MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO.: KEN-14-456

ELIZABETH KINNEY,

Plaintiff-Appellee

v.

TANYA J. BUSCH,

Defendant-Appellant

ON REPORT FROM THE KENNEBEC DISTRICT COURT

BRIEF OF APPELLEE ELIZABETH KINNEY

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INTRODUCTION

In 2012, the State of Maine, through a people's initiative, enacted "An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom." (*See* Addendum or "Add.") That legislation allowed same-sex couples to marry and removed a previous prohibition. *See id.*, enacting 19-A M.R.S. § 650-A and repealing 19-A M.R.S. § 701(5). The legislation also included newly enacted 19-A M.R.S. § 650-B ("Recognition of Marriage Licensed and Certified in Another Jurisdiction"), which lifted a statutory ban that existed from 1997 until the effective date of the initiated legislation, December 29, 2012, on recognizing same-sex couples' marriages, wherever celebrated.

Appellant Busch argues that under section 650-B, a Maine court adjudicating a divorce action filed in 2013 must pretend that a marriage that lawfully occurred in 2008 in Massachusetts instead occurred on December 29, 2012 – that is, if the spouses are of the same sex.

Nothing in section 650-B so provides. The premise of Busch's argument is that all marriages of same-sex couples occurring prior to December 29, 2012 must be deemed to have occurred on that date under section 650-B in order to avoid a retroactive application of that statute. This premise, however, is incorrect. Section 650-B provides that marriages of same-sex couples are recognized in Maine *after* the effective date of that statute "for all purposes." The activity addressed in

section 650-B is *recognition* of an existing marriage, and is forward-looking. From December 29, 2012 onward, extant marriages of same-sex couples will be recognized in Maine. Recognizing a same-sex couple's existing marriage after December 29, 2012, whatever its vintage, in a divorce proceeding filed after 2012, is not a retroactive application of the statute.

Hence, while, as discussed below, Busch's argument suffers from many other infirmities, constitutional and otherwise, we need go no further than this simple point.

STATEMENT OF THE FACTS

I. In 2012, the people of Maine lifted the statutory ban on recognition of same-sex marriages in order to achieve marriage equality.

Until 1997, Maine followed general rules of comity regarding its treatment of marriage. *See, e.g., Inhabitants of Hiram v. Pierce*, 45 Me. 367, 371 (1858) ("Whether the marriage was valid must be determined by the laws of that State; and, if valid there, it will be held valid here") (citations omitted). *See also Sutton v. Warren*, 51 Mass. 451, 451 (1845); *West Cambridge v. Lexington*, 18 Mass. 506, 517 (1823).

In 1997, the Legislature approved an initiated bill that banned same-sex couples from marrying in Maine and banned recognition of such marriages lawfully celebrated elsewhere. Laws 1997, c. 65, § 3 (adding sub-section 5 to 19-A M.R.SA § 701) (*repealed*). *See generally* Jennifer Wriggins, "Maine's 'Act

to Protect Traditional Marriage and Prohibit Same-Sex Marriages': Questions of Constitutionality Under State and Federal Law," 50 Me. L. Rev. 345, 347, 357 n. 78 (1998) (describing initiator's stated goals and legislative enactment).

By people's initiative, Maine lifted these statutory bans effective December 29, 2012. *See* Laws 2011, I.B. 3 (deleting 19-A M.R.S. § 701(5) ("Same Sex Marriage Prohibited") and adding 19-A M.R.S. §§ 650-A, 650-B). (Add.) Section 650-B provides:

> a marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes under the laws of this state.

The clear purpose of enacting the initiative, including section 650-B, was to achieve marriage equality. The initiated legislation allowed same-sex couples to join in marriage, removing a previous disability, and also provided for recognition of same-sex couples' marriages celebrated elsewhere (*see* Add. 1), thereby removing a previous impediment to recognition. The text, as well as the legislative history of the initiative, shows that the goal was to give same-sex unions treatment equal to heterosexual unions, with no second-class treatment or discrimination against such unions. So, for example, the text provides that a same-sex marriage "**is recognized for all purposes**." *See also* 19-A M.R.S. § 650-A (requiring gender-specific terms relating to "the marital relationship or familial relationships" to be construed as gender neutral for all purposes throughout the law).

