IN THE
INDIANA COURT OF APPEALS

CASE NO. 53 A 01 - 1305 - DR - 00221

IN Re: THE MARRIAGE OF	)	Appeal from the
MELANIE DAVIS,	)	Monroe County Circuit Court
Petitioner-Appellant,	)	
	)	
and	)	Lower Court Case Number
	)	53C08-1210-DR-000561
ANGELA SUMMERS,	)	
Respondent-Appellee.	)	
	)	The Hon. Valeri Haughton,
	)	Judge

BRIEF FOR THE APPELLANT

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STATEMENT OF THE ISSUE

The trial court erred as a matter of law when it held that a marriage that was valid in Indiana at the time it was solemnized became automatically void when one spouse underwent a gender transition and obtained a court-ordered amendment of her birth certificate consistent with the standards of care for a person with a diagnosis of gender dysphoria. The erroneous order not only precluded the parties' ability to obtain a dissolution decree, it also invalidated the rights and responsibilities of the spouses with respect to each other, and precluded a proper custody determination for their minor child.

STATEMENT OF THE CASE

The appellant, Melanie Davis, filed a Verified Petition for Dissolution of Marriage in the Monroe County Circuit Court on October 25, 2012. App. 10-11. The trial court denied the petition in an Order on March 8, 2013, App. 5-6, and denied a Motion to Correct Error on April 15, 2013, App. 18. A notice of appeal was filed on May 15, 2013. App. 19-22. The clerk filed a notice of completion of transcript on July 15, 2013. App. 23-25. This brief was timely filed on August 14, 2013.

STATEMENT OF THE FACTS

The parties to this case were married (in Brown County, Indiana), on October 30, 1999. App. 5. At that time, they were known as David Paul Summers and Angela Summers. *Id.* The couple's child, Katrina, was born July 24, 2005. *Id.*

On May 31, 2005, David Summers filed a verified petition in Marion County Circuit Court seeking to change his name to Melanie Lauren Artemesia Davis, and also asking that the gender marker be changed on his birth certificate from male to female, "pursuant to the standards of care for those with a diagnosis of gender dysphoria."[1] App. 7.

The Marion Circuit Court granted the change of name in an Order on September 12, 2005. App. 8. In an Amended Order on October 21, 2008, the Marion Circuit Court also ordered that the gender designation on David Summers's – now Melanie Davis's – birth certificate "be amended from Male to Female in order to conform to her identity, legal name and appearance." App. 9.

Davis and Summers separated in 2008, and on October 25, 2012, Davis filed a Verified Petition for Dissolution of Marriage in the Monroe Circuit Court, citing

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[1] According to the American Psychiatric Association, publisher of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, a diagnosis of gender dysphoria is appropriate for "people whose gender at birth is contrary to the one they identify with." American Psychiatric Association, "Fact Sheet on Gender Dysphoria," *available at* http://goo.gl/h14xIL .

Gender dysphoria may take a variety of forms, including "strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender." *Id.* A person's "social and legal transition to the desired gender" is part of the care and treatment for such individuals. *Id.*

an irretrievable breakdown of the marriage. App. 10. Summers did not oppose the petition.

The trial court on January 23, 2013, approved an Agreed Provisional Order giving Davis physical custody and joint legal custody of Katrina and requiring Summers to pay child support. App. 12-14.

In an Order on March 8, 2013 – without having held a hearing or received any briefing – the trial court denied the petition for dissolution. App. 5-6. The court said that the parties' marriage was valid "prior to Petitioner's gender assignment." *Id*. at 6. But, citing Ind. Code § 31-11-1-1, which prohibits same-sex marriages (I.C. § 31-11-1-1(a)) and declares such marriages "void in Indiana even if the marriage is lawful in the place where it is solemnized" (I.C. § 31-11-1-1(b)), the trial court reasoned that the parties' marriage "became void on October 21, 2008," the date Davis's birth certificate was ordered by the Marion Circuit Court to be amended to reflect her new gender as female. *Id*. The trial court said it "could not dissolve a marriage that is not a marriage because it is already void." *Id*. Although the parties are separated, the court did not adjudicate a permanent custody arrangement for the couple's minor child, Katrina.

