In the Court of Special Appeals of Maryland

No. 2099

September Term, 2013

MICHELLE L. CONOVER,

Appellant,

v.

BRITTANY D. CONOVER,

Appellee.

On Appeal from the Judgment of the Circuit Court for Washington County (Daniel P. Dwyer, J.)

Brief of FreeState Legal Project, The American Civil Liberties Union of Maryland, Equality Maryland, and The Public Justice Center as *Amici Curiae*

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STATEMENT OF THE CASE

When a child is born to a woman who is not married, § 1-208(b) of the Estates & Trusts Article generates a legal presumption of the child's parentage. Under the statute, the child "shall be considered to be the child of his father . . . if the father" satisfies one or more of several conditions, one of which is to marry the child's mother and acknowledge parenthood of the child. This case concerns whether the presumption applies equally to men and women. Specifically, if a woman affirms her parenthood of a child born to her wife before they were married, does she enjoy the same presumption under § 1-208(b) as a man in the same situation: that she is the child's legal parent?

This appeal arises from a divorce and child visitation proceeding between Michelle Conover (appellant) and Brittany Conover (appellee).[1] Michelle and Brittany were in a committed same-sex relationship for over nine years, during which they conceived a son, Jaxon, via anonymous-donor insemination of Brittany. The Conovers married in the District of Columbia when Jaxon was five months old, after marriage between partners of the same sex became legal there. They later separated, and Brittany cut off Michelle's access to Jaxon when Jaxon was two years old.

The parties countersued each other for divorce in the Circuit Court for Washington County. Michelle sought visitation with Jaxon and presented evidence that she was Jaxon's parent pursuant to the

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[1] For clarity, this brief refers to the parties by their first names. Brittany took Michelle's surname, "Conover," upon their marriage, but has since resumed her former surname, "Eckel."

presumption of parentage contained in § 1-208(b) of the Estates & Trusts Article. Brittany denied that Michelle was Jaxon's parent.

The circuit court ruled that § 1-208(b) did not apply to Jaxon and Michelle's relationship because Michelle was not a man. It held that Michelle did not have "standing as a parent" to contest custody or visitation. And, although it had not taken evidence on this issue, the court concluded that exceptional circumstances did not exist to consider granting Michelle custody or visitation as a non-parent, because Jaxon was "very young" and, due to Brittany's withholding of access, there had been "almost a year of no contact" between Jaxon and Michelle by the time of the court's ruling. Michelle appealed from the circuit court's subsequent judgment of absolute divorce.

QUESTION PRESENTED

Under the presumption of parentage in § 1-208(b) of the Estates & Trusts Article, is a woman considered the legal parent of a child conceived by donor insemination and born to her same-sex partner during their relationship, where she subsequently marries her partner and acknowledges the child as hers?[2]

[2] In presenting this question, the *amici* do not suggest that the Court should not reach the other questions presented by appellant.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici* – FreeState Legal Project, Inc., the American Civil Liberties Union of Maryland, Equality Maryland, and the Public Justice Center—file this brief as friends of the Court pursuant to Maryland Rule 8-511(a)(4).[3] The *amici* are four Maryland non-profit legal or political advocacy organizations that share a commitment to equality under the law for lesbian, gay, bisexual, and transgender ("LGBT") Marylanders and their families.

FreeState Legal Project, Inc. ("FreeState Legal") is a Maryland non-profit direct legal services organization founded in 2007, which is one of the few programs in the country (and the only one in Maryland) specifically dedicated to providing *pro bono* legal representation to LGBT people of limited financial means. FreeState Legal provides representation in a wide variety of contexts in which its clients' sexual orientation or gender identity forms a substantial component of the legal issues they face, including family law matters in particular. As such, FreeState Legal has an interest in the correct and even-handed application of Maryland's child custody and parentage laws to same-sex couples and their children, and offers a unique perspective on the operation of Maryland family law principles in the context of same-sex relationships, especially for same-sex couples of limited means and their children.

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[3] This brief has been submitted along with a motion requesting permission to file it. Appellant consented to the filing of the brief but appellee did not. No person other than the *amici*, their members, and their attorneys has made a monetary or other contribution to the preparation or submission of this brief.

The American Civil Liberties Union of Maryland ("ACLU of Maryland") is a non-profit, non-partisan membership organization founded in 1931 to protect and advance civil liberties in Maryland, and is the state affiliate of the ACLU. It has approximately 13,000 members throughout the state. The ACLU of Maryland is committed to protecting parents' constitutional right of parental autonomy, and has submitted *amicus* briefs in support of parents who objected to court-ordered visitation with non-parents in cases such as *Koshko v. Haining*, 398 Md. 404 (2007). The ACLU of Maryland also seeks to ensure that relationships between children and the adults who function as their parents, whether or not related by blood or adoption, are also protected, and thus has filed *amicus* briefs in cases addressing this issue, including *Janice M. v. Margaret K.*, 404 Md. 661 (2008). And, the ACLU of Maryland has participated in cases involving the rights of lesbian and gay families, including *Conaway v. Deane*, 401 Md. 219 (2007); *Tyma v. Montgomery County*, 369 Md. 497 (2002); and *North v. North*, 102 Md. App. 1 (1994). Finally, the ACLU of Maryland was significantly involved in the legislative and political effort to achieve full marriage equality in Maryland.

Equality Maryland, founded in 1988 (then under the name Baltimore Justice Coalition, later Free State Justice), is Maryland's largest non-profit civil rights political advocacy organization dedicated to creating equal protection under the law for LGBT Marylanders and their families. Working closely with state legislators and with its thousands of members and supporters across the state, Equality Maryland has spearheaded the passage of numerous landmark pieces of LGBT civil rights legislation, including the Antidiscrimination Act, 2001 Md. Laws

ch. 340 (adding protections for sexual orientation to state civil rights law); H.B. 692, 2005 Md. Laws ch. 571 (adding protections for sexual orientation and gender identity to state hate crimes law); the Civil Marriage Protection Act, 2012 Md. Laws ch. 2 (enacting marriage equality for same-sex couples), which Equality Maryland also worked successfully to defend at the ballot box as Question 6 in the general election of 2012; and the Fairness for All Marylanders Act, 2014 Md. Laws ch. 474 (adding protections for gender identity to state civil rights law).

The Public Justice Center, a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to protecting the rights of parents in relation to their children. The PJC has previously participated in a number of Maryland cases addressing the rights of parents, including *Janice M. v. Margaret K.*, 404 Md. 661 (2008); *Koshko v. Haining*, 398 Md. 404 (2007); *In re Ashley E.*, 383 Md. 569 (2005); *In re Marcello K.*, 370 Md. 249 (2002); and *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666 (2002). The PJC was also lead counsel in *Frase v. Barnhart*, 379 Md. 100 (2003).

The *amici* seek to participate in this case in order to ensure that families headed by same-sex couples have the same rights, privileges, and legal protections as those headed by opposite-sex couples.

STATEMENT OF THE FACTS

Michelle and Brittany were in a long-term, committed relationship of at least nine years' duration. E54. In mid-2009, at a time when neither Maryland nor any nearby jurisdiction recognized marriage between same-sex couples, they made the decision to have a child. E54. With the

assistance of a fertility clinic, Brittany was artificially inseminated with sperm from an anonymous donor. E53-54. Michelle participated fully in the selection of the donor, who was selected on the basis of physical resemblance to Michelle. E56.