Campaign literature, editorials and other contemporaneous material underscore that the purpose of the initiative was to achieve marriage equality.[1] The goal of the legislation was to have Maine recognize any same-sex couples' marriage valid in another state as valid in Maine. The legislative history is devoid of any suggestion that the goal was to treat those marriages only as having occurred on the date the legislation was passed instead of giving them full and equal recognition under Maine law.

II. In 2008, the parties were lawfully married in Massachusetts.

Busch and Kinney were married in Massachusetts on October 14, 2008. (A. 72.)[2] That marriage was valid under the law where it was celebrated on that date. Nothing in the record indicates that either party entered into this marriage in 2008 involuntarily, or that it was intended to be a sham for any reason. The parties knew that they were validly married as of 2008 under the law in which their marriage was performed and licensed.

In her Statement of Facts, Busch states that she and Kinney did not remarry in Maine in 2012. (Blue Br. 9.) This is correct. There was no reason why they would do so: they were already married. Busch herself recognizes that they were

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[1] These materials are discussed in greater depth in the amici brief that Concerned Maine Attorneys and Leaders have submitted by consent to the Court.

[2] While the original complaint, answer and counterclaim alleged a different date, that date was subsequently corrected to October 14, 2008 in the pleadings. (*See* A. 43.)

legally married in 2008. (A. 20, ¶ 1.) If they had not been legally married in 2008, then they would not need a divorce now, which Busch herself seeks, and which she concedes a Maine court can adjudge. (*See* A. 40: "This court certainly has jurisdiction to grant a divorce.") Instead, Busch is arguing that while they were in fact legally married in Massachusetts in 2008, a Maine court should pretend that the marriage occurred on December 29, 2012, the effective date of section 650-B, lifting the ban on the recognition of their marriage.

III. In 2013, the parties filed for a divorce dissolving their 2008 marriage, and the District Court ruled that their marital property would be divided based on the date their marriage occurred, as with other marriages.

Kinney filed a complaint for divorce in January 2013. (A. 18.) Busch answered and counterclaimed, also seeking a divorce. (A. 20.) Kinney then filed a motion in limine to address the issue of the division of their marital property. (A. 32.) The District Court (Stanfill, J.) granted the motion, ruling that their marital property would be divided based on the date that the marriage occurred, as it would with any divorce of heterosexuals. (*See* A. 44.)

IV. The parties and District Court agree that a report of the matter is appropriate under M.R. App. P. 24.

When the District Court issued its ruling on the motion in limine, it noted that the division of marital property was the only contested issue in the action, with the couple having no minor children. Hence, if this marital property issue, "one of

importance to these parties and to many others," were ultimately resolved in favor of Busch, who declared that only property acquired after December 29, 2012 was marital, that resolution would "all but dispose of the case." (A. 44, 45.) Given these circumstances, the District Court suggested that, if the parties agreed, a report would be made to this Court pursuant to Rule 24. (A. 45.)

Busch consequently filed a motion to report under Rule 24 (A. 47), to which Kinney agreed. (A. 51-52.) The District Court then issued an Order reporting the matter under Rule 24(a) and (c). That Order notes in detail how the criteria for a report under these two provisions of Rule 24 are met. (A. 13.)

STATEMENT OF THE ISSUE

The reported question is:

> May property acquired between October 14, 2008 and Dec. 29, 2012 by a same-sex couple married in the State of Massachusetts on Oct. 14, 2008 be treated as marital property for the purposes of equitable division of property in a divorce action filed on January 18, 2013?

As the District Court ruled, and as noted below, the answer to this question is yes.

SUMMARY OF ARGUMENT

The Court should accept the report. All relevant factors support the report. The issue is important, capable of repetition, and resolution in one alternative would effectively dispose of the case.

Although "the trial court makes a preliminary determination of the propriety of its report," this Court retains "'the power to make our own independent determination whether in all circumstances of a given case our decision on a report would be consistent with our basic function as an appellate court and [it] would not be cast in the role of an advisory board." *Morris v. Sloan*, 1997 ME 179, ¶ 7, 698 A.2d 1038 (citation omitted).

The answer to the reported question is yes. The calculation of how to divide marital property in a divorce action after 2012 should be based on the actual date of the marriage, just like any marriage of an opposite-sex couple.