Davis filed a Motion to Correct Error on this ruling, arguing, among other things, that the court had misinterpreted the language and purposes of I.C. § 31-11-1-1; that the parties' marriage was neither void *ab initio* nor voidable under Indiana law; that the court's ruling was inconsistent with the policy of certainty in marital status; and that the ruling potentially raised federal constitutional concerns. App.

15-17. Summers did not file any response to this motion. The trial court denied the motion without comment or formal order on April 15, 2013. App. 18

SUMMARY OF THE ARGUMENT

I. The trial court misunderstood the very limited circumstances under which an Indiana marriage may be voided. A marriage is void without judicial proceedings where it is bigamous, where it involves parties who are more closely related than the law allows, or where it is a common law marriage. Marriages are voidable with judicial proceedings where they are procured by fraud or where one of the spouses lacks capacity at the time of the marriage due to age or mental incompetency. None of these circumstances apply here. No court in any state has ever approved the idea that a person's legal gender transition could void an existing marriage, and such a result should be regarded as unconscionable.

II. The trial court erred in believing that I.C. § 31-11-1-1 applied to the circumstances in this case. That statute's plain text, its legislative history, and the circumstances of its passage all make clear that it does not. There is no evidence that the Legislature intended to disturb Indiana marriages that were valid when they were solemnized. The trial court misapplied the statute to a situation where it was never intended to operate.

III. The trial court's order violated federal constitutional due process. Contrary to the trial court's apparent reasoning, Davis could not have been on notice that, in petitioning for a court order changing the gender marker on her birth certificate, she would necessarily be terminating her marriage. Nothing in I.C. §

31-11-1-1, its legislative history, or the law of any other state could have caused the parties to anticipate such a result from a court-ordered amendment to a vital record. Existing legal family relationships – including Davis's relationship with her child – are strongly protected by the Due Process Clause and may not be terminated or nullified without proper legal authority and judicial proceedings.

IV. Finally, the trial court's order cannot be reconciled with Indiana's strong policy in favor of validating the continuing existence of marriages. The purpose of this policy is to avoid the sort of legal mayhem that would result if spouses could not be secure in their continued marital status. This Court has rejected ad hoc exceptions to this policy, and there is no justification for any exception to the policy in this case.

STANDARD OF REVIEW

The trial court's interpretation and application of I.C. § 31-11-1-1, like all questions of statutory interpretation, is "a pure question of law" to be reviewed *de novo*. *N.L. v. State*, 989 N.E.2d 773, 777 (Ind. 2013); *accord*, *Dykstra v. City of Hammond*, 985 N.E.2d 1105, 1107 (Ind. Ct. App. 2013) ("Interpretation of a statute is a question of law which we review *de novo*.").

ARGUMENT

I. A Marriage that Is Valid at the Time It Is Solemnized Cannot Become Void Due to a Later Event Such as a Legal Change of Gender.

The trial court misunderstood the limited circumstances under which an Indiana marriage may be voided, and in doing so it produced a result that should be regarded as unconscionable. No court in any state has ever approved the idea that a person's legal gender transition could void an existing marriage.

