In the Court of Appeals of Maryland

Petition Docket No. 431

September Term, 2015

MICHELLE L. CONOVER,

Petitioner,

v.

BRITTANY D. CONOVER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS

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Petitioner respectfully asks this Court to issue a writ of certiorari to the Court of Special Appeals to review that court's reported decision in a divorce and child visitation case, *Michelle L. Conover v. Brittany D. Conover*, ___ Md. App. ___, No. 2099, Sept. Term 2013 (Aug. 26, 2015).[1] Michelle (Petitioner) and Brittany (Respondent)[2] were in a committed same-sex relationship for nine years, during which they conceived a son, Jaxon, via anonymous-donor insemination of Brittany. The Conovers married when Jaxon was five months old, after marriage between partners of the same sex became legal in a nearby jurisdiction. Although they later separated, they continued to raise Jaxon together until he was two years old—but then Brittany cut off Michelle's access to Jaxon, and claimed they had no children together in the ensuing divorce proceeding. In contrast, Michelle asserted legal parentage of Jaxon under a presumption of parentage codified in § 1-208(b)(4) of the Maryland Code, Estates & Trusts Article ("E.T."), which provides that when an unmarried woman gives birth to a child, a person who then marries the mother and acknowledges parentage of the child is considered the child's other parent.

The circuit court, and later the Court of Special Appeals, ruled that because Michelle is not a biological or adoptive parent of Jaxon, this case is controlled by *Janice M. v. Margaret K.*, 404 Md. 661 (2008). In *Janice M.*, this Court declined to recognize the status of "*de facto* parent" as an exception to the rule that anyone who is not a parent (so-called "third parties") must show parental unfitness or "exceptional circumstances" before a court can consider whether child custody or visitation with the third party would be in the child's best interests. According to the appellate majority below, *Janice M.* leaves "no choice" but to consider Michelle a legal stranger to Jaxon. Ex. A, maj. op. at 18. Noting "genuine ... concern that *Janice M.* should not be the final word on *de facto* parenthood," the lower court characterized the arguments of Michelle and supporting amici as "better addressed to the Court of Appeals." *Id.* at 18 n.16, 11 n.10. In concurrence, Judge Nazarian argued that "the premise underlying *Janice M.*'s rejection of

[1] A copy of the Court of Special Appeals' opinion is attached as Exhibit A.

[2] This petition refers to the parties by their first names at the time of the circuit court proceedings, although both parties later changed their names as discussed *infra*.

de facto parenthood ... no longer holds, at least with regard to *married* same-sex couples," but he agreed with the majority that *Janice M.* controlled and that the "intermediate appellate court [is] not at liberty to hold otherwise." *Id.*, con. op. at 7, 1. But *Janice M.*—unlike this case—did not involve a legal presumption of parentage.

QUESTIONS PRESENTED

1. Did the Court of Special Appeals err in holding that Petitioner is a "third party," where Petitioner is a legal parent under E.T. § 1-208(b)(4)?
2. Should *Janice M. v. Margaret K.* be reconsidered?

ADJUDICATION OF CLAIMS IN THE LOWER COURTS

This case began in the Circuit Court for Washington County as an action styled *Brittany D. Conover v. Michelle L. Conover*, Case No. 21-C-13-046273.[3] Brittany initiated the case by filing a complaint for absolute divorce, asserting that the parties had no children together. *See* Ex. B at 3. Michelle filed a counter-complaint for absolute divorce, identifying Jaxon as the parties' minor child and seeking visitation with him. *Id.*

On receipt of Michelle's pleading, the circuit court set a hearing on the issue of "parental standing," which was held on April 30, 2013. *Id.* The circuit court (Dwyer, J.) issued an Opinion and Order on June 4, 2013.[4] In its Opinion, the court concluded, *inter*

[3] A copy of the docket in the circuit court, including the docket entry evidencing the judgment of the circuit court, is attached as Exhibit B.