This is a legal issue interpreting a statute, section 650-B, and thus reviewed by this Court *de novo*. *In re M.B.*, 2013 ME 46, ¶ 26, 65 A.3d 1260. The Court first seeks to discern the legislative intent from the plain meaning of the text and, if the statutory text is not deemed clear, otherwise ascertains the legislative intent via settled rules of statutory construction. *See State v. Hussey*, 381 A.2d 665, 666-67 (Me. 1978) ("Determination of legislative intent is the fundamental rule in the construction or interpretation of statutes. We first try to ascertain legislative intent

from the plain meaning of the words used in the statute. Where necessary, we may resort to the clear and overriding purpose of a statute in order to determine legislative intent.") (citations omitted); *Maine Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 6, 923 A.2d 918 ("Well-settled rules of statutory construction are critical, as is legislative history when interpreting any ambiguous language in the statute.").

Applying this test in discerning the meaning and application of section 650-B, first, the statutory text is clear. Marriages of same-sex couples are "recognized for all purposes." Nothing in that text provides that one should pretend that a 2008 marriage occurred in 2012. Busch seeks to create doubt where none exists by suggesting that to divide marital property post-2012 based on the actual date of her marriage would constitute a retroactive application of section 650-B. It would not. Even if a court's refusal to pretend that a 2008 marriage occurred in 2012 would somehow amount to a retroactive application, such application is the clear intent of the statute as reflected in its text, purpose, history, rules of statutory construction and constitutional principles.

ARGUMENT

I. The Court should accept the District Court's report.

Under Rule 24(a), a report is permitted when, as here, all parties appearing agree that the question presented is of sufficient importance or doubt to justify the

report, provided that the decision would in at least one alternative finally dispose of the action. M.R. App. P. 24(a). Under Rule 24(c), the trial court may report a question of law involved in an interlocutory order on the motion of the aggrieved party, if that court is of the view that the issue should be determined by the Law Court before any further proceedings are taken. M.R. App. P. 24(c). While Rule 24(c) itself does not recite any criteria beyond the trial court's view that the interlocutory ruling should be reviewed, as a practical matter, Rule 24(c) "is not a vehicle for the trial court to involve the Law Court in interlocutory rulings; the rule exists to promote judicial efficiency where a pivotal, important question of law should be definitively decided before the rest of the action proceeds." 3A C. Harvey, *Maine Civil Practice*, § A24:1 at 195 (2014-15 ed.).

Here, all relevant criteria are met. The issue whether a same-sex couple's marriage occurring prior to December 29, 2012, lawful under the laws of that jurisdiction where it took place, is treated under Maine law as occurring on that actual date or, as Busch argues, on December 29, 2012, is an important one to these particular parties and indeed to many others, as it is capable of repetition, and as noted *infra*, n. 5, affects many areas of the law beyond identification of marital property in a divorce proceeding.[3] As the District Court noted, and no party has

[3] As the amici note, the universe of potentially affected people includes the approximately 180,000 same-sex couples who married outside Maine by December 29, 2012.

contested, the only issue remaining in this case is the division of marital property, and the Law Court's ruling in this matter in Busch's favor would effectively dispose of that issue, because the property to be divided was acquired prior to December 29, 2012.[4]

In sum, the treatment of many same-sex couples' marriages is at issue, and prompt resolution of the question will provide critically needed direction, both for married couples in Maine now and in the future. Long-married same-sex couples considering whether to move to Maine, for example, should know whether they will be treated as married from the actual date of their marriage or only since December 29, 2012, given the varied legal consequences that the duration of their marriage could have.[5]