A. The Parties' Marriage Was Neither Void *Ab Initio* Nor Voidable Under Indiana Law.

It is hornbook family law that a marriage is either "void" *ab initio* or "voidable" with judicial proceedings. *See*, *e.g.*, Harry D. Krause, et al., *Family Law: Cases, Comments, and Questions* 86 (6th ed. 2007). A marriage that is void *ab initio* does not require legal proceedings to dissolve, because it was never legally operative to begin with; a voidable marriage remains in force unless and until its validity is challenged by someone with legal standing to do so, typically one of the spouses. In this case, the trial court acknowledged that the parties' marriage had been valid for nearly nine years. *See* App. 5-6. Moreover, it did not *adjudicate* the marriage to be void based on the petition of one of the spouses supported by good legal cause. Rather, the court reasoned the marriage had simply *become* void more than four years earlier due to an intervening event. That intervening event was not a crime, fraud, imprisonment, spousal abuse, failure to uphold a marital obligation, or any other wrong, but simply an order from a court of this state amending a birth certificate. There is no authority for such a holding.

Under Indiana law, a marriage is "void without legal proceedings," I.C. § 31-11-8-1, in only three circumstances: if either party had a spouse who was living at the time the marriage was solemnized, I.C. § 31-11-8-2; if the parties are more closely related than the law allows, I.C. § 31-11-8-3; or if it is a common-law marriage after 1958, I.C. § 31-11-8-5. The legislature did not include same-sex marriages among the types of marriages that are void without judicial proceedings. *See* I.C. § 31-11-8-1.

Marriages are voidable with judicial proceedings in Indiana under two circumstances: where a party was incapable of contracting marriage due to age or mental incompetency, I.C. § 31-11-9-2, or where the marriage was procured through fraud by one of the parties, I.C. § 31-11-9-3. Proceedings seeking to void a marriage may only be brought by the incapable party, in cases of age or mental incompetency, I.C. § 31-11-10-1(b), or by the spousal victim of fraud, I.C. § 31-11-10-2(b).

In this case, the parties' marriage was valid when celebrated. In 1999, Davis, then known as David Summers, was legally a male on the relevant evidentiary document: his birth certificate. "A birth certificate as a public document is … prima facie evidence of the truth of the facts stated therein when those facts are required by law to be furnished." *Hinson v. Hinson*, 356 So.2d 372, 374 (Fla. Ct. App. 1978). And, of course, the couple produced a biological child. Thus, the trial court in this case essentially created a new legal category – a valid marriage that could *become* void upon the occurrence of some intervening event. Such a thing is unknown in Indiana's law, or the modern-day law of any other state.

B. A Gender Transition by One of the Spouses Cannot Void a Marriage.

No court has ever found a marriage to have been voided by one of the spouses' gender transition. This is so even though there is good reason to believe there are many such couples in the United States. *See* Jennifer Finney Boylan, "Is My Marriage Gay?," *The New York Times*, May 12, 2009, A27 (noting that the author, a transgendered female, remained legally married in Maine to her spouse Deirdre, even though same-sex marriage was not legal in Maine at that time, and that "each week we hear from wives and husbands going through similar experiences together"); Mark F. Scurti, "Same Sex Marriage: Is Maryland Ready?," 35 *U. Balt. L.F.* 128, 134 (2005) (observing that "many such couples" involving one spouse who has undergone gender transition during marriage "exist in Maryland and across the country"). There are no cases indicating that any such marriages have been disturbed, even in states that now or at one time prohibited same-sex marriages.

Indeed, it would shock the conscience for a state to penalize an individual with the loss of his or her marriage for obtaining updated identity documents pursuant to an accepted course of care for a legally benign and widely recognized medical condition. The American Psychiatric Association advises that gender dysphoria should not "be used against [an individual] in social, occupational, or legal areas." American Psychiatric Association, "Fact Sheet on Gender Dysphoria," *available at* http://goo.gl/h14xIL . Both state and federal courts have recognized gender dysphoria as a legitimate and serious medical condition. *E.g.*, *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 376 (N.J. Sup. Ct. App. Div. 2001)