As noted, both parties have changed their names since the case began. In the judgment of absolute divorce, the circuit court changed Respondent's name, at her request, back to her former name, Brittany D. Eckel. After the circuit court ruling that is on appeal, Petitioner changed his name to Michael Lee Conover by judicial decree. Petitioner is a transgender man; in other words, although he was born biologically female, his gender identity (*i.e.*, his deeply-held core sense of his own gender) is male. However, because Petitioner had not transitioned to living as a man when the circuit court ruled, the record does not reflect his identity as a transgender man. For clarity and consistency with the record and the legal issues as they were presented in the courts below, this petition refers to Petitioner, outside of this footnote, using female pronouns and his former name, Michelle. Petitioner does not contend that his identity as a transgender man is material to any legal issue on appeal in this case, including whether he qualifies as a legal parent of Jaxon under E.T. § 1-208(b)(4).

[4] A copy of the circuit court's Opinion and Order is attached as Exhibit C.

alia, that the parentage presumption in E.T. § 1-208(b)(4) does not "establish standing for visitation and custody of a child," and that, although Michelle was Jaxon's "*de facto* parent," Michelle had not made a showing of exceptional circumstances sufficient to seek visitation as a third party. Ex. C at 4, 6. At a later uncontested hearing, the court took evidence of grounds for divorce, and a judgment of absolute divorce was entered on October 25, 2013, finally adjudicating all claims of all parties. *See* Ex. B at 4 (docket entry #23000). Michelle noted a timely appeal on November 19, 2013. *Id.*[5]

The appeal was briefed and argued to the Court of Special Appeals (Zarnoch, Wright, and Nazarian, JJ.).[6] The reported decision issued on August 26, 2015. According to the majority, this Court's decision in *Janice M.* constrained the court to hold that:

> A non-biological, non-adoptive spouse who meets one [or more] tests under ET § 1-208(b) is still a "third party" for child access purposes. Under *Janice M.*, he or she is not a "legal parent".... He or she must still show exceptional circumstances to obtain access to a child over the objection of a fit biological parent and to overcome the natural parent's due process rights.

Ex.A, maj. op. at 12 (Zarnoch, J.). The mandate issued on September 29, 2015.[7]

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The central statutory provision in this case is E.T. § 1-208(b)(4). Section 1-208 as a whole concerns the legal parentage of children whose parents are not married. Subsection (b) enumerates four scenarios in which a child born to an unmarried woman "shall be considered to be the child of his father." The particular scenario in E.T. § 1-208(b)(4) provides that a person is a child's "father" where the person has "subsequently married the mother and has acknowledged himself, orally or in writing, to be the father."[8]

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[5] *See* Md. Rule 8-131(d) (providing that "interlocutory order[s] previously entered in the action" ordinarily are reviewable on appeal from subsequent final judgment).

[6] Four organizations filed an amicus brief in the Court of Special Appeals, represented by undersigned counsel, who is on the staff of FreeState Legal, one of the amici. After the Court of Special Appeals' decision, FreeState Legal and undersigned counsel were retained to represent Petitioner. Accordingly, FreeState Legal will not seek leave to participate as an amicus in this Court.

[7] A copy of the Court of Special Appeals' mandate is attached as Exhibit D.

[8] The other three scenarios are: (1) where paternity has been determined in an

Also pertinent are presumptions that apply to children of married couples, codified in neighboring E.T. § 1-206. Section 1-206(a) provides that a "child born or conceived during a marriage is presumed to be the legitimate child of both spouses." Section 1-206(b) states that 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."

Constitutional provisions are also salient. *Janice M.* and the line of third-party custody cases of which it is a part are based on the constitutional "rights of parents to direct and govern the care, custody, and control of their children," *Janice M.*, 404 Md. at 671. These are substantive due process rights protected by the Due Process Clause of the

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action under §§ 5-1001 *et seq.* of the Family Law Article; (2) where the father has "acknowledged himself, in writing, to be the father"; and (3) where the father has "openly and notoriously recognized the child to be his child." E.T. § 1-208(b)(1)-(3). Although Michelle relies principally on § 1-208(b)(4), Michelle would also qualify under (2) & (3).