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[4] It is unclear to what extent this Court considers whether the ruling will dispose of the action under Rule 24(c). One treatise states that interlocutory reports are not limited to cases where a decision would in one alternative dispose of the action. 3A C. Harvey, *Maine Civil Practice*, § A.24:4 at 204 & n. 5, citing *Meiners v. Aetna Cas. & Sur. Co.*, 663 A.2d 6 (Me. 1995) and *Exxon Corp. v. King*, 351 A.2d 534 (Me. 1976). In *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, ¶ 6, 692 A.2d 441, 443, ¶ 3, decided under Rule 24(c)'s predecessor, M.R. Civ. P. 72, this Court said: "Although not required by Rule 72(c), our decision will in at least one alternative dispose of the action against the church. We conclude that the interlocutory ruling in this case was appropriately reported." Hence, the Court considered this factor, noting that it was not required. Subsequent opinions have alluded to this criterion in a manner that could be read as making it a requirement, *e.g.*, *Liberty Ins. Underwriters v. Estate of Faulkner*, 2008 ME 149, ¶ 9, 959 A.2d 94, but other opinions have not, *e.g.*, *York Register v. York County Probate Court*, 2004 ME 58, ¶¶ 11-12, 847 A.2d 395; *Thermos Co. v. Spence*, 1999 ME 129, ¶ 5, 735 A.2d 484. Hence, it appears that the better view is summarized in this Court's statement in *Morris*, 1997 ME 179, ¶ 7: this Court "may take into account" whether the answer could will finally dispose of the matter.

[5] These consequences, in the myriad contexts in which duration of a marriage matters, are discussed in detail in the amici brief. They include, without limitation, not just determination of marital property in a divorce, but spousal support under 19-A M.R.S. § 951-A(2)(A)(1); elective

(footnote continued)

II. Contrary to Busch's argument, the division of marital property in a post-2012 divorce based on the actual length of a same-sex couple's marriage is not a retroactive application of section 650-B.

A. The text of section 650-B shows that Busch's argument is incorrect.

The change effected in section 650-B is to Maine's *recognition* of same-sex couples' marriages. As of the effective date of that statute and thereafter, such marriages from other jurisdictions are recognized for all purposes, whenever they occurred. For a district court in a divorce action filed in 2013 to recognize an out-of-state marriage that occurred in 2008 and to treat it accordingly under Maine divorce law is not to apply section 650-B retroactively. The marriage is being recognized *after* the effective date of the statute, for the purposes of a divorce occurring *after* the effective date of the statute.

Maine law, both before and after section 650-B was enacted, defines marital property as property acquired after the marriage occurred. *See* 19-A M.R.S. § 953(2) (defining "marital property" as property "acquired by either spouse subsequent to the marriage," with certain exceptions). When a district court applies the definition of marital property contained in Section 953(2) in a post-2012 divorce proceeding, it is not acting retroactively. Because Kinney and

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(continued footnote)
shares of an estate under 18-A M.R.S. §§ 2-201, 2-202; omitted spouse shares under 18-A M.R.S. § 2-301; parental rights and obligations, *see* M.R. Evid. 302; child support; custody; public benefits, such as Medicaid, pensions, social security, and veterans benefits; income and real estate taxes under 36 M.R.S. § 4641-C(4); and marital privilege under M.R. Evid. 504(a).

Busch were married in 2008, property "acquired . . . subsequent to the marriage" is property acquired after that marriage was validly licensed in 2008.

Maine's statutory ban on recognizing the marriage until the end of 2012 did not mean that Kinney and Busch were not married in 2008. Rather, in 2012, the ban that precluded Maine courts from recognizing a lawful 2008 Massachusetts marriage was lifted. Section 650-B did not change the date that the marriage occurred; it simply lifted the ban on recognizing that marriage in Maine as of the effective date of the statute, onward.

This conclusion is wholly supported by the text of section 650-B. That text provides that "a marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes." The operative action is recognition, which is "for all purposes." Nothing in this text states that a marriage of a same-sex couple validly licensed and certified in another jurisdiction is only partially recognized, or is treated as if it occurred on a date other than the date on which it was validly licensed and certified. Instead, the validly licensed and certified marriage from the other jurisdiction – of whatever vintage – is now recognized.

B. The inchoate nature of marital property shows that Busch's argument is incorrect.

The fluid nature of "marital property" prior to divorce only underscores how dividing that property after 2012 is not a retroactive action. "Marital property" is a

legal term that only has meaning at the time of a divorce. *See* 19-A M.R.S. § 953(1). Property comes and goes while a couple is married. A couple might be married in 2001; buy a house in 2002; sell the house in 2003; use the proceeds for rent in 2004-2005; and divorce in 2006. While the house would have been marital property had they divorced in 2002, the divorce did not occur until 2006, and it is at that moment – at the time of dissolution – that the calculation occurs. *See Long v. Long*, 1997 ME 171, ¶ 8, 697 A.2d 1317 ("The 'marital property' designation grants no present rights in the property during the marriage, but on divorce, the court must divide all marital property 'as the court deems just' granting an equitable share to each spouse.").