(characterizing gender dysphoria as "a recognized mental or psychological disability"); *Farmer v. Haas*, 990 F.2d 319, 321 (7th Cir. 1993) (observing that "transsexualism is not a frivolous 'life style' choice but a genuine psychiatric disorder"). Appropriate amendments to government records reflecting a person's new identity and appearance are commonplace and a part of the standards of care for individuals with gender dysphoria. *See*, *e.g.*, World Professional Association for Transgender Health, "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7," 13 *International Journal of Transgenderism* 165, 185 (2011), *available at* http://goo.gl/g4iBH1. Indeed, there is a trend toward making it easier for individuals to revise such records to reflect a gender transition. *See*, *e.g.*, Kevin Rector, "SSA makes gender change in records easier," *The Baltimore Sun*, June 17, 2013, *available at* http://goo.gl/7VRhq5 (reporting on a new policy by the federal Social Security Administration easing requirements to change one's gender in agency records).

The only marginally analogous case to this one is *Moore v. Moore*, 817 N.E.2d 111 (Ohio App. 2004), which held that a gender transition did not alter legal obligations in a dissolution decree. In *Moore*, a former husband petitioned for relief from the spousal support provisions of a dissolution decree following his former wife's gender transition to a male. The Ohio Court of Appeals agreed with the trial court that the gender transition provided no basis for revisiting the divorce decree. The decree's terms were based on "the lengthy nature of [the parties'] marriage and their employment histories," and the only relevant consideration for altering those

terms would be a significant change in the former wife's financial circumstances. *Id*. at 112.[2]

Moore is consistent with other cases which establish that events during the course of a marriage do not affect the marriage's continued legal validity; what is relevant is the parties' capacity *at the time of the marriage*. *See*, *e.g.*, *Geitner By and Through First Nat. Bank of Catawba*, 312 S.E.2d 236, 238 (N.C. Ct. App. 1984) (capacity at the "precise time when the marriage is celebrated controls its validity or invalidity"); *Briggs v. Briggs*, 325 P.2d 219, 224 (Cal. App. 1958) (same); *Forbis v. Forbis*, 274 S.W.2d 800, 805 (Mo. Ct. App. 1955) (validity "must be determined as of the date of the marriage"). In the absence of facts existing at time of the marriage that could establish voidability, such as mental incapacity or fraud, a marriage that meets statutory prerequisites when celebrated "is subject to dissolution only through legal proceedings or the death of one of the spouses." Eugene F. Scoles et al., *Conflict of Laws* 249 (4th ed. 2004). Accordingly, "the parties to the marriage contract may not cancel or annul [a marriage] at will," 55 C.J.S. Marriage § 70, such as by doing some act that they believe would nullify the marriage. "In the absence

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[2] A few decisions have dealt with a different question from the one in this case: whether a transgender individual's actual *capacity to marry* is controlled by his or her gender at birth or the gender after the transition process. *E.g.*, *compare M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (sex for purposes of marriage is determined by the party's legal gender at the time of marriage), *with Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (sex for purposes of marriage is fixed at birth). Of course, either of these lines of cases would support the validity of the marriage in this case, since Davis, then known as David Summers, was a male at birth and remained so at the time of the marriage.

of fraud, no privately imposed conditions will alter the marital status." 55 C.J.S. Marriage § 72.

Even a subsequent change to a state's legal definition of marriage will not ordinarily affect marriages that were procured before the change in law. This is because married couples "acquire[] vested property rights as lawfully married spouses with respect to a wide range of subjects," and retroactive invalidation would "throw[] property rights into disarray, destroy[] … legal interests and expectations of … couples and their families, and potentially undermin[e] the ability of citizens to plan their lives." *Strauss v. Horton*., 207 P.3d 48, 59 (Calif. 2009).

In summary, the parties in this case contracted a marriage that was valid in Indiana at the time it was solemnized. The marriage was neither voidable nor void *ab initio* under Indiana law, and subsequent events during a valid marriage cannot render a marriage void. The trial court's understanding to the contrary was legal error.

II. The Statute's Plain Language and Legislative History Make Clear I.C. § 31-11-1-1 Cannot Be Used to Invalidate the Parties' Marriage.

