), and allowed states to refuse to give full faith and credit to same-sex marriages lawfully entered in other states, 28 U.S.C. § 1738C, *rendered obsolete by Obergefell*, 576 U.S. at 674–75. In the years that followed, most states adopted statutes and state constitutional amendments both prohibiting same-sex marriage within state borders and barring recognition of same-sex marriages entered elsewhere. *See* Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, at xi (2012) ("Within a decade [of *Baehr*], more than thirty-five states . . . passed laws to 'defend' traditional marriage."). In 2000, Colorado similarly adopted a statute restricting marriage to "one man and one woman." § 14-2-104(1)(b), C.R.S. (2000); *see also id.* -104(2) (providing that a marriage between two persons of the same sex shall not be recognized regardless of where contracted).

¶28 Then, in a groundbreaking ruling in 2003, the Massachusetts Supreme Judicial Court held that same-sex marriage bans were unconstitutional under that state's constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) ("The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who

wish to marry. We conclude that it may not."). In the years after *Goodridge*, a handful of state supreme courts reached similar conclusions under their respective constitutions. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, Cal. Const. art. I, § 7.5; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). In Colorado, by contrast, voters approved a 2006 constitutional amendment declaring that "[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state." Colo. Const. art. II, § 31.

¶29 Although Colorado later passed legislation granting certain legal protections to same-sex couples through designated beneficiary agreements, § 15-22-102, C.R.S. (2009), and civil unions, § 14-15-102, C.R.S. (2013), these alternatives fell short of providing same-sex couples access to marriage on the same terms as different-sex couples.

¶30 In 2014, in companion cases from Utah and Oklahoma, the Tenth Circuit struck down those states' same-sex marriage bans under the Fourteenth Amendment. *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014) ("[W]e hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that [Utah's same-sex marriage bans] do

not withstand constitutional scrutiny."); *Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014) ("[Oklahoma] may not, consistent with the United States Constitution, prohibit same-sex marriages."). Construing the Tenth Circuit's rulings to mean that Colorado's prohibitions on same-sex marriage were likewise unconstitutional, a state and federal district court in Colorado each entered orders enjoining enforcement and application of those laws. *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *1 (D. Colo. July 23, 2014); *Brinkman v. Long*, Nos. 13-CV-32572, 14-CV-30731, 2014 WL 3408024, at *15–21 (Colo. Dist. Ct. July 9, 2014). These courts' rulings were stayed pending petitions for U.S. Supreme Court review of *Kitchen* and *Bishop*. When the Court later denied the petitions on October 6, 2014, *Kitchen*, 574 U.S. 874 (2014) (No. 14-124); *Bishop*, 574 U.S. 875 (2014) (No. 14-136), the Tenth Circuit lifted its stay of the *Burns* preliminary injunction, the district court made its injunction permanent in *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 5312541, at *1 (D. Colo. Oct. 17, 2014), and Colorado began to recognize same-sex marriages.

¶31 Eight months later, the U.S. Supreme Court handed down its decision in *Obergefell*. Reasoning that the fundamental right to marry "appl[ies] with equal force to same-sex couples," 576 U.S. at 665, the Court held that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment[,] couples of the same[]sex may not be deprived of that right and that liberty," *id.* at 675. In so

doing, the Court expressly overruled its earlier decision in *Baker*, *id.*, and held that it was unconstitutional for states "to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," *id.* at 680, or "to refuse to recognize a lawful same-sex marriage performed in another [s]tate on the ground of its same-sex character," *id.* at 681. Notably, the Court held that the various state laws challenged by the litigants in that case[4] were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 675–76.

B. Recognition of a Common Law Same-Sex Marriage Before *Obergefell*

¶32 The question raised in this case is whether a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry. LaFleur argues that he and Pyfer could not have entered into a common law marriage predating *Obergefell* because (1) the parties could not, as a matter of law, have formed the requisite intent to enter into a common law marriage when same-sex marriage was not recognized as lawful; and (2) *Obergefell* did not have retroactive effect. We disagree.

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[4] *Obergefell* involved a collection of cases that originated in Michigan, Kentucky, Ohio, and Tennessee and were brought by fourteen same-sex couples and two men whose same-sex partners were deceased. 576 U.S. at 652–53.

1. *Obergefell* Rendered Colorado's Restrictions on Same-Sex Marriage Void Ab Initio

¶33 *Obergefell* struck down state laws that excluded same-sex couples from civil marriage as unconstitutional. 576 U.S. at 674–75. The longstanding general rule is that a statute that is declared unconstitutional is void ab initio; it is inoperative as if it had never been enacted. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; . . . it is, in legal contemplation, as inoperative as though it had never been passed."); *Coulter v. Routt Cnty. Comm'rs*, 11 P. 199, 203 (Colo. 1886) ("When a statute is adjudged to be unconstitutional, it is as if it never had been." (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 188 (2d ed. 1871))); *see also* 16A Am. Jur. 2d *Constitutional Law* § 194 (2020) ("Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio." (footnotes omitted)).

¶34 Under this principle, state law restrictions on same-sex marriage—such as Colo. Const. art. II, § 31, and section 14-2-104(1)(b) and -104(2)—deemed unconstitutional in *Obergefell,* cannot stand as an impediment to the recognition of a same-sex marriage predating that decision. Recognition of a same-sex marriage

is the remedy for the state's earlier violation of the couple's constitutional rights; the failure to recognize such a marriage effectively continues to enforce the very laws deemed invalid. By logical extension, because *Obergefell* held that states must allow same-sex couples to enter marriages on the "same terms and conditions as opposite-sex couples," *Obergefell*, 576 U.S. at 676, and because Colorado recognizes *common law* marriages between opposite sex-couples, it must also recognize such marriages between same-sex couples—including those entered into pre-*Obergefell*.

¶35 We find *In re Estate of Carter*, 159 A.3d 970 (Pa. Super. Ct. 2017), instructive on this point. There, a Pennsylvania appellate court reversed a lower court's ruling that it was "legally impossible" for a same-sex couple to prove a common law marriage where the state abolished common law marriages in 2005 and same-sex marriages were not recognized until May 2014. *Id.* at 977. The court observed that the premise of the lower court's analysis—that the state's now-invalidated exclusionary marriage law was legally binding during the time the couple might otherwise have entered into a common law marriage—"misreads the fundamental import" of *Obergefell*. *Id.* It concluded that "a court today may not rely on the now-invalidated provisions of the Marriage Law to deny th[e] constitutional reality" that "same-sex couples have precisely the same capacity to enter marriage contracts as do opposite-sex couples," *id.*, and held that because different-sex

couples may establish a common law marriage predating 2005, same-sex couples must also have that right, *id.* at 977–78.

¶36 For the same reason, we disagree with the South Carolina Court of Appeals' decision in *Swicegood v. Thompson*, 847 S.E.2d 104, 112 (S.C. App. 2020), which held that the state's marriage statute, although invalidated by *Obergefell*, nevertheless "operated as an impediment to the formation of a common-law marriage between same-sex couples *when it was still in force*." (Emphasis added.) This view mistakenly assumes that the unconstitutional law, although void, was ever in force. "[W]hat a court does with regard to an unconstitutional law is simply to ignore it. It decides the case '*disregarding the [unconstitutional] law*,' because a law repugnant to the Constitution 'is void, and is as no law.'" *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) (alteration in original) (citations omitted) (first quoting *Marbury v. Madison*, 5 U.S. 137, 178 (1803); and then quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)). To treat a law repugnant to the Constitution as a barrier to forming an agreement to be married fails to disregard that unconstitutional law; indeed, it resurrects it. Put differently, to hold that a same-sex couple may enter a marriage only *after Obergefell* wholly disregards the effect of that decision.

¶37 Similarly, we reject LaFleur's contention that, as a matter of law, it was impossible for a same-sex couple to form the requisite intent to enter into a

common law marriage before Colorado recognized same-sex couples' fundamental right to marry.

¶38 As we hold today in *Hogsett*, to enter the legal and social institution of marriage, a couple must mutually agree "to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation." *Hogsett*, ¶ 3. That the marital relationship was not recognized at the time does not change the nature of the relationship itself. An analogy to anti-miscegenation laws is instructive. LaFleur's argument suggests that an interracial couple lacked the capacity, as a matter of law, to enter into a marriage pre-*Loving* because the state in which they resided did not recognize the relationship. But, as noted above, courts rejected such logic in the wake of the *Loving* decision. *See, e.g.*, *Reaves*, 434 P.2d at 298; *Lewis*, 306 F. Supp. at 1183–84. In the wake of *Obergefell*, we do the same for same-sex couples.