Michelle has argued throughout the litigation that E.T. § 1-208(b) must be interpreted on a gender-neutral basis, and thus that she qualifies as Jaxon's legal parent under the statute despite its gender-specific language. The circuit court specifically considered and rejected this argument. *See* Ex. C at 4 ("Defendant is in fact a female ... thus not sufficiently establishing that she could be the 'father' of the child."). The appellate court did not reach the argument because it appeared to assume, *arguendo*, that Michelle met the criteria in E.T. § 1-208(b). *See* Ex. A, maj. op. at 12 (holding that a "non-biological, non-adoptive spouse who [qualifies] under ET § 1-208 is still a 'third party'"). The majority asserted that Michelle failed to preserve certain constitutional arguments, *see id.* at 8, but this finding of non-preservation did not appear to include Michelle's core argument that E.T. § 1-208(b) applies to her on a gender-neutral basis. To the extent that the lower court did find unpreserved Michelle's argument that she is a legal parent under E.T. § 1-208(b), such a finding would be unsupported by the record. Her trial counsel devoted all of her opening, almost all of her closing, and half of her post-hearing brief to the argument that Michelle is Jaxon's legal parent under E.T. § 1-208(b), *see* Ex. E (record excerpts); and, as noted, the trial court specifically ruled on it.

Given that the Court of Special Appeals apparently assumed without deciding that Michelle meets the statutory qualifications under E.T. § 1-208(b), if this Court reverses on Petitioner's first question presented, the Court would have two alternatives: either remand for resolution of whether Michelle qualifies under E.T. § 1-208(b); or, instead, decide that issue itself under established jurisprudence interpreting Maryland's Equal Rights Amendment, Article 46 of the Declaration of Rights. *Cf. In re Roberto d.B.*, 399 Md. 267, 283 (2007) ("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").

Fourteenth Amendment to the United States Constitution and its Maryland counterpart, Article 24 of the Declaration of Rights. *See id.* at 679 & n.7.

STATEMENT OF FACTS

Michelle and Brittany were in a long-term, committed relationship of at least nine years' duration. They decided to have a child together in mid-2009, at a time when neither Maryland (where they lived) nor any nearby jurisdiction recognized marriage between same-sex couples. Brittany was artificially inseminated with sperm from an anonymous donor, whom the parties selected together on the basis of physical resemblance to Michelle. The parties' son, whom they named Jaxon William Lee Eckel Conover, was born in April 2010.[9] A few months later, on September 28, 2010, Michelle and Brittany were married in nearby Washington, D.C., which had enacted marriage equality during Brittany's pregnancy, about a month before Jaxon's birth.[10]

As noted, the circuit court expressly found that Michelle was a "*de facto* parent" of Jaxon. Ex. C at 6. The record in the circuit court contained ample evidence, in addition to the parties' mutual decision to conceive Jaxon, supporting the circuit court's determination of Michelle's *de facto* parentage. For instance, in July 2010, when Jaxon was three months old, Brittany and Michelle signed a document identifying both of them as "Parental Guardian[s]" of Jaxon and agreeing that they would share "joint custody" of him. Jaxon called Michelle "daddy" or "da-da" (which was his first word).

Michelle and Brittany separated in September 2011, about a year after their marriage. But even after the parties separated, Michelle continued to have visitation with Jaxon, and Brittany continued to treat Michelle as Jaxon's parent, including sending Michelle a Father's Day gift "from Jaxon" in 2012—until Brittany unilaterally cut off Michelle's access to Jaxon in mid-July 2012.

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[9] "Conover" is Michelle's last name, and "Eckel" is Brittany's last name, though she took Michelle's last name when they later married. "Lee" is Michelle's middle name.

[10] Both the majority and concurring opinions in the Court of Special Appeals incorrectly state that the parties lived in the District of Columbia. *See* Ex. A, maj. op. at 1, con. op. at 5. In fact, they married in D.C., but lived in Maryland at all times relevant.