C. Necessity and logic show that Busch's argument is incorrect.

If one recognizes in 2013 that a marriage celebrated in 2008 exists, then central to that recognition is the actual date of that "validly licensed and certified" celebration and the absence of a need to *re*-marry following the enactment of 19-A M.R.S. § 650-B. Thus, it is inconsistent for Busch to recognize the 2008 marriage for the purpose of dissolving it, but not to divide property acquired incident thereto.

D. The legislative purpose and history show that Busch's argument is incorrect.

The clear legislative intent was to end discrimination against same-sex couples marrying and receiving respect for their existing marriages. Busch's

interpretation advances and perpetuates disparate treatment of same-sex unions. Maine would recognize a same-sex couple married before 2012 as married, but would treat that marriage only as occurring on December 29, 2012 – **unlike** heterosexual marriages. Recognition of same-sex couples' marriages would not be accurate and complete, as with heterosexual marriages. Unlike anyone else's marriage, a same-sex couple's marriage would be artificially telescoped as if it only existed for perhaps months or days, instead of the many years since it was licensed and certified. Such a result would fly in the face of the purpose of the initiated change in the law.

E. None of the precedent cited by Busch supports the conclusion that her marriage should be treated as occurring on December 29, 2012 for the purpose of dividing marital property in a divorce action filed in 2013.

None of the case law that Busch cites stands for the proposition that a statute lifting a ban against recognizing existing valid same-sex marriages must be interpreted to require such marriages to be treated as if they occurred as of the date the ban was lifted.

In *Charron v. Amaral*, 451 Mass. 767, 889 N.E.2d 946 (2008), for example, the couple was not married as of the date of an injury, but only married thereafter – that is, after the Massachusetts Supreme Judicial Court (SJC) held that same-sex couples could not be denied married equality under the Massachusetts Constitution. Interpreting its own ruling requiring the Commonwealth to issue

marriage licenses, the SJC noted that it had not ruled that same-sex couples in committed relationships would be deemed married before they obtained a marriage license, or that the Court was amending the laws concerning benefits available to couples who marry to make up for past discrimination. *Charron*, 889 N.E.2d at 950-51. To announce a new rule treating couples who were not married but wanted to be treated as if they had been would, the SJC reasoned, entail an unworkable exercise. *See id.* As Chief Justice Marshall noted in her concurring opinion, the decision providing for marriage equality did not dilute the importance of actually being married, but underscored it. To allow recovery for an unmarried couple based on the principles in the constitutional ruling on marriage "would create in effect a common-law or de facto quasi marital statute" promoting litigation and creating uncertainty. *Id.* at 952-53 (Marshall, C.J., concurring). The operative date of the marriage, therefore, is the date the legal marriage occurs.

In short, the ruling in *Charron* stands for the proposition that a couple is deemed married on the date they were married – the opposite of Busch's argument.

A Connecticut Supreme Court decision that held the other way – ruling that damages for loss of consortium could be recovered prior to the marriage of a same-sex couple – further underscores that the issue in these consortium cases addresses whether the common law of torts should be adjusted to allow remedies for unmarried couples, not the identification of the day a couple was in fact married

and deemed to be married. *Mueller v. Tepler*, 312 Conn. 631, 95 A.3d 1011 (2014). In Connecticut, as in Massachusetts, marriage equality was achieved by court decision, not statute. *See id.*, 95 A.3d at 1018. The Connecticut Court ruled that a loss of consortium action could be maintained, not because the couple was deemed to be married on a date earlier than the day they were actually married, but because fairness principles required an expansion of the common-law on loss of consortium to allow for recovery for unmarried same-sex couples. *Id.* at 1023, 1029.