The trial court erred in believing that I.C. § 31-11-1-1 applied to the circumstances in this case. The statute's plain text and legislative history make clear that it does not. There is no evidence that the Legislature intended to disturb Indiana marriages that were valid when they were solemnized. Nothing in this case challenges the validity of I.C. § 31-11-1-1 or the State's ability to favor and incentivize heterosexual marriages over same-sex marriages, which this Court has

previously upheld. *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005). The trial court simply misapplied the statute to a situation where it was never intended to operate.

The legislation enacting what would become I.C. § 31-11-1-1 was approved by both houses of the General Assembly as an "emergency" measure on April 25, 1997. "An Act to Amend the Indiana Code concerning family law," P.L. 198-1997, 1997 Ind. Acts 2879 (specifying in § 2 that "[a]n emergency is declared for this act"). The legislation was adopted amid concern that same-sex couples from Indiana might obtain marriages in Hawaii – whose state courts were at the time considering whether such marriages should be authorized – then return to Indiana expecting the marriages to be recognized. According to a news report on the act's passage, "The controversial issue arose in Indiana after a judge in Hawaii ruled in December [1996] that Hawaii may not forbid same-sex marriages. It was the first legal decision in U.S. history allowing men to marry men and women to marry women." Stuart A. Hirsch, "Ban on gay marriages to go to governor," *Indianapolis Star*, April 26, 1997, B-1.

I.C. § 31-11-1-1 has two subsections. The first subsection prohibits the licensing and solemnization in Indiana of marriages between persons of the same sex: "Only a female may marry a male. Only a male may marry a female." I.C. § 31-11-1-1(a). This subsection has no relevance to this case, since the parties satisfied the legal requirements for marriage as male and female in 1999.

The statute's second subsection also has no relevance here, because it is a choice-of-law provision governing the recognition of same-sex marriages obtained by Indiana couples under the laws of *other* states: "A marriage between persons of the same gender is void in Indiana *even if the marriage is lawful in the place where it is solemnized."* I.C. § 31-11-1-1(b) (emphasis added). This part of the statute was necessary to create an exception to Indiana's normal choice-of-law rule recognizing marriages from other states by default. *See Guevara v. Inland Steel Co.*, 90 N.E.2d 347, 349 (Ind. 1950) ("The general rule is that the validity of a marriage is governed by the law of the place of celebration.") (citations and internal quotation marks omitted); *Restatement (Second) of Conflict of Laws* § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage at the time of the marriage.") This subsection reflected the legislature's "emergency" concern about the possible consequences if Hoosier same-sex couples sought marriages in other jurisdictions, then returned home expecting Indiana to recognize them.

The inapplicability of I.C. § 31-11-1-1 to the parties' marriage in this case is confirmed by the structure of the statutory scheme, the act's legislative history, contemporaneous news accounts, and scholarly commentary.

First, the legislature did not include same-sex marriages among the types of marriages that are "void without legal proceedings." *See* I.C. § 31-11-8-1. Since the

legislature obviously could have done so, it is reasonable to infer that the legislature could not have intended the sort of outcome the trial court reached in this case. Statutes are "not read … in isolation"; rather, this Court "consider[s] the language and structure of the entire statutory scheme, as well as changes made to the statutory scheme over time." *Joe v. Lebow*, 670 N.E.2d 9, 18 (Ind. Ct. App. 1996).

Second, the conference committee report on the legislation stated that the act's purpose was to "[m]ake[] a marriage between persons of the same gender that is solemnized *in any other country, state, or territory* void in Indiana." Conference Committee Report for H.B. 1265 (filed April 24, 1997), *available at* http://goo.gl/5zpNwH (emphasis added). The marriage in this case was solemnized in Indiana.