¶39 To the extent that LaFleur contends that he did not anticipate that his relationship could carry legal consequences, we are unpersuaded. Many couples may not appreciate or intend the legal consequences of entering into a marital relationship, or anticipate the ways in which those consequences may shift over

time as the law evolves.[5] But a couple need not intend the *legal consequences* of a marital relationship in order to intend to enter into the relationship itself. *See Hogsett*, ¶ 54 ("Parties asserting a common law marriage need not prove that they had detailed knowledge of and intent to obtain all the legal consequences that attach to marriage."). Instead, the focus is on whether the parties intended to enter into a relationship that is *marital in nature*. *See Hogsett*, ¶ 49 ("The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation."). The myriad rights, benefits, and responsibilities

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[5] We disagree with LaFleur's attempt to paint lawful same-sex marriage as an unthinkable turn of events at the time of the parties' ceremony, given that the *Goodridge* opinion that struck down Massachusetts's same-sex marriage ban had been announced just two weeks earlier and was widely reported. *See, e.g.*, *Gay-Marriage Ruling Hits Home – Both Sides See Extended Fight over Issue in Colorado*, Denver Post, Nov. 20, 2003, at B-01, NewsBank (explaining that "[v]olleys were already being fired between pro- and anti-gay rights factions [in Colorado], fewer than 24 hours after the controversial ruling by the Massachusetts Supreme Court" and speculating that "the Massachusetts decision will serve as a launching pad" for the invalidation of similar state and federal laws); Peggy Lowe & M.E. Sprengelmeyer, *State Split on Gay Ruling – Massachusetts Court Leaves Some Happy, Others Steaming*, Rocky Mountain News, Nov. 19, 2003, at 5A, NewsBank; David Von Drehle, *Gay Marriage is a Right, Massachusetts Court Rules*, Wash. Post (Nov. 19, 2003), https://www.washingtonpost.com/archive/politics/2003/11/19/gay-marriage-is-a-right-massachusetts-court-rules/98368878-a113-4710-9813-7c98ac5630d9/ [https://perma.cc/QM7Q-SV27]; Elizabeth Mehren, *Mass. High Court Backs Gay Marriage*, L.A. Times (Nov. 19, 2003), https://www.latimes.com/archives/la-xpm-2003-nov-19-na-marriage19-story.html [https://perma.cc/BPG8-E9TR].

bestowed on the marital relationship by the state reflect the government's and society's pledge to support and protect the union, but they are incidental to the marital relationship itself. *See Obergefell*, 576 U.S. at 669–70. Thus, the fact that a couple did not anticipate or intend the legal consequences of entering a marital relationship does not render their intent to enter into such a relationship legally impossible.

2. Any New Rule Announced in *Obergefell* Applies Retroactively

¶40 As a general rule, judicial decisions operate retroactively. Courts apply settled precedent and legal principles to the disputes before them, and litigants typically have no basis to argue that they are exempt from already-decided legal rules. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991). It is only when the law changes in some respect that the question of nonretroactivity arises—that is, whether the court should apply the old rule or the new one. *Id.*

¶41 In *Obergefell*, the Supreme Court did not purport to announce a new right; instead, it declared that the long-recognized fundamental right to marry could "[n]o longer . . . be denied" to same-sex couples. 576 U.S. at 675. Thus, it is questionable whether *Obergefell* calls for nonretroactivity analysis. However, even assuming *Obergefell* did not merely recognize an existing fundamental right to marry but instead announced a new rule of federal law, we conclude that the

decision applies retroactively to marriages (including common law marriages) predating that decision.

¶42 Whether *Obergefell* applies retroactively is a question of federal law. The U.S. Supreme Court has recognized that state courts enjoy freedom "to limit the retroactive operation of their own interpretations of state law," *Harper*, 509 U.S. at 100, but the "question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise," *Beam Distilling Co.*, 501 U.S. at 535.[6]

¶43 Though the U.S. Supreme Court's framework for assessing the retroactive effect of its decisions has evolved over the past thirty years, *see Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971); *Beam Distilling Co.*, 501 U.S. at 535–39, under the Court's more recent case law, it is clear that "[w]hen [the U.S. Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling

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[6] The parties briefed this case under the standards governing retroactivity that this court identified in *Marinez v. Industrial Commission of the State of Colorado*, 746 P.2d 552, 556 (Colo. 1987) (applying the factors from the U.S. Supreme Court decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). However, *Marinez* involved a *state* court ruling. We have relied on the *Chevron Oil* factors in determining whether to apply a state court ruling retroactively, *see Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 112 n.7 (Colo. 1992) (continuing "to adhere to the *Chevron* analysis in resolving the issue of retroactive or prospective application of [a] state judicial decision"). But this case concerns retroactive application of a question of *federal* constitutional law. We are therefore bound by the U.S. Supreme Court's case law. *See Beam Distilling Co.*, 501 U.S. at 544 (deviating from the *Chevron Oil* retroactivity analysis).

interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and *as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule*," *Harper*, 509 U.S. at 97 (emphasis added).[7]

¶44 In *Obergefell*, the Supreme Court did not reserve the question of whether the rule of law announced in the case—that the Constitution entitles same-sex couples to civil marriage "on the same terms and conditions as opposite-sex couples"—operated only prospectively. *See* 576 U.S. at 674–76, 679–81. Rather, the Court applied the ruling to the parties in the controversy before it. *Id.*

¶45 Thus, under *Harper*, we conclude that *Obergefell*'s holding that restrictions on same-sex marriages are unconstitutional "must be given full retroactive

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[7] Though this approach "has been attacked for its failure to take account of reliance on" now-changed law, *Beam Distilling Co.*, 501 U.S. at 536, it comports with the declaratory theory of law that judges "find the law" rather than "make it" or amend it, *id.* at 535–36; *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (observing that judges "make" the law only insofar as they "find" it, "discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be"); Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin and What it Might*, 95 Cal. L. Rev. 1677, 1680–81 (2007) ("[T]he Court has no power to make law; law's source is never the Court. An overruled decision is thus simply mistaken, and once the overruling court recognizes the mistake, it must also conclude that the law has always been what it is now declared to be.").

effect . . . as to all events, regardless of whether such events predate or postdate" the decision. *Harper*, 509 U.S. at 97. Because a different-sex couple may prove a common law marriage in Colorado predating 2014, a same-sex couple must also have that opportunity. Accordingly, courts may recognize a common law same-sex marriage entered in Colorado before the state acknowledged the right of same-sex couples to marry.

¶46 Virtually every other jurisdiction to consider this question thus far has held that *Obergefell* applies retroactively to allow recognition of a common law same-sex marriage predating the decision. *See, e.g.*, *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016) (concluding that under the framework set forth in *Beam Distilling Co.* and *Harper*, *Obergefell* applied retroactively); *Gill v. Nostrand*, 206 A.3d 869, 874–75 (D.C. 2019) ("We now expressly recognize, as the trial court did and as *Obergefell* [and other authorities] require, that a same-sex couple may enter into common-law marriage in the District of Columbia and that this rule applies retroactively."); *In re J.K.N.A.*, 454 P.3d 642, 649 (Mont. 2019) ("*Obergefell*'s holding that state prohibitions against same-sex marriage violate the United States

Constitution operates retroactively in relation to [a party's] claim that a common law marriage existed with [her same-sex partner] . . . .").[8]

¶47 One deviation from this trend is the *Swicegood* decision discussed above. Notably, the *Swicegood* court held (consistent with *Ranolls*, *Gill*, and *In re J.K.N.A.*) that its review of U.S. Supreme Court case law "compels the conclusion [that] *Obergefell* must be applied retroactively." 847 S.E.2d at 110. And yet the court reasoned that the state's invalidated marriage statute was "'a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity,' which formed an 'independent legal basis' for" denying relief. *Id.* at 112 (quoting *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 756 (1995) (majority opinion)).

¶48 The *Swicegood* court's reliance on *Reynoldsville Casket* is misguided. In that case, the U.S. Supreme Court acknowledged that "when two different rules of law each independently bar recovery, then a decision" that retroactively invalidates one rule will not affect the result so long as "[t]he other, constitutionally adequate rule remains in place." *Reynoldsville Casket*, 514 U.S. at 757. But this principle does not allow a same-sex marriage ban to operate as an impediment to the formation

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[8] The court of appeals division in *Hogsett* arrived at the same conclusion. *In re Marriage of Hogsett & Neale*, 2018 COA 176, ¶ 22, __ P.3d __ ("Inherent in our conclusion is the recognition that *Obergefell* applies retroactively in determining the existence of a common law marriage.").

of a common law marriage because, for the reasons discussed earlier, such an impediment would "critically depend[] upon the continued application of . . . a principle that [the] Court has held unconstitutional." *Id.*[9] Any impediment to marriage imposed by a same-sex marriage ban is not a "constitutionally adequate rule"—it is part and parcel with the unconstitutional law itself. Holding otherwise, as the *Swicegood* decision itself demonstrates, renders the acknowledged retroactivity of *Obergefell* utterly meaningless.

¶49 In sum, for the reasons above, we conclude that a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry.

C. Application of the Updated Common Law Marriage Framework

¶50 Having concluded that Pyfer and LaFleur were not, as a matter of law, barred from entering into a common law marriage, we next determine whether a common law marriage was established under the refined test we announce in *Hogsett*. "A determination of whether a common law marriage exists turns on

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[9] This fact distinguishes South Carolina's same-sex marriage ban from other "impediments" to marriage discussed by the court. *See Swicegood*, 847 S.E.2d at 109 (discussing impediments such as where one party has an existing marriage or where the parties reside in a jurisdiction that does not recognize common law marriage).

issues of fact and credibility, which are properly within the trial court's discretion." *Lucero*, 747 P.2d at 665. Accordingly, we review the court's factual findings for clear error and its common law marriage finding for an abuse of discretion.

¶51 LaFleur argues that the parties did not, as a factual matter, have the intent to enter into a common law marriage. We disagree and conclude that the record supports the district court's conclusion that Pyfer and LaFleur manifested a mutual intent to enter into a marital relationship.