Similarly inapposite is Busch's citation of decisions in which courts declined to treat as unmarried couples who married after courts struck down their state bans where higher courts reversed or stayed the lower court rulings. *E.g.*, *Caspar v. Snyder*, 2015 US Dist. LEXIS 4644 (E.D. Mich. 2015); *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014). In those cases, same-sex couples married in the adjudicating jurisdiction legally at the time they were celebrated; a subsequent judicial proceeding reversed or stayed the rulings; and the courts held that the marriages, legal when performed, were not stripped of their legality by the subsequent events. To so strip a marriage of legality when celebrated **would** be a retroactive application – before, the marriage existed; after, it does not. Under section 650-B, in contrast, marriages of same-sex couples validly performed under the law of the jurisdiction where they occurred always existed after they were

celebrated. Maine, for example, did not attempt to tell Massachusetts that it could not marry same-sex couples. Rather, Maine simply did not recognize those marriages until it lifted its recognition ban in 2012.

Further, for a State to deny effect to marriages after the couples legally married in that jurisdiction would strip them of a vested right, the right to marry and remain married. *See Caspar*, 2015 U.S. Dist. LEXIS at *2-3. That vested right, moreover, is fundamental. *See id.; see also infra* § IV.

In contrast, here, there is no fundamental right to be deemed **not** married after one has legally married in accordance with the laws of the jurisdiction where the marriage occurs. Certainly Busch cites no authority for such a position. To recognize a marriage previously performed in another jurisdiction strips no one of any protected right.

Contrary to Busch's argument (Blue Br. 17), nothing in the record remotely suggests that this marriage was "foisted upon her." Busch voluntarily chose to marry in a jurisdiction where her marriage was legal in 2008. She took her vows, made her promise, and subjected herself to whatever benefits and obligations would flow from that marriage over its duration. Busch was married as of 2008; from 2008 until 2012 she was married; and all that happened when section 650-B was enacted was that Maine finally recognized that fact. She concedes that she has

no expectation that she was not married validly in 2008 when she herself seeks a divorce to undo that 2008 marriage.

F. Treating a marriage as occurring on its actual date does not lead to absurd results.

Busch argues that absurd results could follow if Maine does not pretend that her 2008 marriage occurred in 2012. (Blue Br. 13.) Her hypothetical assumes a marriage celebrated outside Maine in 2001, a move by the couple to Maine in 2003, and a separation after 2012. She posits that if one spouse won the lottery in 2005 and immediately spent the money in a wasteful fashion, it would be absurd for the other spouse to argue in the separation that the spouse had committed economic misconduct as to marital property.

There is nothing absurd about the spouse so arguing.

Section 953(1) instructs the division of marital property be in such proportions as the trial court deems just. *See Lesko v. Stanislaw*, 2014 ME 3, ¶ 17, 86 A.3d 14 (2014). The division "must be fair and just considering all of the parties' circumstances," left to the discretion of the trial court. *Id.* (citation omitted). Factors that can be considered include economic misconduct. *See id.*, ¶¶ 12-14; *Thumith v. Thumith*, 2013 ME 67, ¶ 12, 70 A.3d 1232. In Busch's hypothetical, the couple was legally married in 2001. When they moved to Maine in 2003, their marriage did not vanish. They were still legally married; Maine simply did not recognize that marriage at the time they moved to the state. If the

couple chooses to separate in Maine after Maine lifts the ban on that recognition, then marital property will be calculated from the date they were married outside the state, just as with any other couple married outside the state and seeking a separation in Maine. The same-sex couple is logically treated like a heterosexual couple married outside the state in 2003 and separated in 2012, and there is nothing absurd or unfair about this result.

What would be absurd – and what Maine rectified with section 650-B – would be disparate treatment dependent upon whether these parties divorced in Maine or Massachusetts, although both jurisdictions now recognize their lawful marriage solemnized in Massachusetts.

Assume, for example, a same-sex couple marries in Massachusetts in 2004, moves to Maine in December 2012 and files for divorce a year thereafter. To treat the couple as if they had been married for one year instead of almost a decade, and to ignore the marital property they accumulated over those many years would be inequitable and not make sense.

Finally, the merits of any economic misconduct argument would be reviewed based on all the circumstances. If there were some reason why it would not be fair to treat one spouse as having engaged in economic misconduct, then that spouse would be free to make any equitable argument he or she desired to the trial court, just as a spouse of a different sex couple could so argue.