The parties' son, Jaxon William Lee Eckel Conover, was born in the first week of April 2010. E53. "Conover" is Michelle's last name, and "Eckel" is Brittany's family name, although she took Michelle's last name ("Conover") when they subsequently married. E65. "Lee" is Michelle's middle name, and "William" is Michelle's father's name, E65; "William Lee" is also the middle name of Brittany's brother. E92. On Jaxon's birth certificate, Brittany is listed as the mother; no other parent is listed. E73.[4]

In July 2010, when Jaxon was three months old, Brittany and Michelle signed a document, *see* E151, identifying Brittany as "Parental Guardian Number 1" of Jaxon, identifying Michelle as "Parental Guardian Number 2," and stating that Michelle and Brittany agreed that they would share "joint custody" of Jaxon. E61-62. The document was written entirely in Brittany's handwriting. E66-68. *See* E84-85, E98-99, E115-116.

A few months after Jaxon's birth, on September 28, 2010, Michelle and Brittany were married in the District of Columbia, E57-58, which had enacted marriage equality effective as of March 3, 2010 (*i.e.*, during

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[4] In 2011, after Jaxon's birth, the Maryland Department of Health & Mental Hygiene revised its policies regarding children born to female married same-sex couples, allowing the names of both women to be placed on the birth certificate as parents. *See* Letter of Geneva G. Sparks, State Registrar, to Birth Registrars (Feb. 10, 2011), *available at* http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/exec_md_20110210_ss-spouse-instructions-to-facilities.pdf.

Brittany's pregnancy, one month before Jaxon's birth).[5]

Jaxon calls Michelle "da-da" or "daddy" ("da-da," in reference to Michelle, was Jaxon's first word). E57, E81-82. Michelle and Brittany separated in September 2011. After the separation, Michelle continued to have visitation with Jaxon for almost a year, until mid-July 2012, when Brittany cut off access. E58-59. At that time, Jaxon was just over two years old. Before Brittany ended Michelle's visitation, she continued to treat Michelle as Jaxon's parent (including sending Michelle a Father's Day gift from Jaxon in 2012, shortly before she cut off visitation). E60.

Brittany filed a complaint for divorce in February 2013. E21. She indicated that the parties had no children together. E21. Michelle filed a counter-complaint for divorce identifying Jaxon as the parties' minor child and seeking visitation. E28. Upon receipt of Michelle's pleading, the court set a hearing "on the issue of parental standing." E8 (docket).

The hearing was held on April 30, 2013. Michelle and Brittany were the only witnesses. Through counsel, Michelle argued that she should be considered Jaxon's parent pursuant to the parentage presumption in § 1-208(b) of the Estates & Trusts Article. Her counsel noted: "Now, granted

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[5] *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Law 18-110 (Dec. 18, 2009). The Act was passed in December 2009 and took effect after a mandatory period of Congressional review, which expired as of March 3, 2010, as memorialized in a notice in the D.C. Register. *See* 57 D.C. Reg. 1833 (Mar. 5, 2010), *available at* http://www.dcregs.dc.gov/Notice/DownLoad.aspx?IssueFileID=5449. There is a three-business-day waiting period under D.C. law between application for a marriage license and its issuance, *see* D.C. Code § 46-409, and so the first day that same-sex couples were able to wed in D.C. was Tuesday, March 9, 2010, the fourth business day after March 3.

the statute does refer to father, which is a sex issue. And our argument is clearly that sex cannot be a determination here and cannot be considered, ah, for constitutional reasons." E47-48.

The court issued its Opinion and Order on June 4, 2013, E14, concluding that the parentage presumption in § 1-208(b) does not "establish standing for visitation and custody of a child," E17; that § 1-208(b) did not apply to Michelle in any event because she "is in fact a female" and thus could not be Jaxon's "father," *id.*; and that she had not made a showing of exceptional circumstances, E18-19, (an issue which the court reached despite having stated repeatedly at the hearing that parentage was the only issue before the court). *See* note 19, *infra*. At a subsequent uncontested divorce hearing, the court took evidence of grounds for divorce, and a final judgment of absolute divorce was entered on October 25, 2013. E9 (docket).

ARGUMENT

This case implicates two lines of Maryland case law about the rights of parents and children. One line of precedent concerns the rights of parents vis-à-vis "non-parents" (so-called "third parties") to custody and visitation of children in the absence of parental unfitness or exceptional circumstances. Another line of cases illuminates the process of establishing who <u>is</u> a child's legal parent—a process that in some circumstances obliges a court to make a determination about a child's genetic or biological parentage, but in other circumstances insists that a court disregard mere genetics or biology in favor of legal presumptions of

parentage that are deeply embedded in our social fabric and exist to serve the stability and best interests of children and families.

These principles primarily have been developed in consideration of the parent-child relationships of opposite-sex couples, but the children of same-sex couples are equally in need of the stability and protection that the law provides—and, under settled principles of equality under the law, should enjoy the same legal assurances that apply to all children in the State. In particular, following the enactment of the Civil Marriage Protection Act, 2012 Md. Laws ch. 2 (eff. Jan. 1, 2013), which ended the unequal treatment of opposite-sex and same-sex couples under Maryland law and secured equal access to civil marriage for same-sex couples, the children of all married couples in Maryland are entitled to the protections that civil marriage entails, regardless of the gender of their parents.

In this case, the circuit court believed that Michelle was not subject to the statutory presumption that she is the parent of her wife's child for the sole reason that Michelle is a woman and not a man. If the circuit court had applied the presumption, it would have been obligated—just as it would be obligated in the case of a similarly situated opposite-sex married couple—to consider whether Jaxon's best interests would be served by extinguishing Michelle's parental relationship with her son, before the court could allow the presumption to be rebutted. Because the circuit court's holding, if it is allowed to stand, endangers the stability of same-sex couples and their families across the State, the *amici* respectfully urge the Court to reverse and remand to the circuit court for further proceedings in line with the governing legal principles that the *amici* summarize in this brief.

I. A person who legitimates a child by way of a statutory presumption of parentage is a legal parent of the child, and not a "third party," unless and until the presumption of parentage is rebutted after consideration of the best interests of the child.

The *amici* respectfully submit that the circuit court erred as a matter of law in this case in holding that Michelle was a "third party" with respect to Jaxon. By virtue of the parentage presumption contained in E.T. § 1-208(b), Michelle is Jaxon's legal parent, unless and until that presumption of parentage has been rebutted. And, the fact that Michelle is a woman (and therefore cannot literally be Jaxon's "father" as a matter of biology), cannot be used to rebut the E.T. § 1-208 presumption—at least, not without more. In order for the E.T. § 1-208 presumption to be rebutted, the circuit court would have had to determine that Jaxon's best interests would be served by extinguishing the presumption that Michelle is his legal parent (which the court did not consider).