¶52 "[A] common law marriage may be established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement." *Hogsett*, ¶ 49. "In assessing whether a common law marriage has been established, courts should give weight to evidence reflecting a couple's express agreement to marry." *Id.* In the absence of such evidence, courts may infer such an agreement from the parties' conduct. *Id.*

¶53 As we explain in *Hogsett*, the factors identified in *Lucero*, 747 P.2d at 665, can still be relevant to this inquiry. Courts should therefore consider factors such as

> cohabitation[;] reputation in the community as spouses[;] maintenance of joint banking and credit accounts[;] purchase and joint ownership of property[;] filing of joint tax returns[;] . . . the use of one spouse's surname by the other or by children raised by the parties[;] . . . evidence of shared financial responsibility, such as leases in both partners' names, joint bills, or other payment records;

> evidence of joint estate planning, including wills, powers of attorney, beneficiary and emergency contact designations; . . . symbols of commitment, such as ceremonies, anniversaries, cards, gifts, and the couple's references to or labels for one another[;] . . . [and] the parties' sincerely held beliefs regarding the institution of marriage.

Hogsett, ¶¶ 55–56. These factors must be assessed in context, however, and "the inferences to be drawn from the parties' conduct may vary depending on the circumstances." *Id.* at ¶ 49.

¶54 As in *Hogsett*, "[w]e begin by reviewing evidence of an express agreement to marry." ¶ 62. Here, Pyfer proposed marriage to LaFleur, and LaFleur accepted. The parties then participated in a ceremony that, as the district court explained, "certainly appear[ed] to be a wedding." For instance, Pyfer and LaFleur exchanged vows during the ceremony, which was officiated by a reverend and was attended by friends and family. They exchanged rings and wore tuxedos. A toast was given. And Pyfer and LaFleur signed a document titled "Certificate of Holy Union"—much like a couple would sign a marriage license. This evidence suggests, as the district court found, that the parties expressly agreed to enter into a common law marriage as of November 30, 2003, the date of the ceremony.

¶55 That said, given the range of meanings that a same-sex couple might ascribe to such a ceremony before *Obergefell*, it is important to examine the other circumstances of the relationship to discern the parties' intent. *Hogsett*, ¶ 54 n.9. Here, the parties' conduct was such that, in addition to the ceremony, a mutual

agreement to enter into a marital relationship may be inferred. Of course, some of the evidence does not point in either direction. While it would have been significant had one of the parties used the other's surname, for example, the fact that they did not do so does not necessarily suggest that the parties did not intend to be married. *See Hogsett*, ¶ 45 ("[T]here may be any number of reasons, including cultural ones, that spouses and children do not take one partner's name at marriage."). Similarly, the parties' failure to file joint tax returns reveals little, especially given that for the majority of their relationship, this was not a possibility under federal law. *See Hogsett*, ¶ 66.

¶56 Other factors, by contrast, are more instructive. Although the parties did not share joint bank accounts or own property together, they cohabitated, and LaFleur financially supported Pyfer, both in his day-to-day life and in his pursuit of a career. And Pyfer listed LaFleur as his spouse on several forms over the years.

¶57 LaFleur did not tell his coworkers that he was married. But there was testimony that LaFleur worked in an environment that was not welcoming of same-sex couples; thus, viewed in context, his failure to publicize his relationship with Pyfer does not necessarily reflect a lack of mutual agreement to be married. *See Hogsett*, ¶ 51 ("There may be cases where, particularly for same-sex partners, a couple's choice not to broadly publicize the nature of their relationship may be explained by reasons other than their lack of mutual agreement to be married.").

Pyfer, by contrast, "held himself out as married to family and friends" with LaFleur's knowledge.

¶58 True, there was evidence, toward the end of their relationship, that Pyfer was involved in an extramarital affair and that Pyfer and LaFleur ceased sharing a bedroom and instead lived separately in the same house. However, the parties' actions as their relationship deteriorated cannot be used to override their earlier agreement to be married. *See Hogsett*, ¶ 57 ("[C]onduct inconsistent with marriage that occurs as a relationship is breaking down should not negate a finding of common law marriage where there is evidence of the parties' earlier mutual agreement to be married. In other words, infidelity, physical separation, or other conduct arising as the relationship is ending does not invalidate a couple's prior mutual agreement to enter a common law marriage.").

¶59 In short, viewing the record as a whole and considering the totality of the circumstances, the district court's conclusion that the parties mutually agreed to be married and "intended to be joined with [each other] for the rest of [their] li[ves]" is supported by the record. Accordingly, we affirm the court's conclusion that Pyfer and LaFleur entered into a common law marriage.

D. Allocation of Marital Assets and Debts and Award of Spousal Maintenance

¶60 Pyfer contends that the district court abused its discretion in allocating the marital assets and debts between Pyfer and LaFleur, arguing that the court did not

make adequate findings or adequately consider the statutory factors pursuant to section 14-10-113. Pyfer also contends that the court abused its discretion in awarding a grossly inadequate award of spousal maintenance, arguing that it (1) did not make adequate findings or adequately consider the statutory factors pursuant to section 14-10-114; (2) incorrectly computed the guideline amount of maintenance; and (3) did not consider the division of property and denial of Pyfer's request for attorney's fees. We agree and therefore remand for the district court to reconsider its property division and spousal maintenance award and make appropriate findings under sections 14-10-113 and -114.

1. Division of Property

¶61 The division of marital property is left to the district court's discretion. *In re Marriage of Cardona & Castro*, 2014 CO 3, ¶ 9, 316 P.3d 626, 629 (citing *In re Marriage of Hunt*, 909 P.2d 525, 537 (Colo. 1995)). We will not disturb the district court's division of property "unless there has been a clear abuse of discretion," *In re Balanson*, 25 P.3d 28, 35 (Colo. 2001), that, when viewed in relation to the property division as a whole, "affects the substantial rights of the parties," *id.* at 36.

¶62 Section 14-10-113(1) provides that the court "shall set apart to each spouse his or her property and shall divide the marital property, without regard to marital misconduct, in such proportions as the court deems just." In making its equitable distribution of marital property, the court must consider "all relevant factors,"

including (1) each spouse's contribution "to the acquisition of the marital property, including the contribution of a spouse as homemaker;" (2) "[t]he value of the property set apart to each spouse;" and (3) each spouse's economic circumstances "at the time the division of property is to become effective." *Id.*

¶63 We have interpreted section 14-10-113 to require a multi-step analysis. *See Balanson*, 25 P.3d at 38. First, the district court must determine "whether an interest constitutes property." *Id.* If so, the court then must classify such property as marital or separate. *Id.* Finally, it must value and make an equitable distribution of the marital property after considering the statutory factors. *Id.*

¶64 Here, we cannot tell from the record whether the district court engaged in such an analysis. It was uncontested that the $160,000 increase in value of LaFleur's home was marital property. But LaFleur maintained multiple retirement accounts, some of which predated the marriage, and the court did not classify the contents of those accounts as separate or marital property. Indeed, neither LaFleur nor the court traced the contents of those retirement accounts—a requirement to claiming separate ownership. *See In re Marriage of Seewald*, 22 P.3d 580, 586 (Colo. App. 2001) ("The court also did not make any findings concerning the classification of the specific assets comprising the trust, including whether husband was able to trace the present trust assets back to his premarital holdings sufficiently to overcome the presumption of marital property." (citing *In re*

Marriage of Renier, 854 P.2d 1382, 1384 (Colo. App. 1993))). Instead, the court awarded Pyfer $50,000 of LaFleur's Roth IRA and ordered that the remaining retirement assets be retained by the named account holder. The court took a similar approach regarding each party's debts, stating, "[E]ach party is to pay all debts in his name." The court did not attempt to determine whether such debt was separate or marital.

¶65 Consequently, we are unable to determine whether the district court's property division was inequitable, and we must set aside the property division and remand for further proceedings. Upon reconsideration, the parties may well end up in the same position. But the court must first conduct the multi-step analysis by classifying each item of property as separate or marital, valuating the property, and considering the statutory factors identified in section 14-10-113.[10]

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[10] On remand, the court should consider each party's financial, emotional, and other contributions to the relationship. For example, at the permanent orders hearing, the court noted that Pyfer stayed home and did not work or pay rent to LaFleur. Yet in marital relationships, one spouse often financially supports the other. Having concluded that Pyfer and LaFleur had entered into a common law marriage, it is not clear why the court expected one spouse to pay rent to the other to live in the couple's marital home. Moreover, the fact that Pyfer did not hold a steady job does not mean he did not contribute to the marital relationship in a meaningful way, nor should the fact that he did not work be held against Pyfer in equitably distributing the marital assets and debts or awarding spousal maintenance.

2. Award of Spousal Maintenance

¶66 "[A]wards of spousal maintenance . . . flow from the property distribution." *In re Marriage of de Koning*, 2016 CO 2, ¶ 26, 364 P.3d 494, 498. In other words, "the issues are interdependent." *Id.* Therefore, "[w]hen a trial court is required to revisit a property division, it must also reevaluate [the] maintenance . . . award[] in light of the updated property division." *Id.* Accordingly, we also set aside the maintenance award and remand for reconsideration. On remand, the district court should follow the detailed procedure set forth in section 14-10-114, making explicit factual findings where required and addressing the factors relevant to its determination.

IV. Conclusion

¶67 We conclude that, because *Obergefell* struck down state laws that excluded same-sex couples from civil marriage as unconstitutional, such laws cannot stand as an impediment to the recognition of a same-sex marriage predating that decision, but rather are treated as if they never existed. To the extent *Obergefell* announced a new rule of federal law, that decision applies retroactively under *Harper* because the Court in *Obergefell* applied its rule of federal law to the litigants before it. We therefore hold that a court may recognize a common law same-sex marriage entered in Colorado before the state recognized same-sex couples' fundamental right to marry.