Third, contemporaneous news accounts indicate that the act was motivated by legislators' concern over evasive marriages. *See*, *e.g.*, Barb Albert, "Same-sex marriage takes hit in Senate," *Indianapolis Star,* Feb. 11, 1997, B-2 (State Sen. Richard Bray "argued that Congress recently decided to allow states to choose whether to recognize same-sex marriages *sanctioned in other locales*") (emphasis added).

Fourth, the understanding of I.C. § 31-11-1-1(b) as a provision intended to prevent evasive marriages by Indiana domiciliaries is confirmed by an authoritative scholarly history of the state's domestic relations law, which explains that legislators enacted both provisions of I.C. § 31-11-1-1 "in an attempt to ensure that homosexual Hoosiers could not wed." Michael Grossberg & Amy Elson, "Family

Law in Indiana: A Domestic Relations Crossroads," in David J. Bodenhamer & Hon. Randall T. Shepard, eds., *The History of Indiana Law* 80 (2006). The concern at the time was that "if any same-sex couple could go to Hawaii to be married, and return to their home state to live, then Hawaii was strong-arming the other states, setting marriage policy for the nation." *Id*. (footnote and quotation marks omitted).

In summary, I.C. § 31-11-1-1 has no application to the parties' marriage in this case. The parties did not attempt to procure a same-sex marriage in Indiana, nor did they attempt to evade Indiana's laws by seeking a same-sex marriage in another jurisdiction. The trial court misapplied the law and should be reversed.

III. The Trial Court's Order Violated Constitutional Due Process.

The notion that a marriage could become void by operation of law, as the trial court reasoned here, violates the most elementary notions of procedural and substantive due process guaranteed by the 14th Amendment of the federal Constitution.

Davis obviously was not on notice that, in petitioning for a court order changing the gender marker on her birth certificate, she would *ipso facto* be terminating her marriage. As we have explained in Part II, above, I.C. 31-11-1-1 could not reasonably be interpreted, at the time of the gender change in 2008 or now, to provide such a draconian consequence. Nothing in the statute, legislative history, or the law of any other state could have caused Davis to anticipate such a result from a court-ordered amendment to a vital record. To the contrary: it is well established that a marriage "cannot be dissolved except by 'due judicial

proceedings.'" *Boddie v. Connecticut*, 401 U.S. 371, 381 n.8 (1971) (quoting *Jeffreys v. Jeffreys*, 296 N.Y.S.2d 74, 87 (N.Y. Sup. Ct. 1968)); *accord*, 55 C.J.S. Marriage § 70 ("[E]xcept by the death of a party, the marriage contract cannot be terminated in any other way than by the sovereign power of the state speaking through its tribunals.").

Given that a state may not terminate the legal relationship between parent and child without clear and convincing evidence of parental misconduct, *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), it is difficult to see how a court could declare the legal relationship between spouses to have been terminated, as the trial court did here, with no due process whatsoever. The U.S. Supreme Court has long made clear that *existing* legal family relationships are strongly protected by the 14th Amendment's Due Process Clause. Where marriage and child rearing are concerned, a long line of decisions dating back almost a century has recognized a "private realm of family life which the state cannot enter," because family life involves "the most intimate and personal choices a person may make in a lifetime." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). Accordingly, "settled family relationships" should not "be destroyed by a procedure we would not recognize if the suit were one to collect the grocery bill." *Williams v. North Carolina*, 317 U.S. 287, 316 (1942) (Jackson, J., dissenting).

The trial court's order also may have deprived Davis of her constitutional right to a legally secure parent-child relationship with her daughter, Katrina. The "interest of parents in the care, custody, and control of their children … is perhaps

the oldest of the fundamental liberty interests recognized by" the Supreme Court under the 14th Amendment's Due Process Clause. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion by Justice O'Connor). Accordingly, this Court has explained that "[c]hild custody proceedings implicate the fundamental relationship between parent and child, so procedural due process must be provided to protect the substantive rights of the parties." *Brown v. Brown,* 463 N.E.2d 310, 313 (Ind. Ct. App. 1984).