In so arguing, the *amici* are not advocating an extension of the law. Rather, the governing lines of Maryland precedent regarding statutory parentage presumptions and the "exceptional circumstances" standard for third-party custody and visitation are in doctrinal harmony and together dictate reversal in this case.[6]

A. The exceptional circumstances standard applies to a claim by a non-parent against a parent for custody or visitation.

It is well established that a parent has a right to custody of his or her child that is superior to the rights of persons who are not parents of

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[6] This brief denominates the standard for third-party custody and visitation as the exceptional circumstances standard, for short, given that the alternative showing of parental unfitness is not at issue.

the child. The Maryland cases standing for this principle are legion; they include *Ross v. Hoffman*, 280 Md. 172 (1977); *Shurupoff v. Vockroth*, 372 Md. 639 (2003); *McDermott v. Dougherty*, 385 Md. 320 (2005); and *Koshko v. Haining*, 398 Md. 404 (2007), among others. The principle is sometimes expressed as a presumption "that fit parents act in the best interests of their children," *McDermott*, 385 Md. at 422, but the presumption is substantive, not evidentiary. It is driven by the "fundamental right of parents," based on constitutional principles of substantive due process, "to direct and control the upbringing of their children." *Koshko*, 398 Md. at 422 (citing, *inter alia*, *Troxel v. Granville*, 530 U.S. 57 (2000)).

This fundamental parental right is safeguarded by a requirement that, in a child custody and visitation dispute between a child's parents and a non-parent, "only if the parents are unfit or extraordinary circumstances exist is the 'best interest of the child' test to be considered" in whether to award custody or visitation to the non-parent. *McDermott*, 385 Md. at 418-19. Or, in other words:

> If the court does not find either unfitness or exceptional circumstances, the "presumption [that the child's best interests are served by custody with the parent] remains, and custody must be awarded to the biological parents (or parent). If the court makes either such finding (parental unfitness or exceptional circumstances), the presumption is rebutted and the court then must resolve the custody dispute by applying the best interest of the child standard."

B.G. v. M.R., 65 Md. App. 532, 546 (2005) (citation omitted).

Maryland courts have held that a non-parent "third party" seeking custody or visitation of a child must satisfy this exceptional circumstances test in the context of claims by a child's grandparents, *see Koshko*, 398 Md.

404; or a child's sibling, *see In re Victoria C.*, 437 Md. 567 (2014); or a spouse or domestic partner of the parent, *see, e.g.*, *Karen P. v. Christopher J.B.*, 163 Md. App. 250 (2005) (partner); *Tedesco v. Tedesco*, 111 Md. App. 648 (1996) (spouse)—even where the spouse or partner has been so thoroughly involved in the child's care and upbringing as to be considered the child's "*de facto* parent." *See Janice M. v. Margaret K.*, 404 Md. 661 (2008).[7] But the custody and visitation cases articulating the exceptional circumstances standard that applies to non-parents have only occasionally had to address an antecedent question: who is a legal parent of a child?

B. The question of who is a legal parent is governed by statutory presumptions of parentage.

Under Maryland law, as in many other states, there are statutes that specify who is considered a parent of a child and how parentage is judicially determined. In Maryland, these statutes are primarily contained in two places: in the provisions of the Family Law Article that govern paternity suits, and in a set of parentage presumptions contained in the Estates & Trusts Article.[8]

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[7] Two of the *amici* here filed an *amicus* brief in *Janice M.* urging the Court of Appeals to reach a different conclusion. All of the *amici* respectfully maintain that *Janice M.* should be reconsidered. To appreciate the continuing harm to the stability of gay and lesbian families caused by the *Janice M.* decision, one need look no further than this case, where the circuit court found that Michelle "was a *de facto* parent" of Jaxon, E19, yet held that Michelle was categorically ineligible even to seek visitation with the son she raised from birth. For purposes of this brief, however, the *amici* accept *Janice M.* as governing precedent. Even under *Janice M.*, the decision below constitutes reversible error.

[8] For a thorough review of the modern development of these two sets of provisions, *see Mulligan v. Corbett*, 426 Md. 670, 673-79 (2012). *See*

Sections 1-206 and 1-208 of the Md. Code, Estates & Trusts Article ("E.T.") establish presumptions regarding the parentage of children who are born to married and unmarried parents, respectively. E.T. § 1-206(a) provides that a "child born or conceived during a marriage is presumed to be the legitimate child of both spouses." Under E.T. § 1-206(b), a "child conceived by artificial insemination of a married woman with the consent of her husband [which is presumed] is the legitimate child of both of them

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also Markov v. Markov, 360 Md. 296, 304-05 (2000) (tracing history of parentage presumption to Lord Mansfield's Rule at common law). The Family Law Article provisions governing paternity suits are largely irrelevant to this case, except to note that § 5-1005 of the Family Law Article provides that an "equity court may determine the legitimacy of a child pursuant to § 1-208 of the Estates & Trusts Article," and that such a legitimation may "limit paternity proceedings" under the Family Law Article. Moreover, one method of establishing legitimacy of a child under E.T. § 1-208 is to obtain a judicial determination of paternity under the Family Law Article. *See* E.T. § 1-208(b)(1).

Another mechanism, not at issue here, of establishing a person as a legal parent of a child is adoption. *See* E.T. § 1-207(a) ("An adopted child shall be treated as a natural child of his adopting parent or parents."). Some same-sex couples have obtained "'second-parent adoptions,' where a child with one parent is adopted by a second parent without severing the prior-existing parental relationship." *Conaway v. Deane*, 401 Md. 219, 335 (2007) (Raker, J., dissenting). The parties here did not obtain such a decree. But adoption is not necessary where the statutory presumption of parentage applies. *See Bridges v. Nicely*, 304 Md. 1, 7, 12 (1985) (stating that "§ 1-208(b) of the Estates and Trusts Article offer[s] 'a less traumatic approach to the problem'" than adoption, and that "benefits that would be achieved through the adoption process could more simply be accomplished through legitimation of the child under this section," but holding that a father who sought to adopt his child born out of wedlock was not *prohibited* from doing so, as there may be "instances where such an adoption may have beneficial social consequences beyond those available under the legitimation statute") (quoting *Dawson v. Eversberg*, 257 Md. 308, 314 (1970)).

for all purposes." As to a child born to unmarried parents, E.T. 1-208(a) provides that the child "shall be considered the child of his mother." And E.T. § 1-208(b), which is most relevant here, provides:

> (b) A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:
>
> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
>
> (2) Has acknowledged himself, in writing, to be the father;
>
> (3) Has openly and notoriously recognized the child to be his child; or
>
> (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

The circuit court's threshold mistake in this case was to assume that E.T. § 1-208 is only "intended for children to claim parentage and rights to property after a parent has deceased," and cannot be used "to establish standing for visitation and custody of a child." E17. The circuit court was incorrect. E.T. § 1-208 "is not limited to matters of inheritance only but is more in the nature of a general legitimation statute." *Bridges v. Nicely*, 304 Md. 1, 8 (1985). And the Court of Appeals has held repeatedly that a presumption of parentage established by E.T. § 1-206 or E.T. § 1-208 will be given effect in custody and visitation cases. *See, e.g.*, *Mulligan v. Corbett*, 426 Md. 670 (2012) (holding, in suit for paternity and visitation, "we have interpreted ET §§ 1-206(a) and 1-208 as providing the framework through which the court, in equity, may adjudicate paternity"); *Evans v. Wilson*, 382 Md. 614 (2004); *Monroe v. Monroe*, 329 Md. 758 (1993); *Turner v. Whisted*, 327 Md. 106 (1992); *Thomas v. Solis*, 263 Md.

536 (1971). *See also Stubbs v. Colandrea*, 154 Md. App. 673 (2004); *Skeens v. Paterno*, 60 Md. App. 48, 54-57 (1984).