¶68 Accordingly, we agree with the district court that the parties here were not, as a matter of law, barred from entering into a common law marriage in 2003. Applying the updated framework announced in *Hogsett*, we also agree with the court that the parties did in fact enter into a common law marriage. We nevertheless reverse the district court's division of property and award of spousal maintenance and remand for further findings in accordance with sections 14-10-113 and -114.

CHIEF JUSTICE BOATRIGHT concurs in part and concurs in the judgment.
JUSTICE SAMOUR dissents.

CHIEF JUSTICE BOATRIGHT, concurring in part and concurring in the judgment.

¶69 For the reasons stated in my concurrence in the judgment only to *In re Marriage of Hogsett & Neale*, 2021 CO 1, __ P.3d __ (Boatright, C.J., concurring in the judgment only), I disagree with the majority's decision to announce new factors for establishing common law marriage on the facts of that case. As a result, I do not think that the same new factors should be applied here. Furthermore, application of any factors is unnecessary because, in my view, the fact that Dean LaFleur and Timothy Pyfer had a ceremony that was—in every way—a wedding evinces their mutual intent to be married. In the simplest of terms, LaFleur and Pyfer are married because they had a wedding. I do agree with the majority, however, that the fundamental right to marry as outlined in *Obergefell v. Hodges*, 576 U.S. 644, 674–75 (2015), "must be given retroactive effect." Maj. op. ¶ 5. I also agree that LaFleur and Pyfer did, in fact, enter into a common law marriage, and that remand is appropriate for the district court to reconsider its property division and spousal maintenance award as well as make appropriate findings. Accordingly, I concur in part and concur in the judgment.

¶70 As the majority acknowledges, LaFleur and Pyfer held a ceremony on November 30, 2003, after Pyfer proposed marriage to LaFleur. *Id.* at ¶¶ 7, 10. In the district court's words, "[t]here were rings, tuxes, attendance [by friends and family], [a] toast, vows, [and] a reverend," and the couple signed a "Certificate of

Holy Union." *Id.* at ¶ 10. This, the district court explained, "certainly appear[ed] to be a wedding." *Id.* I agree. In my view, this *was* indisputably a wedding ceremony and effectively an "express agreement to marry." In fact, I struggle to imagine stronger evidence of the couple's "mutual consent or agreement . . . to enter the legal and social institution of marriage." *See Hogsett*, ¶ 3. With such strong evidence substantiating mutual intent, therefore, it is clear—without application of factors—that LaFleur and Pyfer were in a common law marriage.

¶71 As I stated in my concurrence in the judgment only in *Hogsett*, when the record clearly establishes whether or not both parties intended to be married, a factors-based analysis proves a needlessly confusing and futile exercise. This case provides another good example of such an exercise: After reviewing the details of the ceremony and acknowledging the district court's finding that—on the basis of the intent demonstrated by the ceremony—the parties entered into a common law marriage, the majority explains that, "the parties' conduct was such that, in addition to the ceremony, a mutual agreement to enter into a marital relationship may be inferred." Maj. op. at ¶ 54–55. In the discussion that follows, the majority acknowledges that "some of the evidence [considered under the factors] does not point in either direction," while "[o]ther factors, by contrast, are more instructive." *Id.* at ¶¶ 55, 56. This evidence and these factors include the parties' use of different surnames, failure to file joint tax returns, financial arrangements, cohabitation,

public manifestations (or lack thereof) of marriage, and behavior when the relationship disintegrated. *Id.* at ¶¶ 55–58. In reaching its conclusion, the majority explains that, "viewing the record as a whole and considering the totality of the circumstances," the district court's "conclusion that the parties mutually agreed to be married . . . is supported by the record" and that, therefore, the parties entered into a common law marriage. *Id.* at ¶ 59.

¶72 I agree with the district court's conclusion that the parties mutually agreed to be married—on the basis of the intent demonstrated by the wedding ceremony. The majority's factor-based analysis does not add to the district court's already-apparent and correct conclusion. Thus, any factors-based analysis proves unnecessary.

¶73 In addition, establishing a specific date or at least an approximate timeframe for when the parties would have entered into a common law marriage is important because any conduct *after* the marriage began is not relevant—in a factor-based analysis or otherwise—to determining whether a common law marriage existed in the first place. The majority correctly notes in *Hogsett*, and reiterates here, that "conduct inconsistent with marriage that occurs as a relationship is breaking down does not negate a finding of common law marriage where there is evidence of the parties' earlier mutual agreement to be married." *Hogsett*, ¶ 57. This statement does not, in my view, go the full distance. Indeed, conduct inconsistent with

marriage that occurs *after* the marriage *began*—not just as the relationship is breaking down—is not relevant. If the evidence demonstrates that the parties formed a mutual intent to be married, then the parties entered into a common law marriage at that time. Any post-marriage evidence falls outside the scope of the inquiry. Here, it is evident when the parties' marriage began: at their wedding ceremony on November 30, 2003. The majority's factor-based analysis nevertheless—and, in my view, erroneously—relies on evidence from after that point.

¶74 Furthermore, just as infidelity, separation, or other conduct inconsistent with marriage by a partner in a licensed marriage does not invalidate the licensed marriage, conduct inconsistent with marriage by a partner in a common law marriage does not invalidate the common law marriage. In other words, parties who enter into licensed or common law marriages remain married until they legally divorce, regardless of their conduct. To consider post-agreement-to-be-married evidence for common law marriages would be tantamount to considering the fictional concept of common law divorce.[1] Thus, the fact that LaFleur and

[1] No one asserts that common law divorce exists; and no one would reasonably argue that infidelity, separation, or other conduct inconsistent with marriage would constitute evidence that parties did not originally intend to be married—especially after the couple had a wedding ceremony.

Pyfer's relationship eventually deteriorated is not relevant to the fact that they were common law married on November 30, 2003, and any factors relying on conduct after that date are, in my view, irrelevant.

¶75 In sum, I disagree with the majority's decision to announce new factors for establishing common law marriage in *Hogsett* on the facts of that case, and therefore, do not think those factors should be applied in this case. Because I do agree with the majority, however, that the fundamental right to marry as outlined in *Obergefell*, 576 U.S. at 674–75, "must be given retroactive effect," maj. op. ¶ 5; that LaFleur and Pyfer did, in fact, enter into a common law marriage; and that remand is appropriate for the district court to reconsider its property division and spousal maintenance award as well as make appropriate findings, I concur in part and concur in the judgment.

JUSTICE SAMOUR, dissenting.

I. Introduction

¶76 Is it possible for a same-sex couple in Colorado to have *mutually intended and agreed* to enter into a *legal* marital relationship when both parties were aware that Colorado law prohibited same-sex marriage at the time? The answer is clearly no. When Pyfer and LaFleur participated in their wedding ceremony in November 2003, they both understood that same-sex couples could not lawfully marry in Colorado because Colorado considered same-sex marriage unlawful, unenforceable, and invalid. Thus, Pyfer and LaFleur could not possibly have *intended or agreed* to enter into the *legal* relationship of marriage. And, because common law marriage in Colorado requires *mutual intent and agreement* to enter into the *legal* relationship of marriage, *In re Marriage of Hogsett & Neale*, 2021 CO 1, ¶ 49, __ P.3d __, __, Pyfer and LaFleur cannot be deemed to have entered into a common law marriage.

¶77 Only after the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), rendered our state's ban on same-sex marriage unconstitutional could Pyfer and LaFleur have mutually intended and agreed to enter into a common law

marriage.[1] But *Obergefell* wasn't announced until June 2015—more than a decade after Pyfer and LaFleur had their wedding ceremony.

¶78 The majority correctly notes that our state's restriction on same-sex marriage was rendered void ab initio by *Obergefell* and must be treated as though it never existed. Maj. op. ¶ 33. But the majority then concludes—rather simplistically—that, as a result, there was no impediment to Pyfer and LaFleur being common law married. *Id.* at ¶ 34. Alternatively, the majority rules that *Obergefell* applies retroactively. *Id.* at ¶ 41. The majority misses the mark on both fronts. As a matter of law, neither *Obergefell*'s effect on our state law nor *Obergefell*'s retroactive application can transform Pyfer and LaFleur's mutual intent and agreement at the time of their wedding ceremony in 2003.

¶79 Rather than concede that the mutual intent and agreement requirement is a fly in the analytical ointment, the majority shoehorns Pyfer and LaFleur's relationship into the confines of a common law marriage by engaging in a two-

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[1] The majority points out that in 2014, eight months before *Obergefell*, two Tenth Circuit cases out of Utah and Oklahoma had effectively declared Colorado's prohibition on same-sex marriage unconstitutional. Maj. op. ¶ 30 (indicating that "Colorado began to recognize same-sex marriages" in October 2014). Be that as it may, given the way we framed the question we agreed to review, I assume for purposes of this dissent that Colorado's prohibition on same-sex marriage became unconstitutional when *Obergefell* was penned in June 2015.

step dance. First, the majority pays lip service to, but declines to meaningfully embrace, the requirement regarding mutual intent and agreement to enter into a *legal* marital relationship—a requirement embedded in Colorado's common law marriage jurisprudence. In the process, the majority clouds the issue by downgrading this requirement and affording preeminence to a different requirement—intent and agreement to enter into *any* type of marital relationship (legal or otherwise). Second, the majority curiously rules that, while it is true that the parties must have intended and agreed to enter into the *legal* and social *institution* of marriage, they need not have intended and agreed to incur the consequences of a legally sanctioned marriage.