III. Even if dividing marital property in a post-2012 divorce relating to a 2008 marriage based on the date of the marriage were somehow deemed a retroactive application of section 650-B, such retroactivity was clearly intended.

As noted, it is not a retroactive application of section 650-B to treat in a post-2012 divorce marital property as accumulating as of the date that the marriage occurred. Even if this were considered a retroactive application of section 650-B, however, then the statute should be read including such retroactivity.

First, the purpose of this statute is to remedy marriage inequality. Thus, it is remedial, and remedial statutes are presumed to apply retroactively. *Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 18, 976 A.2d 955.

Second, the ultimate quest in interpreting a statute is always to discern legislative intent. An intent for retroactive application can be found in explicit statutory language or if "necessarily implied from the language used." *Greenvall v. Maine Mutual Fire Ins. Co.*, 2001 ME 180, ¶ 7, 788 A.2d 165 (citations omitted). As noted above, the latter applies here. The intent to treat a 2008 marriage as occurring in 2008 is necessarily implied from section 650-B's text. The marriage is to be "recognized for all purposes," with no language suggesting that marriages would not be treated as occurring on the date they were "validly licensed and certified in another jurisdiction." 19-A M.R.S. § 650-B. Recognition of a 2008 marriage – which Busch concedes the law provides – is recognition of a marriage occurring in 2008.

Third, such legislative intent is reflected in the legislative purpose. *See Sinclair v. Sinclair*, 654 A.2d 438, 440 (Me. 1995) (applying statute retroactively although the statutory text was silent as to retroactivity, given the purpose of the statute). In *Sinclair*, the Court rejected a contrary statutory interpretation that would have left many preexisting existing parties without the intended benefits of the statutory change. *Id.* The only way to effectuate the legislative purpose to end discrimination against same-sex couples in marriage is to treat a 2008 marriage of a same-sex couple the same as a 2008 heterosexual marriage. The purpose of section 650-B was to obtain marriage equality. This means giving same-sex couples' marriages equal stature as heterosexual marriages, and affording them the same treatment. In order to fulfill this intent, a 2008 marriage must be recognized as having occurred in 2008, regardless whether a same-sex or opposite sex couple made the vows.

IV. It would be unconstitutional to treat this marriage disparately from heterosexual marriages by pretending the marriage occurred in 2012.

Busch argues that to recognize her 2008 marriage as a 2008 marriage violates her fundamental rights. (Blue Br. 18-19: Busch's "marital status in Maine has been changed without her consent. Tanya [Busch] went from legally unmarried to legally married by the collective strokes of the voters' pen at the ballot box.")

This argument, as noted above, is meritless. As of 2008 and thereafter, Busch was legally married. She sought to be legally married in 2008 and to obtain marital status as of that date. Voters did not change her marital status in 2012; rather, they lifted the ban in Maine on recognizing the marital status that Busch freely chose to obtain in 2008.

The fundamental right at issue here is the right to marry. As the Supreme Court stated when striking down a Virginia law criminalizing an interracial marriage celebrated outside the state:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also Maynard v. Hill*, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.

Loving v. Virginia, 388 U.S. 1, 12 (1967).

Not to recognize that this marriage was legally entered into in 2008 would violate the couple's fundamental rights and their right to equal treatment under the law. Any loss of a fundamental right existed prior to 2012, when Maine refused to recognize the parties' marriage solely because it was a same-sex couple's marriage. Any reading of section 650-B not to accord equal treatment of same-sex couples' marriages – a position advanced by Busch – would perpetuate discrimination and disparate treatment not just in contravention to statutory intent,

but the constitutional right to equal protection under the U.S. and Maine Constitutions.

Section 650-B should be read to avoid constitutional infirmity. *See Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551 ("When constitutional rights are implicated in the application of a statute, another rule of statutory construction holds that we must construe a statute to preserve its constitutionality, or to avoid an unconstitutional application of the statute, if at all possible. Thus, when there is a reasonable interpretation of a statute that will satisfy constitutional requirements, we will adopt that interpretation, notwithstanding other possible interpretations of the statute that could violate the Constitution" (citations omitted)). For this reason also, the statute should not be read as failing to give the parties' marriage equal treatment under Maine law solely because it is a same-sex union.