The parentage presumptions in E.T. § 1-206 and E.T. § 1-208 allow a child to be legitimated—*i.e.*, they establish that a particular person is the legal parent of the child—without the need to obtain a judicial legitimation decree, a finding of paternity via blood test, or an adoption in the first instance. Indeed, the Court of Appeals has observed that establishing parentage of a child by way of the parentage presumptions, where they apply, is "'more appropriate[ ]' and 'less traumatic'" than a paternity suit or adoption proceeding. *Mulligan*, 426 Md. at 678 (comparing to paternity suit) (quoting *Turner*, 327 Md. at 133) (some internal quotation marks omitted); *see also Bridges*, 304 Md. at 7 (describing application of E.T. § 1-208(b) presumption as "'a less traumatic approach to the problem'" than adoption) (citation omitted). The E.T. § 1-208(b) presumption eliminates the "need for [an unmarried father] to obtain a filiation decree in order to seek custody of [his] child or visitation with it." *Skeens*, 60 Md. App. at 57. The father may use "any one of the four methods specified" in E.T. § 208(b) to establish his presumptive paternity of the child, *id.*, only one of which requires a judicial decree. Similarly, a man who is married to the mother of his child at the time of the child's conception or birth is presumed to be the child's father under E.T. § 1-206, without having to establish paternity by blood test or judicial order.

At first blush, therefore, it might seem that the role of the parentage presumptions in E.T. § 1-206 and E.T. § 1-208 is simply to provide a less cumbersome process for a biological father to establish his parentage of a child. But, although the presumptions undoubtedly have that benefit in

many cases, that is not their focus. To the contrary, it is precisely when the presumptions do *not* correspond to biological parentage that they have the greatest impact.

To illustrate, the E.T. § 1-206(a) presumption that a child conceived or born during a marriage is the child of both spouses was at issue in *Mulligan v. Corbett*, *supra*. In that case, Mulligan became pregnant during her marriage, but at the time of conception she and her husband were separated in anticipation of divorce and she was romantically engaged with another man, Corbett. *See* 426 Md. at 679-80. The child was born after the divorce decree was entered. *See id.* at 680-81. Notably, Mulligan's husband had undergone a vasectomy five years earlier, *see id.* at 684; and, nine months before the child was born, Mulligan and Corbett "were attempting to conceive a child" and "made concerted efforts to time their relations with [Ms. Mulligan's] menstrual cycle." *Id.* at 680. These biological realities did not negate the legal presumption that "Mr. Mulligan was [the child's] presumed father under the Estates and Trusts Article." *Id.* at 684. The Court of Appeals held that the trial court properly concluded that Mulligan's husband was "'the legal father of the minor child.'" *Id.* (quoting trial court); *see also id.* at 700 ("we hold that the circuit court did not err").

C. Once a child has been legitimated under a statutory presumption of parentage, the presumption cannot be rebutted without considering the child's best interest.

Although the putative father in *Mulligan* was unable to rebut the established presumption of parentage in that particular case, the presumptions of parentage under E.T. §§ 1-206 and 1-208 can be rebutted. *See* E.T. § 1-105(b) (stating that presumptions contained in the Estates &

Trusts Article are rebuttable unless otherwise expressly provided). For instance, "the result of blood or genetic testing . . . is evidence that rebuts the statutory presumption of paternity." *Kamp v. Dept. of Human Servs. ex rel. Duckworth*, 410 Md. 645, 658 (2009).

But, "society has historically protected the integrity of the marital family unit from claims of paternity by other men." *Turner v. Whisted*, *supra*, 327 Md. 106, 114-15 (1992). The Court explained in *Evans v. Wilson*, *supra*, 382 Md. 614, 636 (2004):

> If . . . mandatory blood or genetic testing . . . could be invoked every time an individual seeks to establish paternity of a child born during a marriage, the consequences to intact families could be devastating. Without regard to the child's best interests, courts would be forced to order genetic tests of every child whose paternity is merely questioned. This would be the case even if the child is well cared for and could assert that he or she does not want his or her life to be disturbed.

Moreover, biology is not paramount, because "'an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child.'" *Turner*, 327 Md. at 115 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting)). In other words, a putative father seeking to disestablish the parenthood of a presumptive parent under the E.T. §§ 1-206 and 1-208 presumptions does not necessarily enjoy the benefit of the fundamental parental right that animates the exceptional circumstances standard.[9]

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[9] For this reason, *dicta* in some of the exceptional circumstances cases stating that anyone "who is not a biological or adoptive parent is a third party," *e.g.*, *Victoria C.*, *supra*, 437 Md. at 591, is an over-simplification. Mere status as a "biological parent," without more, is insufficient to enjoy the fundamental liberty interest that triggers the

Therefore, the Court of Appeals has held that, "[i]f a self-proclaimed father seeks blood testing in order to delegitimate a presumptively legitimate child, he must first show that blood testing is in the best interests of the child." *Mulligan*, 426 Md. at 699. The *Turner* Court elucidated the factors that inform a court's best-interests analysis in determining whether to allow a presumption of parentage to be rebutted, 327 Md. at 116 (internal citations omitted):

> The criteria for determining the child's best interests in cases of disputed paternity include consideration of the stability of the child's current home environment, whether there is an ongoing family unit, and the child's physical, mental, and emotional needs. An important consideration is the child's past relationship with the putative father. . . . [O]ther factors might even include the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history. . . .
>
> [T]he trial court should consider the extent of [the putative father's] commitment to the responsibilities of parenthood, and balance his interest in establishing his status as [the child's] natural father against the [mother and presumptive father's] interest in protecting the integrity of the familial relationships already formed. This balance of interests

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protection of the exceptional circumstances standard. Conversely, there is a class of persons who are neither "biological parents" nor "adoptive parents" but who are recognized as parents under Maryland law—specifically, persons who enjoy an unrebutted presumption of parentage under E.T. § 1-206 or E.T. § 1-208. It is thus more accurate (if perhaps more opaque) to describe the persons whose interests are protected by the exceptional circumstances standard as "legal parents." *See, e.g.*, *Janice M.*, *supra*, 404 Md. at 675 ("[B]efore the trial court may consider 'the best interest of the child' test in deciding a custody dispute between fit parents and a third party, the trial court must first find the *legal parents* unfit to have custody or extraordinary circumstances that could result in serious detriment to the child if that child were to remain in the custody of the parents.") (emphasis added).

> should be considered in connection with the court's paramount concern of protecting [the child's] best interests.

The Court has required the best interests of the child to be satisfied before a presumption of parentage can be rebutted in a variety of circumstances.[10] For instance, a man who seeks to establish that he is the father of a child that was born or conceived during the marriage of the child's mother to another man, in an effort to obtain custody or visitation of the child, ordinarily must satisfy the best-interests standard before he can rebut the presumptive paternity of the mother's husband. *See Mulligan*, 426 Md. at 698-700; *Evans*, 382 Md. at 624-36; *Sider v. Sider*, 334 Md. 512, 527-28 (1994);[11] *Turner*, 327 Md. at 113-17; *Stubbs v. Colandrea*,

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[10] The Court of Appeals has held that the best-interests threshold does not apply when a putative parent in a paternity proceeding seeks genetic testing in order to prove that he or she is <u>not</u> the parent of a child and there is no presumptive parent. *See generally Langston v. Riffe*, 359 Md. 396 (2000); *see also In re Roberto d.B.*, 399 Md. 267, 285-93 (2007) (holding that best interests of child were not threshold consideration where gestational surrogate who gave birth to child conceived with donor eggs and sperm sought genetic testing under paternity statutes to demonstrate she was not the mother).