No such due process was provided here. Katrina is Davis's biological daughter and was born during the period the trial court said the parties' marriage was valid. Yet the unprecedented circumstances in this case – the trial court's finding of a void marriage, combined with its refusal to adjudicate any permanent custody arrangement – leave Davis's legal relationship to her daughter confused and unclear. *See Santosky*, 455 U.S. at 753 (persons facing possible loss of parental rights have an especially "critical need for procedural protections"); *Rainier v. Snider*, 369 N.E.2d 666, 670 (Ind. Ct. App. 1977) (the need for the presumption of a marriage's validity "may be augmented" where there could be a "question of the legitimacy of offspring").

Katrina, who has in some sense been rendered the child of unwed parents and whose own security is thus placed in jeopardy, also may have been impaired in her own constitutional rights. *See Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) ("[I]t seems to me extremely likely that, to the extent parents and families have

fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests.") (footnote omitted).

Had this Court anticipated that I.C. § 31-11-1-1 might be used to summarily void an existing Indiana marriage, or had the State taken the position that it would be proper to do so, this Court likely would not have analyzed the statute under the low constitutional bar of rational basis review. *See Morrison*, 821 N.E.2d at 27-28. In *Morrison*, this Court held that the rationale for the law proffered by the State – that "opposite-sex marriage furthers the legitimate state interest in encouraging opposite-sex couples to procreate responsibly and have and raise children within a stable environment" – survived rational basis scrutiny. *Id.* at 35. Although I.C. 31-11-1-1(b), the choice of law provision, was not at issue in *Morrison*, *id.* at 19 n.2, nothing in that decision remotely hinted at the outcome in this case. Encouraging opposite-sex couples to procreate responsibly may be a legitimate reason for favoring one type of couple over another in who may obtain a marriage license, but it cannot justify nullifying the legal rights and responsibilities of a couple who had already been married for almost nine years – and who had, moreover, procreated in the responsible manner the law encourages. In interpreting a statute, this Court presumes the legislature did not intend "to bring about an absurd or unjust result. Thus, we must keep in mind the objective and purpose of the law as well as the effect and repercussions of such a construction." *Spencer v. Spencer*, 990 N.E.2d 496, 496 (Ind. Ct. App. 2013).

In summary, the trial court's order violated constitutional due process and should be overturned.

IV. The Trial Court's Order Violated Indiana's Strong Policy of Validating Existing Marriages.

The trial court's ruling in this case – that the parties' once-valid marriage had ceased to exist more than four years ago – cannot be reconciled with Indiana's strong policy in favor of validating the continuing existence of marriages. The purpose of this policy is to avoid the sort of legal mayhem that would result if spouses could not be secure in their continued marital status.

"Indiana was an early subscriber to the view that one of the strongest presumptions of law is that a marriage, once shown, is valid." *Rainier,* 369 N.E.2d at 668 (quoting *Terer v. Terer,* 101 Ind. 129, 132 (1885)). "This presumption is strengthened by another presumption[,] that of the *continuance* of a marriage…." *Id.* (emphasis added). Indeed, "[t]he presumption in favor of the validity of a marriage … is one of the strongest known." *Bruns v. Cope*, 105 N.E. 471, 473 (Ind. 1914). As one federal court has aptly stated, "the policy of the civilized world[] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). This Court has rejected an "ad hoc 'policy approach'" to the presumption of marriage validity, because such an approach would "wreak havoc with the stability of the case law and would provide little guidance to trial judges who must confront the issue in myriad factual contexts." *Rainier*, 369 N.E.2d at 670.