¶80 The majority attempts to maneuver a judicial tightrope today. But I find its approach, at best, strained beyond the breaking point and, at worst, internally inconsistent. Because the majority's position is legally untenable, utterly unfair to LaFleur as well as many others in his shoes, and likely to foster further confusion in this area of the law, I respectfully dissent.[2]

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[2] I wholeheartedly agree with the concerns Justice Hart eloquently expresses about common law marriage in her special concurrence in *In re Marriage of Hogsett & Neale*, 2021 CO 1, __ P.3d __ (Hart, J., specially concurring).

II. Analysis

¶81 As we observed in *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987), Colorado recognizes common law marriage, which dispenses with the formalities of a statutory, licensed marriage. In a common law marriage, two people create a *legally valid* marital relationship without having to hold a marriage ceremony conducted in accordance with statutory requirements. *In re Marriage of J.M.H. & Rouse*, 143 P.3d 1116, 1118 (Colo. App. 2006). A common law marriage is established "by the mutual consent or agreement of the parties" to enter into a *lawful* marital relationship, "followed by a mutual and open assumption" of that relationship. *Lucero*, 747 P.2d at 663.

¶82 Today, in the companion case of *In re Marriage of Hogsett & Neale*, the majority gives the relevant factors we articulated in *Lucero* a much-needed tune-up to account for our society's evolution during the last three-plus decades. I applaud those efforts. However, the majority and I part ways because, while it purports to preserve the analytical framework forged by *Lucero*, it effectively endorses a new common law marriage test by eroding the significance of the parties' intent and agreement to enter into a *legal* marital relationship.

¶83 The majority echoes *Lucero*'s principal lesson and holds that "a common law marriage may be established by the mutual consent or agreement of the couple to enter the *legal* and social institution of marriage, followed by conduct manifesting

that mutual agreement." *Hogsett*, ¶ 3 (emphasis added). But it then backtracks, explaining that "[t]he core query is whether the parties intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and obligation." *Id.* What happened to the "legal" aspect of the test? Why isn't that part of the "core query"?

¶84 Apparently, the majority considers mutual intent and agreement to enter into a *legal* marital relationship a *peripheral requirement* of common law marriage. But I don't understand the difference the majority draws between a core requirement and a peripheral requirement: Either something is a requirement or it isn't. And a peripheral requirement is, by definition, still a requirement.

¶85 Must the parties have intended and agreed to enter into a *legal* marital relationship? Or does it suffice that they intended and agreed to enter into *any* marital relationship (legal or otherwise)? It can't be both. If it's the former, I'm not sure why the majority demotes to peripheral status the requirement of mutual intent and agreement to enter into a legal marital relationship. And if it's the latter, the majority ought to come out and admit that it's overturning decades of precedent construing the common law as requiring a mutual intent and agreement to enter into a legal marital relationship. It is difficult to conclude that the majority isn't changing the common law today. After all, by framing the "core query" as it does, the majority drains all the life out of our longstanding common law marriage

requirement that couples mutually intend and agree to enter into a legal marital relationship.

¶86 Here, Pyfer cannot satisfy the requirement of mutual intent and agreement to enter into a legal marital relationship. The district court found that he proposed marriage to LaFleur, that LaFleur accepted his proposal, and that the two held a wedding ceremony in November 2003. But, at that time, the Colorado Constitution stated that "[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state." Colo. Const. art. 2, § 31, *invalidated by Obergefell v. Hodges*, 576 U.S. 644 (2015). Similarly, section 14-2-104, C.R.S. (2003), *invalidated by Obergefell v. Hodges*, 576 U.S. 644 (2015), provided, as pertinent here, that "a marriage is valid in this state if . . . [i]t is only between one man and one woman." § 14-2-104(1)(b). Subsection (2) of the same statute reiterated that "any marriage contracted within . . . this state" not between one man and one woman shall not be "recognized as valid in this state." § 14-2-104(2).

¶87 Neither Pyfer nor LaFleur claims that he was unaware that Colorado law did not recognize same-sex marriage in 2003. To the contrary, the record reflects that each was well aware of this restriction. Consequently, whatever marriage Pyfer and LaFleur intended to enter into in 2003, one thing is for certain: It could not possibly have been a *legal* marriage. That is, as a matter of law, Pyfer and

LaFleur could not have intended or agreed to enter into a marital relationship recognized as legal, enforceable, and valid in Colorado.

¶88 Because the marriage Pyfer and LaFleur entered into in 2003 was not legally binding—something they both realized—there was no basis for either of them to believe that a dissolution proceeding could ever be initiated in the event the marriage failed. Nor did they have reason to think that a court could ever be called upon to distribute their assets and debts or to order either of them to pay maintenance. It follows that neither Pyfer nor LaFleur had cause to consider a prenuptial agreement or any other type of premarital arrangement to protect himself in case the marriage failed.

¶89 LaFleur, the party who owns almost all the assets in this relationship, confirms that he didn't expect there could be legal consequences if his marriage with Pyfer failed. Not only was that a reasonable expectation, it was the only rational one. Indeed, how could there be *legal* consequences vis-à-vis a dissolution proceeding as a result of entering into a marriage that was not recognized as a marriage under Colorado law and was thus devoid of legal effect? Something that's not legally binding cannot simultaneously be legally binding. In meteorological terms, it's either raining or it isn't.

¶90 The majority responds that nothing is amiss here because, following *Obergefell*, we have to treat our now-defunct constitutional and statutory

provisions prohibiting same-sex marriage as though they never existed. Therefore, urges the majority, there was no obstacle preventing Pyfer and LaFleur from entering into a common law marriage in 2003.

¶91 The inherent flaw in the majority's facile rationale is that it overlooks that a requirement of common law marriage is *mutual intent and agreement* to be *lawfully* married. Treating, as we must, our state law barring same-sex marriage nonexistent in 2003 does not alter the fact that Pyfer and LaFleur did not mutually intend or agree to enter into a legal marriage. Nor could they have done so—they weren't clairvoyant, and their intent and agreement could only have been based on what they knew at the time. How can two individuals mutually intend and agree to enter into a legally binding relationship when they both know that the law doesn't recognize that relationship and, in fact, deems it unlawful, unenforceable, and wholly invalid? Asked differently, how could Pyfer and LaFleur have intended and agreed to enter into a *legal* marriage when they both knew such a marriage was *illegal* in Colorado? That we must treat a certain state law in 2003 as though it never saw the light of day doesn't mean that we can somehow retroactively metamorphose Pyfer and LaFleur's mutual intent and agreement in 2003.

¶92 Alternatively, the majority argues that the Supreme Court's holding in *Obergefell* applies retroactively. But even assuming *Obergefell*'s retroactivity, it

doesn't obviate the Sisyphean challenge presented by the common law marriage requirement of mutual intent and agreement to enter into the *legal* relationship of marriage.[3] *Obergefell* may have changed *our state law* retroactively, but it lacks the power to change *anyone's intent* or *any couple's agreement* retroactively.

¶93 Significantly, the Supreme Court wisely predicted a quarter of a century ago that even when courts apply retroactively a new rule of law to a pending case, "they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758–59 (1995). In those instances there may be:

> (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) . . . a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of "finality" . . . , that limits the principle of retroactivity itself.

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[3] Sisyphus was "a king in classic mythology who offended Zeus and was punished by being forced to roll an enormous boulder to the top of a steep hill. Every time the boulder neared the top, it would roll back down, and Sisyphus would have to start over." E.D. Hirsch, Jr. et al., *The Dictionary of Cultural Literacy: What Every American Needs to Know* 42 (1st ed. 1988).

Id. at 759.[4] In my opinion, this case fits nicely within at least two of these categories—categories (2) and (3).

¶94 First, the mutual intent and agreement requirement is a previously existing, independent legal basis for denying relief in this case: Pyfer cannot demonstrate that he and LaFleur mutually intended and agreed to enter into the legal relationship of marriage under Colorado law prior to *Obergefell*. *See* Colo. Const. art. 2, § 31; § 14-2-104.

¶95 Second, the general rule requiring Pyfer and LaFleur to have mutually intended and agreed to enter into the legal relationship of marriage, *see Lucero*, 747 P.2d at 663, is well-established and reflects reliance interests and other significant policy considerations. Indeed, requiring mutual intent and agreement to enter into the legal relationship of marriage ensures that couples are on notice that legal consequences could flow from the relationship. Without it, someone like LaFleur could unwittingly enter into a marital relationship that's explicitly deemed invalid by the law, only to find out more than a decade later when the relationship fails that he is nevertheless subject to significant legal consequences in a dissolution proceeding. The due process concerns inherent in this type of

[4] The Court cautioned that "simple reliance" does not suffice to create a retroactivity exception. *Reynoldsville Casket*, 514 U.S. at 759.

after-the-fact surprise cannot be brushed aside. Yet, that's precisely what the majority does. The majority dismisses LaFleur's accurate assertion that he and Pyfer could not have mutually intended or agreed to enter into a legally binding marriage because the idea of a same-sex couple entering into a lawful marriage in Colorado in 2003 was unthinkable. Maj. op. ¶ 39 n.5.