[11] *Sider* arose from two consolidated cases, a divorce and child custody case between the husband and wife, and a paternity action filed jointly by the wife and the biological father of the child, who was conceived during an affair between the father and the wife. *See Sider*, 334 Md. at 514-18. In that case, although the Court stated that "the 'best interest of the child' standard should be used in deciding whether to grant a paternity petition," *id.* at 527 (citing *Turner*, 327 Md. at 116-17), it ruled that the lower court failed properly to conduct the best-interests balancing analysis prescribed in *Turner* and *Monroe v. Monroe*, *supra*, 329 Md. 758 (1993). *See Sider*, 334 Md. at 527-28. The *Sider* Court held, based on the "unique situation" presented in that case, *id.* at 525, that the lower court "failed to consider [the father's] interest" in its balancing, *id.* at 528, and that "[h]ad the court properly considered all the competing interests, the

supra, 154 Md. App. 673, 688-89 (2004).[12]

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only conclusion it could have reached would have been to grant the paternity petition." *Id.* The "perhaps most important[ ]" factor in the Court's analysis was that, due to the husband and wife's divorce, "there is no family integrity to protect." *Id.* at 529.

In subsequent decisions, the Court has confined *Sider* to its facts, choosing "not to apply or extend [its] holdings further." *Langston*, *supra*, 359 Md. at 432-33. *See also Kamp*, 410 Md. 668-71 (reversing trial court's best-interests determination allowing disestablishment of paternity, where circuit court had concluded "'there was no family unit to protect'" but had disregarded father-daughter relationship between husband and child continuing after husband and wife's divorce).

[12] The *amici* recognize that a biological father not married to the mother who has timely assumed, or sought to assume, the responsibilities of parenthood may have a constitutionally protected relationship with his child, which could not be terminated based solely on a best-interests determination. *See, e.g.*, *Lehr v. Robinson*, 463 U.S. 248, 261 (1983) ("When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection.") (citations omitted); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that state cannot terminate parental relationship without affording heightened procedural protection to parents' fundamental liberty interest in the parent-child relationship); *see also Evans*, 382 Md. at 642 (declining to determine whether "biological link to a child combined with a substantial parent-child relationship" might give putative biological father of child born to married woman a constitutionally protected interest defeating presumptive legal parenthood of mother's husband, where putative father had "not developed a 'substantial parent-child' relationship").

At a minimum, the interest of a biological father who has developed a relationship with the child would weigh strongly in the best-interests analysis. *See Sider*, 334 Md. at 528 (reversing best-interests analysis where circuit court failed to "sincerely consider[ ] [biological father's] interests" in relationship with child born to married woman).

That issue is not present in this case, however. Jaxon was conceived

The same rule applies to the converse scenario: the husband of a woman who conceives or gives birth to a child during their marriage is presumed to be the child's father, and the husband will not be permitted to demonstrate that he is not the father unless to do so would be in the child's best interest. *See Kamp*, *supra*, 410 Md. at 658-72; *Ashley v. Mattingly*, 176 Md. App. 38, 55-62 (2007). *Kamp* and *Ashley* are particularly noteworthy because their facts underscore that the presumption of parentage requires a court to take no notice of contrary evidence of genetic or biological fact unless and until the best-interests test is satisfied.

In *Ashley*, a husband and wife married when the wife was one month pregnant, and the child was born during the marriage. *See Ashley*, 176 Md. App. at 40-41. The parties separated about a month after the child was born, and later divorced. *Id.* at 41. When the child was ten years old, the husband obtained independent DNA testing of himself and the child, which confirmed that he could not possibly be the child's biological father. *Id.* at 42. He then filed suit to disestablish his paternity and discontinue his child support obligation. *Id.* at 40. This Court held that the circuit court "had discretion to order genetic testing to determine paternity *if it first determined that it was in the child's best interest to do so*." *Id.* at 62 (emphasis added).

Kamp is an even more compelling example. In that case, the wife became pregnant with a child five years after her husband had undergone a vasectomy. *Kamp*, 410 Md. at 648. At the time of conception, the couple were married but separated, and the husband was living and working in

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via anonymous donor insemination, and no putative biological father has asserted any interest here.

another state. *Id.* The husband and wife both knew during the pregnancy that the husband was not the father and knew the identity of the biological father. *See id.* at 649-50. The child learned when she was eight years old that the husband was not her biological father and learned the identity of her biological father. *Id.* at 651. In subsequent litigation, the husband moved for DNA testing; the circuit court granted his motion, reasoning: "'The parties were separated and the truth about [the child's] parentage was out. There was no family unit to protect.'" *Id.* at 668 (quoting trial court). The test results confirmed that the husband was not the child's biological father. *Id.* at 654; *see also id.* at 667-68. On appeal, the Court of Appeals rejected the trial court's rationale for ordering DNA testing as insufficient in light of the child's best interests, and remanded. *Id.* at 672. It held: "Although it is true that 'the cat is now out of the bag and cannot now be stuffed back in,' nevertheless, the DNA test results need not be and, we hold, *shall not be considered until doing so is determined to be in the child's best interests*." *Id.* (emphasis added).

Finally, there is a case that is squarely on point with this case in every relevant respect: *Monroe v. Monroe*, *supra*, 329 Md. 758 (1993). In *Monroe*, the Court held that a child's biological mother could not introduce evidence to rebut the same presumption that is at issue here—the presumption under E.T. § 1-208(b)(4) that a man who marries a child's mother after the child's birth and acknowledges the child as his own is the father of the child—unless the mother showed that to do so would be in the child's best interests. Indeed, the Court held that the necessity of a best-interests showing was particularly acute when the "only effect of results favorable to the mother would be to show that a man who has

acted as the child's father, who has acknowledged the child, and who is married to the child's mother is, in fact, not the child's father," 329 Md. at 771, without "the establishment, concomitantly or otherwise, of paternity in someone else." *Id.* at 766. "This is especially so," the Court said, "when, as here, one means of legitimation was the parties' marriage, after which they held the child out as being *their* legitimate issue." *Id.* at 771 (emphasis in original).[13]

In *Monroe*, Patricia and Donald had been dating for a short time when Patricia informed Donald that she was pregnant with his child. *Id.* at 760. After their daughter was born, Patricia and Donald lived and raised their daughter together; they married when she was about two and a half years old. *Id.* at 760-61. Years later, Patricia and Donald separated. In the ensuing divorce and child custody proceedings, Patricia filed a motion to order a genetic test to establish paternity, alleging that Donald was not the father. *Id.* at 762. The court granted the motion, and the results of the tests excluded Donald as the child's biological father. *Id.*

On appeal, the Court of Appeals held that the trial court erred in failing to "consider, when ordering the blood tests . . . , whether to do so was in the child's best interest," and "also erred in . . . admission of the

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[13] As in this case, the presumptive father in *Monroe* had also legitimated the child through two of the other methods of legitimation under E.T. § 1-208(b): open and notorious acknowledgment of the child, and acknowledgment of his parentage in writing. *See* E.T. § 1-208(b)(2)-(3). Thus, like Michelle here, he satisfied "three of the four ways enumerated in § 1-208." 329 Md. at 768-69. The *Monroe* Court observed that "whether the disjunctive factors are of co-equal importance in establishing the man's paternity of a child is something that we need not and, therefore, do not address." *Id.* at 769 n.6.