CONCLUSION

This Court should accept the reported question and answer it affirmatively. A divorce granted after 2012 calculates marital property based on the duration of that marriage. It is immaterial whether the marriage involved a man and a woman, two men, or two women. All are treated equally. Nothing in section 650-B requires a district court in a post-2012 divorce to pretend that the marriage of a

same-sex couple did not occur on the date that marriage was validly licensed and certified in the jurisdiction in which the marriage took place.

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CERTIFICATE OF SERVICE

I, Catherine R. Connors, Esq., hereby certify that two copies of this Brief of Appellee Elizabeth Kinney were served upon counsel at the address set forth below by first class mail, postage-prepaid on April 3, 2015:

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PUBLIC APPROVAL
NOVEMBER 6, 2012

EFFECTIVE DATE
DECEMBER 29, 2012

CHAPTER

1

INITIATED BILL

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND AND TWELVE

I.B. 3 - L.D. 1860

An Act To Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 19-A MRSA §650-A is enacted to read:

§650-A. Codification of marriage

Marriage is the legally recognized union of 2 people. Gender-specific terms relating to the marital relationship or familial relationships must be construed to be gender-neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law or any other source of civil law.

Sec. 2. 19-A MRSA §650-B is enacted to read:

§650-B. Recognition of marriage licensed and certified in another jurisdiction

A marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes under the laws of this State.

Sec. 3. 19-A MRSA §651, sub-§2, as amended by PL 1997, c. 537, §12 and affected by §62, is further amended to read:

2. Application. The parties wishing to record notice of their intentions of marriage shall submit an application for recording notice of their intentions of marriage. The application may be issued to any 2 persons otherwise qualified under this chapter regardless of the sex of each person. The application must include a signed certification that the information recorded on the application is correct and that the applicant is free to marry according to the laws of this State. The applicant's signature must be acknowledged before an official authorized to take oaths. Applications recording notice of intentions to marry must be open for public inspection in the office of the clerk. When the application is submitted, the applicant shall provide the clerk with the social security numbers of the parties. The application must include a statement that the social security numbers of the parties have been provided to the clerk. The clerk shall record the social

security numbers provided by each applicant. The record of the social security numbers is confidential and is not open for public inspection.

Sec. 4. 19-A MRSA §655, sub-§3 is enacted to read:

3. Religious exemption. This chapter does not require any member of the clergy to perform or any church, religious denomination or other religious institution to host any marriage in violation of the religious beliefs of that member of the clergy, church, religious denomination or other religious institution. The refusal to perform or host a marriage under this subsection cannot be the basis for a lawsuit or liability and does not affect the tax-exempt status of the church, religious denomination or other religious institution.

Sec. 5. 19-A MRSA §701, as amended by PL 2007, c. 695, Pt. C, §4, is further amended to read:

§701. Prohibited marriages; exceptions

1. Marriage out of State to evade law. When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.

1-A. Certain marriages performed in another state not recognized in this State. Any marriage performed in another state that would violate any provisions of subsections 2 to ~~5~~ 4 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.

2. Prohibitions based on degrees of consanguinity; exceptions. This subsection governs marriage between relatives.

A. A man may not marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister, the daughter of his father's brother or sister or the daughter of his mother's brother or sister. A woman may not marry her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother, mother's brother, the son of her father's brother or sister or the son of her mother's brother or sister. A person may not marry that person's parent, grandparent, child, grandchild, sibling, nephew, niece, aunt or uncle.

B. Notwithstanding paragraph A, a man may marry the daughter of his father's brother or sister or the daughter of his mother's brother or sister, and a woman may marry the son of her father's brother or sister or the son of her mother's brother or sister as long as, pursuant to sections 651 and 652, the man or woman provides the physician's certificate of genetic counseling.

3. Persons under disability. A person who is impaired by reason of mental illness or mental retardation to the extent that that person lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning that person's property or person is not capable of contracting marriage. For the purposes of this section:

A. "Mental illness" means a psychiatric or other disease that substantially impairs a person's mental health; and

B. "Mental retardation" means a condition of significantly subaverage intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period.

4. Polygamy. A marriage contracted while either party has a living wife or husband from whom the party is not divorced is void.

~~**5. Same sex marriage prohibited.** Persons of the same sex may not contract marriage.~~