¶96 Notably, I'm not alone in thinking that the mutual intent and agreement requirement throws a monkey wrench into the majority's analysis. A panel of the Court of Appeals of South Carolina is in the same camp. Its recent decision in *Swicegood v. Thompson*, 847 S.E.2d 104 (S.C. App. 2020), is illuminating. There, as here, at the time the same-sex couple agreed to live as a married couple, both parties were aware that state law prohibited same-sex marriage. *Id.* at 113. Though the court determined that the Supreme Court's jurisprudence on retroactivity compelled "the conclusion *Obergefell* must be applied retroactively," *id.* at 110, it held that retroactive application of the decision was not dispositive, *id.* at 110–12. In so doing, the court focused in part on the mutual intent and agreement requirement of common law marriage in South Carolina:

> A party . . . must at least know that his actions will render him married as that word is commonly understood. *If a party does not comprehend that his intentions and actions will bind him in a legally binding marital relationship, then he lacks intent to be married.* The proponent of the alleged marriage has the burden of proving the elements by a preponderance of the evidence.

Id. at 113 (emphasis added) (internal quotation marks and citations omitted). Because both parties knew that South Carolina law prevented them from lawfully marrying in that state during their relationship, the court found that, as a matter of law, they "could not have formed the intent and mutual agreement to enter a legally binding marital relationship." *Id.* Therefore, they could not have been common law married during that timeframe. *Id.*

¶97 So it is here. Prior to *Obergefell*, Pyfer and LaFleur were both aware that they could not enter into the legal relationship of marriage in Colorado. Consequently, as a matter of law, they could not have mutually intended or agreed to be in a legally binding marital relationship before *Obergefell*. Pyfer and LaFleur could not have intended or agreed to enter into the legal relationship of marriage in 2003 any more than a driver with a revoked driver's license can intend to drive legally. That's true even if the law that prohibits driving with a revoked driver's license is declared unconstitutional at some point in the future and that change is applied retroactively.

¶98 Perhaps recognizing the problems inherent in retroactively imputing to Pyfer and LaFleur the required intent to be legally married when they could not have known that their marriage would subject them to any legal consequences, the majority plucks a new rule out of thin air. It declares, rather paradoxically, that, while Pyfer and LaFleur must have intended and agreed to enter into "the *legal*

and social *institution* of marriage," maj. op. ¶ 4 (quoting *Hogsett*, ¶ 49 (emphases added)), they need not have intended or agreed to incur "the *legal consequences* of a marital relationship," *id.* at ¶ 39. But the majority's unprecedented and troubling approach begs the following question: How can a couple intend and agree to enter into a legal marriage without intending and agreeing to incur the legal consequences that flow from entering into such a marriage?

¶99 The majority attempts to justify its holding by speculating that "[m]any couples may not appreciate or intend the legal consequences of entering into a marital relationship, or anticipate the ways in which those consequences may shift over time as the law evolves." *Id.* However, in the same breath that it questions an average couple's awareness of the legal consequences of entering into a legal marital relationship, the majority unrealistically attributes to LaFleur knowledge of a federal court in a different state striking down a ban on same-sex marriage, and then unfairly penalizes him for failing to presciently anticipate that Colorado law would undergo a similar seismic change. *Id.* at ¶ 39 n.5. The majority cannot have its cake and eat it too.

¶100 Moreover, even assuming that not every single couple possesses "detailed knowledge of and intent to obtain all the legal consequences that attach to marriage," *Hogsett*, ¶ 54, that can hardly support the majority's incongruous conclusion. The vast majority of couples who enter into a legal marital

relationship appreciate and intend that some significant legal consequences will flow from that choice. Surely the majority doesn't mean to suggest that the average person is unaware that entering into a legal marriage may result in the division of marital property, lead to an award of spousal maintenance, and implicate child custody and child support issues.

¶101 In sum, I commend the majority's efforts to avoid perpetuating the exclusionary marriage regime *Obergefell* struck down. But giving effect to our common law on the mutual intent and agreement requirement in no way does so.[5] Rather, it properly guarantees that any party with exposure to a legal dissolution proceeding goes into a marital relationship with eyes wide open. If, in the event a marriage fails, someone like LaFleur may be forced to go through a legal dissolution proceeding and face consequences such as property division and spousal maintenance, we should demand that he be on notice of that up front. He's entitled to be alerted by the law that if he chooses to enter into the legal relationship of marriage, he will be subject to the legal rights, benefits, and consequences that are triggered by that choice. The majority's newly minted

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[5] Post-*Obergefell*, same-sex couples must be allowed to enter into the lawful relationship of marriage. This includes same-sex couples who were unlawfully married pre-*Obergefell*.

framework robs LaFleur of that opportunity. To the extent he feels duped by the system, I can hardly blame him.

III. Conclusion

¶102 Because I disagree with the majority that, post-*Obergefell*, a court can somehow transform a pre-*Obergefell* same-sex marital relationship in Colorado from one lacking legal effect to one that was legally binding from the moment of inception, I respectfully dissent. I would reverse and remand with instructions to return the case to the district court to determine whether the parties mutually intended and agreed to be in a *legal* marital relationship and were in a common law marriage after *Obergefell* was decided in June 2015.[6]

[6] The petition for marriage dissolution at the center of this appeal was filed by Pyfer in January 2018, almost two and a half years after *Obergefell* was announced.

SUMMARY
Date January 21, 2021

2021COA4

No. 20CA0859, People in the Interest of R.J.B. — Juvenile Court — Dependency and Neglect — Termination of the Parent-Child Legal Relationship — Appearance by Electronic Means; Constitutional Law — Due Process

In this dependency and neglect proceeding, mother appeals the judgment terminating her parent-child legal relationship following a remote termination hearing via Webex. She claims that the court should have granted her a continuance so an in-person hearing could have been held, and the remote hearing didn't afford her due process or equal protection of the law.

The division concludes that the court didn't abuse its discretion in denying the continuance. The court's need to conduct the termination hearing via Webex didn't establish good cause to continue the hearing when a judge presiding over a hearing held via Webex can address any technical difficulties with sound, video feed,

or broadband issues as they arise; any delay in making an objection can be redressed by the court disregarding improperly admitted evidence; the court had extensively tested the virtual lobby and didn't allow a sequestered witness to hear any of the proceeding; Webex, as a real-time videoconference platform in which all participants may view one another, allows the court and all counsel to observe a witness's demeanor, determine if the witness is relying on documents or other information, and view admitted exhibits as well as other documents that may be used for impeachment; and the court ensured that an official record of the hearing was made in the same manner as during an in-person hearing.

The division also rejects mother's assertions that the remote hearing procedure failed to afford her due process and equal protection of the law. The division concludes that the juvenile court ensured that mother was provided substantially similar and fundamentally fair procedures as would have been available at an in-person termination hearing. So conducting the termination hearing via Webex afforded mother due process. The division didn't consider mother's equal protection claim because it is merely a bald assertion without argument or development.

COLORADO COURT OF APPEALS **2020COA4**

Court of Appeals No. 20CA0859
City and County of Denver Juvenile Court No. 19JV225
Honorable Laurie A. Clark, Judge

The People of the State of Colorado,

Appellee,

In the Interest of R.J.B., a Child,

and Concerning R.B.,

Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE HAWTHORNE*
Bernard, C.J., and Graham*, J., concur

Announced January 21, 2021

Kristin M. Bronson, City Attorney, Amy J. Packer, Assistant City Attorney, Denver, Colorado, for Appellee

Barry Meinster, Guardian Ad Litem

Ainsley Bochniak, Office of Respondent Parents' Counsel, Denver, Colorado, for Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 In this dependency and neglect proceeding, R.B. (mother) appeals the juvenile court's judgment terminating her parent-child legal relationship with R.J.B. (the child) following a remote termination hearing conducted via the Webex remote video-conference platform. Mother claims that (1) the court should have granted her a continuance so an in-person hearing could have been held; (2) the remote hearing didn't afford her due process or equal protection of the law; and (3) there was a less drastic alternative to terminating her parental rights.

¶ 2 We conclude that the court's need to conduct the termination hearing via Webex didn't establish good cause to continue the hearing. We also reject mother's assertions that the remote hearing procedure failed to afford her due process and equal protection of the law. And, the juvenile court didn't err in determining that there was no less drastic alternative to termination. So we affirm the judgment.

I. The Dependency and Neglect Case

¶ 3 In late January 2019, the Denver Department of Human Services learned that mother had been arrested on an outstanding warrant and the home that the child shared with mother and the

maternal grandmother was unsanitary and unsafe. Mother also admitted that she used methamphetamine, marijuana, and alcohol on a regular basis. And she agreed to place the three-year-old child in his godmother's care. But the Department was unable to keep in contact with mother and it initiated a dependency and neglect case the next month.

¶ 4 The juvenile court granted custody of the child to the Department for continued placement with the godmother. And it granted a default judgment adjudicating the child dependent and neglected.

¶ 5 Mother personally appeared at a hearing while she was incarcerated in July 2019. At that time, the court set aside the default judgment and adjudicated the child dependent and neglected based on mother's admission. It also adopted a treatment plan for mother.

¶ 6 Mother was released from custody less than two months later. Shortly after that, she stopped all contact with the Department. And she didn't personally appear at any further court hearings.