blood test results into evidence." *Id.* at 773. It said: "when information which potentially undermines the best interest of the child, as well as the interest sought to be protected by the legitimation statutes, and the policy of this State," is "sought to be introduced" into evidence to rebut the presumption of parentage, "it must first be tested in light of" the best-interests-of-the-child standard. *Id.* at 769.[14]

* * *

In sum, abundant Maryland case law provides that, when a man legitimates a child by one of the methods in E.T. § 1-208(b)—and, in particular, when he does so by "marr[ying] the mother" after the birth of the child and "acknowledg[ing] himself . . . to be the father," E.T. § 1-208(b)(4)—the man is presumed as a matter of law to be the child's parent, and is not subject to the exceptional circumstances standard in a custody or visitation dispute with the child's mother. The presumption of parentage persists unless and until the court receives evidence in the record sufficient to rebut it and establish that the man is not the child's biological parent. But the court cannot accept and take notice of such

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[14] Although the *Monroe* Court held that the circuit court had erred in admitting evidence of Donald's non-paternity, it also stated that "the cat is now out of the bag." *Monroe*, 329 Md. at 773. The Court proceeded to analyze the facts under the exceptional circumstances standard, given that it had been established that Donald was not the child's biological father. The Court held that there was "ample evidence to support [the circuit court's] determination that exceptional circumstances existed." *Id.* at 777. As noted, *supra*, the Court of Appeals later rejected the "cat is out of the bag" approach in *Kamp*, and held that evidence rebutting the presumption of parentage "shall not be considered until doing so is determined to be in the child's best interests." *Kamp*, 410 Md. at 672.

evidence unless it first determines that it would be in the best interests of the child for the presumption of parentage to be rebutted.[15]

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[15] In a handful of the exceptional circumstances cases, a person who was considered a non-parent might have been able to assert that he or she was entitled to a statutory presumption of parentage, but the issue was never raised. In *Karen P.*, *supra*, 163 Md. App. at 256-57, a child was born to an unmarried woman in a committed heterosexual relationship. Her partner was named as the child's father on the birth certificate, and the partner believed the child was his and held the child out as his own. After the partners separated, they litigated child custody, and the mother obtained a court order for DNA testing that excluded the partner as the child's biological father. *See id.* at 259. There is no mention in the opinion that the partner ever raised the issues of whether he was entitled to a presumption of parentage or whether conducting the DNA test was in the child's best interests. This Court upheld the circuit court's conclusion that exceptional circumstances were present, justifying an award of custody to the partner as a non-parent. *See id.* at 274-78.

In *Tedesco*, *supra*, 111 Md. App. at 652-53, a woman's husband was killed in a car accident during her pregnancy with their child. Shortly after the child's birth, she began a relationship with, and later married, her second husband. The child was given the second husband's surname and the child viewed him as her "daddy," *id.* at 657, but there is no indication in the opinion that any contention whether the second husband could qualify as the child's legal parent under a presumption of parentage was ever raised. This Court affirmed the circuit court's conclusion that exceptional circumstances justifying an award of custody to the second husband as a non-parent were not present. *See id.* at 656-63.

In *Lipiano v. Lipiano*, 89 Md. App. 571, 572-73, *cert. denied*, 325 Md. 620 (1992), a child was born to a married woman as the result of an affair. The wife later left her husband for her paramour. In the husband and wife's divorce and child custody case, which was consolidated with a paternity action filed by the mother, blood tests were ordered which confirmed that the wife's paramour was the child's biological father. *See id.* at 574-75. Of import here, the husband made "no complaint in [the] appeal about the procedure leading to the Circuit Court's conclusion that [the paramour was the child's] biological father, including the taking of and reliance on blood tests," and "appear[ed] to concede that [the

Of course, the statutory parentage presumptions, by their terms, apply to men. The circuit court in this case determined that, because Michelle was not a man, she was not entitled to the protections of E.T. § 1-208(b). This was error, for the reasons discussed below.

II. Statutory presumptions of parentage must be interpreted on a gender-neutral basis.

The statutory presumptions of parentage are phrased in gender-specific language. In particular, E.T. § 1-208(b), which is at issue here, governs who will be considered a child's "father." The circuit court ruled that Michelle could not be a "father" because she "is in fact a female." E17. This glib reasoning disregarded well-settled principles of Maryland

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paramour was] indeed her biological father." *Id.* at 576. The case therefore proceeded as an exceptional circumstances case, and this Court affirmed as not clearly erroneous the circuit court's finding that exceptional circumstances justifying an award of custody to the husband as a non-parent were not present. *See id.* at 577-78.

In *Janice M.*, 404 Md. at 665 & n.2, the child had been adopted by one of the parties, and so no statutory presumption of parentage would have been available and none was argued. *See* E.T. § 1-207 (a) ("An adopted child shall be treated as a natural child of his adopting parent or parents. On adoption, a child no longer shall be considered a child of either natural parent . . . ."). In two other cases involving same-sex partners, *Gestl v. Frederick*, 133 Md. App. 216 (2000), and *S.F. v. M.D.*, 132 Md. App. 99 (2000), *overruled on other grounds by Janice M.*, 404 Md. at 685, no issue regarding presumptions of parentage was raised; it is also noteworthy that both decisions predated the legal recognition of marriage for same-sex spouses in any U.S. or foreign jurisdiction.

Therefore, none of these cases constitutes precedent inconsistent with the doctrinal path delineated by the *amici* here. *See, e.g.*, *Brewster v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602, 618 n.3 (2000) ("A case constitutes no precedent with respect to an issue which was not raised and which was not considered by the court.").

constitutional law and statutory interpretation.[16] The circuit court's ruling that E.T. § 1-208(b) does not apply to women is a determination of law, which this Court reviews without deference. *See, e.g.*, *Bldg. Materials Corp. of Am. v. Bd. of Educ. of Baltimore County*, 428 Md. 572, 584 (2012) ("[O]ur decision turns entirely on how the relevant statutes should be construed—a matter on which we owe no special deference to a circuit court.").

Maryland's Equal Rights Amendment ("ERA"), ratified as Article 46 of the Declaration of Rights, provides: "Equality of rights under the law shall not be abridged or denied because of sex." The ERA "says that 'what is sauce for the goose, is sauce for the gander.'" *Tedesco v. Tedesco*, 111 Md. App. 648, 667 (1996) (citation and some internal quotation marks omitted). It "flatly prohibits gender-based classifications, either under legislative enactments, governmental policies, or by application of common law rules, in the allocation of benefits, burdens, rights and responsibilities as between men and women." *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 64 (1985). Maryland courts apply "a strict scrutiny standard when reviewing gender-based discrimination claims" under the ERA. *In re Roberto d.B.*, *supra*, 399 Md. 267, 279 n.13 (2007).

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[16] The circuit court opined that "[w]hile there may have been an argument related to equal protection both under the U.S. Constitution and Maryland's Declaration of Rights for same sex parents, neither party argued that during oral argument nor in their supplemental briefs." E19. To the extent that the court intended by this remark to assert that appellant waived constitutional equal protection arguments based on sex, the assertion was mistaken. Appellant expressly asserted this argument at the hearing below, stating: "Now, granted the statute does refer to father, which is a sex issue. And our argument is clearly that sex cannot be a determination here and cannot be considered, ah, for constitutional reasons." E47-48.