The reason for the presumption of continued validity is that a marriage is more than simply a romantic union; it implicates hundreds of rights and duties as to property, children, inheritance, and survivorship, to name just a few. According to a compendium compiled last year by students at the Indiana University Maurer School of Law, marital status is relevant to 614 different Indiana statutory provisions covering nearly every subject of the law, including family, health, probate, criminal procedure, corrections, commerce, employment, education, agriculture, property, and taxation.[3] The privileges and responsibilities of marriage range from the mundane, *see* I.C. § 15-15-6-10 (communications between a farmer and his or her spouse regarding the terms of a seed contract are not a breach of a confidentiality provision in said contract) to the profound, *see* I.C. § 16-36-1-5 (a spouse may give or refuse consent to health care even if he or she had not previously been appointed by his or her spouse as a health care representative). A couple's marital status also affects the rights and security of third parties. *See*, *e.g.*, I.C. § 12-17.2-5-3 (a person must submit to the state the criminal history of his or her spouse when applying for a license to run a day care); I.C. § 32-17-14-11 (if real property is held by two spouses as a tenancy by the entirety, a transfer-on-death deed recorded by one spouse is void unless the other spouse also agrees to the transfer).

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[3] The publication, titled *More Than Just a Couple*, is available at http://goo.gl/xw88YB.

If a valid marriage could become void without adjudication and with no consent or culpability (or even knowledge) by either spouse, the result would be legal chaos. Titles to real property would be clouded; probate courts would face vexing new issues and claims; the rights and responsibilities of the spouses, their children, heirs, debtors, creditors, and others would all be thrown into uncertainty at best, and summarily invalidated at worst. To mention just one example: in this case, a cloud remains over the parties' actual marital status that could cause significant problems down the road (up to and including the possibility of bigamy) if one of them wishes to marry again, because another court, perhaps in another state, might not accept the singular novelty of the trial court's ruling in this case.

As this Court put it well, the strong presumption in favor of a marriage's validity and continuance "rests upon strong social policies which give effect to the expectations of the parties. Parties to a marriage are entitled to a security provided by the law. The legal premise permits them to assume validity so that they may plan and order their lives accordingly." *Rainier*, 369 N.E.2d at 669-670. As a corollary, the purpose of a dissolution proceeding, which the parties in this case sought, is to ensure an orderly wind-up to a marriage and to clarify the rights of all persons who might be affected – especially their minor children.

In summary, the trial court's ruling, if allowed to stand, would debase Indiana's well established judicial policy favoring the continuing validity of marriages and would open the door to legal mayhem. Consistent with this Court's

reasoning in *Rainier*, *see* 369 N.E.2d at 670, there is no justification for an ad hoc exception to that policy in this case.

V. Even if this Court Holds the Marriage to Have Been Voided, It Should Order the Trial Court to Determine Custody of the Parties' Child.

Even if this Court approves the trial court's ruling that the parties' marriage became void more than four years ago, it should remand with instructions for the trial court to make a formal child custody determination. Davis has had joint legal custody and sole physical custody of Katrina pursuant to an agreed provisional order the trial court approved while the dissolution petition was pending. Given the unprecedented nature of the trial court's ruling, there is no clear guidance in this situation from the domestic relations statutes. But it would be absurd – and a waste of the parties' and judicial resources – to require Davis as the biological father to seek custodial rights by first initiating a paternity action, as if Katrina were the child of unwed parents. Even where a marriage is voidable, "the children of such marriage, begotten before the same is annulled, shall be legitimate; and, in such cases, the same proceedings shall be had as provided in applications for divorce." *Shafe v. Shafe*, 198 N.E. 826, 827-28 (Ind. Ct. App. 1935).

CONCLUSION

This Court should reverse the trial court's order holding that the parties' marriage became void on October 21, 2008, and should remand with instructions to adjudicate the petition for dissolution. Alternatively, if this Court finds that the

trial court's legal analysis concerning the marriage was correct, it should remand with instructions to adjudicate custody of the couple's minor child.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, a true and complete copy of the foregoing Brief for the Appellant was served on counsel for the Appellee by depositing it with a third-party commercial carrier for delivery within three calendar days, addressed to:

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