¶ 7 In March 2020, the Department filed a motion to terminate the legal relationship between mother and the child. About that same

time, the judicial department began implementing measures to mitigate the public health risk posed by the COVID-19 pandemic. *See* Office of the Chief Justice, Order Regarding COVID-19 and Operation of Colorado State Courts (Mar. 16, 2020), https://perma.cc/85XJ-9WG7. As part of these measures, the Chief Judge of the Denver Juvenile Court issued a directive that all hearings — including termination hearings — would be conducted on an electronic platform such as Webex. *See* Presiding Judge, Denver Juvenile Court Order (Mar. 27, 2020), https://perma.cc/ZX8D-MMNV.

¶ 8 Shortly before the termination hearing in late-April 2020, mother filed three motions asking the court to (1) find that an allocation of parental responsibilities (APR) to the godmother was a less drastic alternative to termination; (2) enter an APR order; and (3) continue the termination hearing.

¶ 9 The court denied mother's request for a continuance. And, following a contested termination hearing via Webex, the court determined that there was no less drastic alternative and terminated mother's parental rights.

II. Continuance

¶ 10 Mother first contends that the juvenile court abused its discretion by denying her request to continue the termination hearing because the need to hold the hearing via Webex constituted good cause. We disagree.

A. The Legal Standard

¶ 11 The Children's Code directs courts to "proceed with all possible speed to a legal determination that will serve the best interests of the child." § 19-1-102(1)(c), C.R.S. 2020. When ruling on a motion to continue a termination hearing, the court should balance the need for orderly and expeditious administration of justice against the facts underlying the motion and the child's need for permanency. *C.S. v. People in Interest of I.S.*, 83 P.3d 627, 638 (Colo. 2004).

¶ 12 Because the child was under the age of six when the dependency and neglect petition was filed, the expedited permanency planning (EPP) provisions apply. *See* §§ 19-1-102(1.6), 19-1-123, C.R.S. 2020. In EPP cases, the court shall not delay or continue the termination hearing unless good cause is shown and

the delay is in the child's best interests. §§ 19-3-104, 19-3-602(1), C.R.S. 2020.

¶ 13 A motion to continue is addressed to the court's discretion and we won't disturb its ruling on appeal absent a showing of an abuse of that discretion. *C.S.*, 83 P.3d at 638. A court abuses its discretion when its ruling is manifestly arbitrary, unfair, or unreasonable. *People in Interest of C.Y.*, 2018 COA 50, ¶ 13.

B. Analysis

¶ 14 Initially, we note that mother relies on language from the Denver District Court's COVID-19 directive. As pertinent here, that directive provides that all necessary participants in civil proceedings must appear remotely through telephone or teleconferencing options, but that any proceeding that the attorneys feel aren't capable of remote presentation can be continued at the court's discretion. *See* Chief Judge of the Second Judicial District, Amended Administrative Order Regarding Court Operations Under COVID-19 Advisory (Mar. 29, 2020), https://perma.cc/RC3G-RME8.

¶ 15 But this case was heard in Denver Juvenile Court, which is constitutionally separate from the Denver District Court. *See* §§ 13-

8-101, 13-8-102, C.R.S. 2020. So, the Denver District Court's COVID-19 directive is inapplicable to this proceeding. *See* § 13-8-115, C.R.S. 2020 (providing that the juvenile court has power to make rules for conducting its business to the extent that such rules don't conflict with supreme court rules or state laws).

¶ 16 In her motion, mother claimed that conducting the hearing by Webex would create a fundamentally unfair proceeding because of difficulties with

- hearing other parties;
- the video feed cutting in and out or freezing;
- the parties' broadband capabilities;
- making contemporaneous objections;
- effectuating a sequestration order while a witness waited in a virtual lobby;
- ascertaining whether witnesses were using documents or were in private communication with counsel or other parties;
- using documents to impeach a witness;
- offering exhibits;

- allowing the court and counsel to observe a witness's demeanor; and
- ensuring there was an adequate record of the hearing.

¶ 17 However, as the juvenile court recognized, for several reasons, these concerns were either unfounded or could be addressed at the hearing.

¶ 18 First, a judge presiding over a hearing held via Webex can address any technical difficulties with sound, video feed, or broadband issues as they arise.

¶ 19 Second, any delay in making an objection can be redressed by the court disregarding any slight delay in making the objection or disregarding improperly admitted evidence. Indeed, we presume that all incompetent evidence is disregarded by the juvenile court. *See People in Interest of M.M.*, 215 P.3d 1237, 1249-50 (Colo. App. 2009).

¶ 20 Third, the court indicated that the virtual lobby had been extensively tested and didn't allow a sequestered witness to hear any of the proceeding.

¶ 21 Fourth, Webex is a real-time video-conference platform in which all participants may view one another. *See White v. State*,

116 A.3d 520, 541 n.29 (Md. Ct. Spec. App. 2015). As such, it allows the court and all counsel to observe a witness's demeanor, determine if the witness is relying on documents or other information, and view admitted exhibits as well as other documents that may be used for impeachment.

¶ 22 And fifth, the court indicated that it would ensure that an official record of the hearing was made in the same manner as during an in-person hearing.

¶ 23 Also, mother's request to continue made no showing that delaying the hearing was in the child's best interests. Mother now claims that continuing the hearing would have served the child's best interests because he was in a permanent home and neither she nor any other party were seeking to move him from that home. But she didn't present this argument to the juvenile court.

¶ 24 For these reasons, we conclude that the court didn't abuse its discretion in denying mother's request to continue the termination hearing.

III. Termination Hearing by Webex

¶ 25 Mother next contends that the juvenile court violated her right to due process and equal protection of the law by conducting the termination hearing via Webex. We aren't persuaded.

A. Due Process

¶ 26 We review a procedural due process claim de novo. *People in Interest of C.J.*, 2017 COA 157, ¶ 25. To establish a violation of due process, one must first establish a constitutionally protected liberty interest that warrants due process protections. *Id.*

¶ 27 A parent has a fundamental liberty interest in the care, custody, and control of his or her child. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). To protect the parental liberty interest, due process requires the state to provide fundamentally fair procedures to a parent facing termination. *A.M. v. A.C.*, 2013 CO 16, ¶ 28; *see also Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). These procedures must include a parent receiving notice of the hearing, advice of counsel, and the opportunity to be heard and defend. *People in Interest of Z.P.S.*, 2016 COA 20, ¶ 40. The opportunity to be heard must be provided at a meaningful time and in a

meaningful manner. *Patterson v. Cronin*, 650 P.2d 531, 537 (Colo. 1982).

¶ 28 Mother was afforded each of these procedures during the termination proceeding. She received ample notice of the Department's intent to seek termination of her parental rights at the April 2020 hearing. The record also shows that mother was represented by court-appointed counsel throughout the proceeding and given a meaningful opportunity to be heard and defend against the termination motion.

¶ 29 Even before the hearing, counsel filed motions urging the court to find that an APR to the godmother was a less drastic alternative to termination. And counsel appeared on mother's behalf at the termination hearing. During the hearing, the court offered counsel the opportunity to (1) give an opening statement; (2) cross-examine each of the witnesses called by the Department and guardian ad litem; (3) present additional evidence; and (4) make a closing argument.

¶ 30 The court also ensured that counsel's representation of mother wasn't hindered by holding the hearing via Webex. Counsel had the ability to observe each witness's demeanor by using the video

platform. The court also used the virtual lobby to ensure that sequestered witnesses were unable to hear other portions of the hearing. And, on the few occasions when mother's counsel or the court had been unable to hear a question or a witness's response to a question, the court asked the reporter to read back that portion of the record.

¶ 31 At one point, the court indicated that it was having difficulty hearing mother's counsel. But it immediately recessed to allow counsel to appear telephonically. The court could then easily hear counsel for the remainder of her cross-examination and closing argument.

¶ 32 Finally, mother claims that she wasn't given the opportunity to be heard and personally participate in the termination hearing because she was struggling with homelessness and lacked access to resources to appear via Webex. But at no point did mother alert the court that she faced this problem. Indeed, the court observed that if mother had indicated that she wanted to personally participate in the hearing, it would have made accommodations to ensure that mother was able to do so either by telephone or Webex. And in this

appeal, mother hasn't articulated how conducting the hearing via Webex diminished the effectiveness of her case.

¶ 33 We conclude that the juvenile court ensured that mother was provided with substantially similar procedures as would have been available at an in-person termination hearing. So conducting the termination hearing via Webex afforded mother due process. *Cf. Clarington v. State*, No. 3D20-1461, 2020 WL 7050095, at *11, ___ So. 3d ___ (Dist. Ct. App. Fla. Dec. 2, 2020) (holding that conducting a probation hearing by remote technology does not violate the defendant's due process rights).

B. Equal Protection

¶ 34 Mother also contends that holding the termination hearing via Webex denied her equal protection of the law. The right to equal protection of the law guarantees that parties who are similarly situated receive like treatment by the law. But mother doesn't explain how she received disparate treatment compared to other parties who are similarly situated. *See People in Interest of M.M.*, 726 P.2d 1108, 1117 (Colo. 1986).

¶ 35 In fact, mother's equal protection claim is merely a bald assertion without argument or development. So we won't consider

it. *See Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010) (a bald legal proposition presented without argument or development won't be considered on appeal); *see also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (a party may not merely mention a possible argument in the most skeletal way, leaving the court to be mind-readers and do counsel's work).

IV. Less Drastic Alternative to Termination

¶ 36 Mother contends that the juvenile court erred by determining that an APR to the child's godmother wasn't a less drastic alternative to termination. Again, we disagree.