The Court of Appeals has rejected the view that the ERA is violated if "sex is *at all* a factor in determining whether certain individuals are entitled to the benefits provided by the particular legislative enactment under review." *Conaway v. Deane*, 401 Md. 219, 245 (2007) (emphasis in original). Rather, the ERA "subject[s] to closer scrutiny any governmental action which single[s] out for disparate treatment men or women as *discrete classes*." *Id.* at 260 (emphasis added). "Unless the statute under scrutiny grants, either on its face or in application, rights to men or women as a class, to the exclusion of an entire subsection of similarly situated members of the opposite sex, the provisions of the ERA are not implicated . . . ." *Id.* at 263-64. The ERA "invalidate[s] governmental action which imposes a burden on one sex but not the other, or grants a benefit to one but not the other." *Burning Tree*, 305 Md. at 70.

It is plain that the parentage presumptions, as construed by the court below, grant a benefit to one sex as a class but not to the other. The circuit court held that E.T. § 1-208(b) does not apply to Michelle because she is a woman. Under that construction, men can be presumptive parents under E.T. § 1-208(b), but women cannot. This sex-based differential treatment is precisely what the ERA prohibits.

To be sure, "[d]isparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach of equal rights amendments." *Burning Tree*, 305 Md. at 64 n.3. But the gender specificity of the parentage presumptions cannot be justified on the basis of physical differences between men and women because, as demonstrated in Part I, entitlement to the parentage presumptions has nothing to do with the biology of human reproduction. Indeed, it is

precisely when the presumptions are contrary to the biological fact of parentage that the presumptions do real work.

The *raison d'etre* of the parentage presumptions is not biology but society's interest in the "integrity of the marital family unit." *Turner v. Whisted*, *supra*, 327 Md. 106, 114-15 (1992). The presumption of parentage "'is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, . . . that the integrity of the family unit should not be impugned.'" *Michael H. v. Gerald D.*, *supra*, 491 U.S. 110, 119-20 (1989) (plurality op.) (citation omitted). With the enactment of the Civil Marriage Protection Act in Maryland, same-sex couples are legally able to establish marital family units—as the parties here did—and the integrity of their families deserves the same legal protection that the families of opposite-sex couples enjoy.[17]

In re Roberto d.B. is particularly instructive, because it applies the requirements of the ERA to the paternity provisions of the Family Law Article, a set of statutes that are closely related to the statutory presumptions of parentage. In *Roberto d.B.*, 399 Md. at 270-71, a woman had served as a gestational surrogate: she gave birth to twins conceived through implantation of donor eggs that had been fertilized *in vitro* with the sperm of the intended father, with whom she had contracted to serve as gestational carrier. Once the twins were born, she and the father jointly

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[17] The parties here married in the District of Columbia, before Maryland enacted marriage equality, but their marriage and the legal relationships that flow from it are nonetheless valid and entitled to the full protection of Maryland law. *See Port v. Cowan*, 426 Md. 435 (2012) (holding that Maryland court must recognize validity of marriage between same-sex spouses validly performed in another jurisdiction); *accord* 95 Md. Op. Att'y Gen. 3 (2010).

sought in a paternity proceeding under the Family Law Article to disestablish her *maternity*, in the same way that a putative father could—showing that she had no "genetic connection" to the children. *Id.* at 277.

The Court agreed with the father and the surrogate that the "paternity statute, as written, provides an opportunity for genetically unlinked males to avoid parentage, while genetically unlinked females do not have the same option." *Id.* at 279. Therefore, relying on the canon of statutory construction that statutes should be construed to avoid constitutional doubt, *see id.* at 283-84 (citing cases), the Court "constru[ed] the parentage statutes in a way that affords women the same opportunity to deny parentage as men have." *Id.* at 279.

As in *Roberto d.B.*, the E.T. § 1-208(b) parentage presumption, "as written, provides an opportunity for genetically unlinked males"—*i.e.*, an opportunity to establish presumptive legal parentage—"while genetically unlinked females do not have the same option." *Id.* at 279. The *Roberto d.B.* Court held: "Because Maryland's E.R.A. forbids the granting of more rights to one sex than to the other, in order to avoid an equal rights challenge, the paternity statutes in Maryland must be construed to apply equally to both males and females." *Id.* at 283. So too with E.T. § 1-208(b).[18]

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[18] Decisions in several other states have similarly construed their statutory presumptions of parentage on a gender-neutral basis, permitting women to be established as legal parents in circumstances where the presumptions would apply to similarly-situated men. *See Elisa B. v. Sup. Ct. of El Dorado Co.*, 117 P.3d 660, 666-72 (Cal. 2005); *Smith v. Gordon*, 968 A.2d 1, 7-8 (Del. 2009), *superseded in unrelated part by statute as stated in Smith v. Guest*, 16 A.3d 920 (Del. 2011); *Gartner v. Iowa Dept. of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013); *Frazier v. Goudschaal*, 295 P.3d 542, 552-53 (Kan. 2013); *Hunter v. Rose*, 975 N.E.2d 857, 861 (Mass. 2012); *Chatterjee v.*

III. The circuit court should not have reached the issue of exceptional circumstances because appellant is a legal parent.

In sum, *amici* respectfully submit that the circuit court in this case made two threshold legal errors. First, in disregard of the long line of case law concerning the presumptions of parentage—most importantly including *Monroe*, which is on all fours with this case—the court erred in holding that the E.T. § 1-208(b) presumption is not relevant to the issue of custody and visitation. Second, the court erroneously construed E.T. § 1-208(b) as applying only to men and not to women, and thus held that Michelle did not qualify as a parent under the parentage presumption.

These threshold errors led to a third legal error: the court analyzed the facts under the paradigm of the exceptional circumstances standard, which applies to disputes between legal parents and non-parents. The court should not have reached the issue of exceptional circumstances at all, because Michelle is Jaxon's legal parent, having legitimated Jaxon as her son via E.T. § 1-208(b)(4). As a legal parent, Michelle is not subject to the exceptional circumstances standard. As *Turner*, *Monroe*, *Evans*, and *Kamp* (among others) teach, Brittany cannot disestablish Michelle's status as Jaxon's parent unless she introduces sufficient evidence to show that it is in Jaxon's best interest to do so. No attempt was made to perform that analysis below, and so remand in this case is required.

King, 280 P.3d 283, 286-93 (N.M. 2012); *In re Shineovich & Kemp*, 214 P.3d 29, 39-40 (Or. App.), *rev. denied*, 222 P.3d 1091 (Or. 2009). *But see In re Paternity of Christian R.H.*, 794 N.W.2d 230 (Wisc. App. 2010); *White v. White*, 293 S.W. 3d 1 (Mo. App. 2009); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005). The analysis in *Chatterjee* and *Eliza B.* is particularly thorough.