A. The Legal Framework

¶ 37 The juvenile court may terminate parental rights if it finds, by clear and convincing evidence, that (1) the child was adjudicated dependent and neglected; (2) the parent hasn't complied with an appropriate, court-approved treatment plan or the plan wasn't successful; (3) the parent is unfit; and (4) the parent's conduct or condition is unlikely to change within a reasonable time. § 19-3-604(1)(c), C.R.S. 2020; *People in Interest of C.H.*, 166 P.3d 288, 289 (Colo. App. 2007).

¶ 38 When considering termination under section 19-3-604(1)(c), the court must also consider and eliminate less drastic alternatives to termination. *M.M.*, 726 P.2d at 1122. This determination is implicit in, and thus intertwined with, the statutory criteria for termination. *People in Interest of L.M.*, 2018 COA 57M, ¶ 24. As a result, it is influenced by a parent's fitness to care for his or her child. *Id.* at ¶ 27.

¶ 39 And, as with all termination criteria, the court must give primary consideration to the child's physical, mental, and emotional conditions and needs. § 19-3-604(3); *L.M.*, ¶ 29. Thus, for example, the court may consider whether an ongoing relationship with the parent would be beneficial or detrimental to the child and the child's need for permanency when determining whether there is a viable alternative to termination. *L.M.*, ¶ 29.

¶ 40 Whether a juvenile court properly terminated parental rights presents a mixed question of fact and law because it involves applying the termination statute to evidentiary facts. *Id.* at ¶ 17; *see also In Interest of Baby A*, 2015 CO 72, ¶ 16 (a juvenile court's decision to terminate parental rights under section 19-5-105, C.R.S. 2020, presents mixed questions of fact and law). However,

we won't disturb the court's factual findings if they have record support. *People in Interest of A.J.L.*, 243 P.3d 244, 250 (Colo. 2010).

B. The Record

¶ 41 The record reveals that the child was thriving in the godmother's care. And, as mother points out, the court had previously determined that this was a permanent home for the child.

¶ 42 Even so, the record shows that mother hadn't maintained any relationship with the child. Although the Department tried to arrange visits for mother through two different caseworkers as well as an external agency, mother failed to engage with any of the professionals. Mother didn't attend any visits with the child during the fourteen months the case was open, which negatively impacted the child. He had initially been upset and showed "a lot of backtrack in his behavioral outbursts" when scheduled visits didn't occur. The caseworker also observed that the child no longer referred to mother as "mom" and instead called her by her first name.

¶ 43 Mother was also unfit to care for the child. She had made no effort to engage in substance abuse treatment to address her methamphetamine, alcohol, and marijuana use. And she hadn't participated in a mental health evaluation or treatment to address her bipolar and depression diagnoses.

¶ 44 Also, the godmother testified that she had difficulty establishing appropriate boundaries with mother. For example, during a chance encounter in the community, mother became upset when the godmother would not give her money. The godmother also explained that mother had gone onto her Facebook page and copied a picture of the child with other members of the godmother's family. Mother had then posted the picture on her own Facebook page and became belligerent when the godmother asked her to remove it.

¶ 45 Finally, the record shows that the child needed the permanency provided by adoption. The godmother explained that adoption would allow the child to continue in the stable home environment that she and her family had provided for him. And she wanted to be able to make key decisions for the child, such as when he should have contact with mother. The godmother also

adamantly opposed caring for the child under a custody arrangement because mother would have the ability to return and ask the court to take the child away from her care.

¶ 46 The caseworker similarly opined that an APR would not provide the child with the permanency and stability that he needed. She explained that it was imperative that the child's progress made while in the godmother's care not be disrupted.

¶ 47 On this record, we discern no error in the juvenile court's determination that there was no less drastic alternative to termination.

V. Conclusion

¶ 48 The judgment is affirmed.

CHIEF JUDGE BERNARD and JUDGE GRAHAM concur.

Probate Trial and Procedure Committee

Minutes of the January 6, 2021 Meeting

The Probate Trial and Procedure Committee met virtually on January 6, 2021. The meeting was called to order at approximately 10:00am.

The following members were present or participated by phone:

Lindsay Andrew – Landrew@steenrodlaw.com
Tim Bounds – bounds@evanscase.com
Norv Brasch – norv@tealaw.com
Lynne Bruzzese – lynne@lbdurangolaw.com
Marco Chayet – marco@coloradoelderlaw.com
Carolyn Clawson – west.cclawson@gmail.com
Tammy Conover – tammy@conoverlawllc.com
Maureen Cook
Spencer Crona – scrona@brownandcrona.com
Gunther Goetz – gunther@goetzlawoffice.com
Emily Gregory
Dawn Hewitt – dawn@coloradoelderlaw.com
Keith Lapuyade – keith.lapuyade@overtonlawfirm.com
Marcie McMinimee – mmcinimee@steenrodlaw.com
Lauren Paschal – Lauren@coloradoelderlaw.com
Sal Quintana – s.quintana@qlegalservices.com
Dan Sciullo – dsciullo@spencerfane.com
Catherine Seal – cas@kirtlandseal.com
Sandra Sigler - sandra@siglerlawco.com
Ernest Staggs – estaggs@staggsmorris.com
Herb Tucker -htucker@wadeash.com
Greg Whitehair – jgw@ipresolutionco.com
Chelsea Ziegler – chelsea@tealaw.com

1 Approval of Minutes of Prior Meeting

The minutes of the December 2, 2020 meeting were approved.

2 Chair's Report

a. Probate Bench Book – Project continues to move forward slowly. Justice Boatright is keenly interested in a finished product.

3 New Business or Requests

a. None.

4 Updates/Reports

a. CRPP Rule 40(d). Marci McMinimee reported that the changes have been reviewed and no objections are anticipated, however, CRPP 40(d) has not been finally approved by the Court as there are other forms or rules to be approved and the Court wants to review and approve them in entirety rather than piecemeal.
b. Cost Recovery and Compensation Act. The Committee is not currently meeting, however, Marci McMinimee asked that anyone having input on this matter contact her or Marc Darling.
c. DHS/APS "substantiated perpetrator" list. Kathy Seidel reported that there have been no additional meetings with DPS. Apparently, Colorado Counties, Inc. ("CCI") has drafted some proposed legislation for addressing minor incidents for at-risk adult procedures: "A Bill for an Act concerning creating an alternative response program as a method for County Departments of human or social services to address a report of mistreatment of an at-risk adult when the reported risk is assessed at moderate or lower." The gist of the proposed bill is to allow county APS workers to handle low and moderate risk cases in a more collaborative manner with the client. We do not have any recent reports on the status of the proposed legislation.
d. C.R.S. §§ 15-14-708(2) and 15-14-421(6)(a) re Powers of Attorney. Proposed changes were approved by SRC and T&E Council in December. Anticipate that proposed changes will be approved by Elder Law Council at their January meeting.
e. Virtual Court Proceedings. Norv Brasch reported that there have been no new developments but this issue is still relevant as it is doubtful that courts will return to full, in person proceedings any time in the near future. Marcie McMinimee reported that she contacted the State Court Administrators' office (Connie Lynd) who said that there is nothing in the works at the state level to provide uniformity or guidance surrounding remote court proceedings. A discussion ensued. Sandra Sigler reported that Judge Vreisman in Jefferson County sends extensive and detailed instructions on how to conduct virtual proceedings in his courtroom. Cate Seal reported on a recent CLE covering this topic. Norv Brasch asked Cate and Sandra to send him information and he will pass on to Justice Gabriel at CO Supreme Court.
f. Conservator's Annual Report – Tabled.

5 Adjournment

The meeting adjourned at approximately 10:40 am.

NOTICE OF MEETING FOR THE PROBATE TRIAL AND PROCEDURE COMMITTEE OF THE TRUST AND ESTATE SECTION AND ELDER LAW SECTION OF THE COLORADO BAR ASSOCIATION

February 3, 2021 at 10 a.m.

https://cba-cle.zoom.us/j/91827848116?pwd=VEFQRms3VHYyaFpXSDJmN1ROcVp0UT09

Meeting ID: 918 2784 8116
Passcode: 620136

Call-in: 1 (312) 626 6799
Meeting ID: 918 2784 8116
Find your local number: https://cba-cle.zoom.us/u/aiYe3oM0k

AGENDA

1. Welcome and Introductions
2. Review of Minutes from January 6, 2021 - Approval
3. Chair's Report
    a. Probate Bench Book – Kathy Seidel
    b. Trifecta of Common Law Marriage cases
        i. In re Marriage of Hogsett & Neale, 2021 CO 1
        ii. In re Estate of Yudkin, 2021 CO 2
        iii. In re Marriage of LaFleur & Pyfer, 2021 CO 3
4. New Business or Requests
5. Updates/Reports
    a. CRPP Rule 40(d). Submitted to Supreme Court for approval. Marcie McMinimee
    b. Cost Recovery and Compensation Act; C.R.S. § 15-10-604 re procedure and process. Marc Darling/Marcie McMinimee
    c. Due process concerns re "substantiated perpetrator" list maintained by Departments of Human Services. Kathy Seidel/Norv Brasch
    d. C.R.S. §§15-14-708(2) and 421(6)(a) Powers of Attorney when fiduciary appointed. Marcie McMinimee

e. Virtual Court Proceedings. Norv Brasch

i. People in the Interest of RJB, 20 CAO 859

f. Conservator's Annual Report - Tabled.

6. Adjournment

NEXT MEETING: March 3, 2021 @ 10 a.m.

REMINDER: Join the Committee through CBA Membership Department – email membership@cobar.org