On remand, the circuit court will need to conduct a best-interests analysis consistent with the framework established in *Turner*, *supra*, 327 Md. at 116, quoted above. It is noteworthy that a key component of the *Turner* balancing analysis is the interest of the child's putative biological father. *See id.*; *see also Sider*, *supra*, 334 Md. at 528 (reversing best-interests balancing for "fail[ing] to consider [biological father's] interests"). The Court's analysis in *Monroe* strongly suggests that a child's best interests will rarely be served by extinguishing the presumption of parentage where, as in the scenario presented both here and in *Monroe*, one parent seeks to disestablish the E.T. § 1-208(b)(4) presumption simply to gain a superior position over the other parent in a custody and visitation dispute, and "does not propose to establish who the biological father actually is." *Monroe*, 329 Md. at 766. The *Monroe* Court said, *id.* at 771-73:

> The best interest of a child born out of wedlock but subsequently treated as if it were the legitimate issue of the man who married its mother is not necessarily served by establishing that that man is not the biological father, without a concomitant establishment of paternity in someone else.
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> * * *
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> Thus, the *petitioner's interest in obtaining sole custody must be considered and balanced against those of the respondent in protecting the relationship he has formed, and maintained, with the child*. In addition, the petitioner's motive in seeking to disestablish, after prior acquiescence in, the respondent's paternity without any attempt to establish another's must also be considered. So too, must [the child's] physical, mental, and emotional needs. And, because there is no attempt to establish biological paternal parentage, it is relevant that no genetic information will be generated for use medically or historically. The purpose of this analysis is, of course, to determine what is in the child's best interest. On that question, *input from the child's representative, which the court may appoint, could be important*. Significant to the best interest determination is the desirability,

> from the child's perspective, of establishing that the man that is the only father the child has ever known, the husband of the child's mother, and who has acknowledged the child, is, in fact, not the child's father. *The effect of that determination is not only to establish that the person who the child regarded as her father, is, in fact, not her father, but also to establish that she has no known father*. (Emphasis added.)

Nevertheless, if the circuit court were to decide on remand that Jaxon's best interests favor rebutting the legal presumption of parentage in favor of determining biological parentage, the court could, at that point, take judicial notice of the fact that Michelle is female and thus cannot be Jaxon's biological father. To be sure, the "cat is out of the bag" already—no one contends that it is possible that Michelle is Jaxon's biological father. But the case law contains several examples of men whose paternity of the children at issue was also acknowledged to be biologically impossible, and who nevertheless continued to be their children's legal parents under a presumption of paternity (sometimes to their chagrin). *See, e.g.*, *Mulligan*, 426 Md. at 680, 684 (vasectomy four years before child's conception); *Kamp*, 410 Md. at 648 (vasectomy five years before child's conception); *Ashley*, 176 Md. App. at 42 (results of privately obtained DNA test "revealed that there was a 0.0% probability" of paternity). Even where "'the cat is . . . out of the bag,'" evidence of non-parentage "shall not be considered until doing so is determined to be in the child's best interests." *Kamp*, 401 Md. at 672.

If and when the decision to rebut the presumption has been made, based on Jaxon's best interests, then—and only then—would Michelle be in the position of a non-parent. *See, e.g.*, *Sider*, 334 Md. at 530-31 (applying exceptional circumstances standard after determining that child's best

interests favored rebutting presumption of parentage); *see also Monroe*, 329 Md. at 773-74. And then—and only then—would it be appropriate for the circuit court to undertake an exceptional circumstances analysis.[19]

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[19] *Amici* also agree with Michelle, *see* Appellant's Brief at 32-33, that on this record, the circuit court erred in reaching the exceptional circumstances standard for another reason that is independently sufficient to justify remand: the court ambushed the parties with its exceptional circumstances determination after it had told the parties repeatedly throughout the hearing that "the threshold issue" of whether Michelle was Jaxon's parent was "all we're here for today," E91:18-19, cutting off lines of testimony that were not relevant to the parentage issue. *See* E36:17-18; E37:2-3, 6-8; E46:9-11; E50:16-21; E51:8-25; E52:1-4; E91:14-19; E99:20-25; E110:9-10; E132:11-13; E135:23-25; E136:1-6; E142:1-18; E144:1-12; E145:1-11, 23-25; E146:1-19. *Cf. Van Schaik v. Van Schaik*, 90 Md. App. 725, 739 (1992) ("It cannot even be reasonably argued that Van Schaik had an opportunity for effective argument on the issue of custody when there was no notice at all that it would be considered nor any discussion during the hearing itself of that issue. Appellant's first notice that custody was to be determined was when he was divested of it in the court's decree at the conclusion of the hearing."); *accord Phillips v. Venker*, 316 Md. 212, 222 (1989) ("The absence of adequate notice effectively deprived the plaintiffs of the hearing guaranteed them by the rule.").

Because the parties did not know that the hearing on April 30, 2013 was a hearing on exceptional circumstances until the court issued its written ruling reaching that issue and finding that the exceptional circumstances standard had not been satisfied, the record unsurprisingly contains little evidence addressed to the relevant factors. *See Janice M.*, 404 Md. at 694-95 (enumerating factors). In particular, the record contains hardly any evidence about the core issue in any exceptional circumstances analysis: whether "the lack of visitation 'has a *significant deleterious effect* upon the children who are the subject of the petition.'" *In re Victoria C.*, *supra*, 437 Md. 567, 592 (2014) (quoting *Koshko v. Haining*, *supra*, 398 Md. 404, 441 (2007)) (emphasis added and omitted); *see also Tedesco v. Tedesco*, 111 Md. App. 648, 660 (1996) ("third parties must adduce evidence that demonstrates that the child will be affected detrimentally"). Indeed, Michelle had been denied any visitation with Jaxon for almost a year at the time of the hearing, which was conducted before any discovery, and

CONCLUSION

For these reasons, *amici* urge the Court to reverse the circuit court's Opinion and Order of June 4, 2013 and remand for further proceedings consistent with the following holdings: (1) that E.T. § 1-208(b)(4) establishes a presumption that a woman in the position of appellant in this case is considered to be the legal parent of her spouse's child; (2) that the presumption of parentage established by E.T. § 1-208(b)(4) cannot be rebutted unless it is in the child's best interests to do so; and (3) that only if the presumption of parentage is rebutted may the circuit court consider the presumptive legal parent to be a non-parent who is subject to the exceptional circumstances standard.

Respectfully submitted,

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no representative of Jaxon's interests had been appointed; it is hard to see how Michelle could have presented evidence addressing the issue of exceptional circumstances at that stage of the proceedings.

Therefore, in remanding, this Court should instruct the circuit court that if performing an exceptional circumstances analysis becomes necessary on remand, the court must conduct the analysis anew.

APPENDIX OF PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

MARYLAND DECLARATION OF RIGHTS

Article 46. The Equal Rights Amendment ("ERA")

Equality of rights under the law shall not be abridged or denied because of sex.

MARYLAND CODE, ESTATES & TRUSTS ARTICLE

§ 1-206. Legitimacy of child.

Child born or conceived during marriage

(a) A child born or conceived during a marriage is presumed to be the legitimate child of both spouses. Except as provided in § 1-207 of this subtitle, a child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents.

Child conceived by artificial insemination of married woman

(b) A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.

MARYLAND CODE, ESTATES & TRUSTS ARTICLE

§ 1-208. Children of unmarried parents.

In general

(a) A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother.

Paternity of child

(b) A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:

(1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;

(2) Has acknowledged himself, in writing, to be the father;

(3) Has openly and notoriously recognized the child to be his child; or

(4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

Certificate of Service

Pursuant to Md. Rules 1-321 and 8-502(c), I hereby certify that, on this 26th day of June, 2014, two copies of this "Brief of FreeState Legal Project, the American Civil Liberties Union of Maryland, Equality Maryland, and the Public Justice Center as *Amici Curiae*" were served on counsel for each party by first-class mail, postage prepaid, to the following addresses:

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