ARGUMENT

A. This Court should resolve whether a person who qualifies under an unrebutted statutory presumption of parentage, but who is not a biological or adoptive parent of their child, is a legal parent of their child or is instead a legal stranger.

This case stands at the intersection of two lines of Maryland case law about the rights of children and their parents. *Janice M.* is part of one line of cases, which concerns the rights of parents vis-à-vis non-parent "third parties" to custody and visitation of children. But another separate line of cases illuminates the process of establishing who *is* a child's legal parent—a process that in some circumstances obliges a court to make a determination about a child's genetic parentage, but in other circumstances insists that a court disregard mere genetics in favor of longstanding statutory presumptions of parentage that exist to serve the stability and best interests of children and families.

These statutory parentage presumptions are codified in E.T. §§ 1-206 and 1-208. Under this Court's case law, in a case where a parentage presumption applies, the effect of the presumption is that the presumptive parent is a legal parent of the child unless and until the presumption is rebutted—and the presumption of parentage cannot be rebutted unless it is in the child's best interests to look beyond the presumption to ascertain the child's biological parentage.[11] *Janice M.* and the Court's other leading cases on "third party" custody and visitation have not dealt with these presumptions—rather, they have involved determining the custodial rights of persons who are *not* legal parents.

The Court of Special Appeals' reported decision in this case muddles these lines of case law and, unless it is reviewed by this Court, will throw Maryland parentage law into confusing disarray. If trial courts believe that the distinctive fact of this case is the

[11] *See, e.g.*, *Mulligan v. Corbett*, 426 Md. 670 (2012) (husband was legal parent of child born to wife during marriage, despite having had vasectomy years earlier, where child's best interests did not favor rebutting presumption); *Kamp v. Dept. of Human Servs.*, 410 Md. 645 (2009) (same); *Evans v. Wilson*, 382 Md. 614 (2004) (mother's former paramour could not obtain DNA testing to rebut husband's presumptive parentage where not in child's best interests to rebut presumption); *Monroe v. Monroe*, 329 Md. 758 (1993) (court erred in admitting evidence of husband's non-paternity without considering child's best interests); *Turner v. Whisted*, 327 Md. 106 (1992) (presumption of parentage could be rebutted if in child's best interests to do so).

parties' same-sex relationship, the decision will carve out a "same-sex marriages only" exception in Maryland family law. But, more dangerously still, because the lower court insisted that its decision applies to "all non-biological, non-adoptive parents ... no matter what sex or sexual orientation they are," Ex. A, maj. op. at 12, its decision destabilizes parentage law for all families, whether headed by same-sex or opposite-sex couples.

1. The lower court's decision throws Maryland parentage law into confusion.

If the Court of Special Appeals' reported decision in this case is not overruled, the legal effect of statutory presumptions of parentage in Maryland child custody cases will be impossible to predict. The confusion into which the lower court's decision throws Maryland parentage law is made starkly obvious by contrasting the Court of Special Appeals' decision in this case with its reported decision in *Sieglein v. Schmidt*, No. 2616, Sept. Term 2013 (Aug. 25, 2015), issued only one day earlier. In *Sieglein*, the Court of Special Appeals held, correctly and in harmony with prior Maryland parentage cases, that where a child was conceived with donor sperm using assisted reproductive technology and born to a married woman with her husband's consent, the husband was the legal father of the child pursuant to the parentage presumption codified in E.T. § 1-206(b).

The decision in this case cannot be reconciled with *Sieglein*. Michelle, just like the husband in *Sieglein*, gave "consent to the conception of a child via assisted reproductive services," and this "'volitional act resulted in the creation of a child.'" *Sieglein*, op. at 21 (citation omitted). Michelle and the husband in *Sieglein* are each the "non-biological, non-adoptive spouse" of their child's mother. Ex. A, maj. op. at 12. And yet, according to the lower court, the husband in *Sieglein* is the legal parent of his child and Michelle is not. Although there are some distinctions between this case and *Sieglein*, the Court of Special Appeals made no attempt to explain the disparate results, and none of the possible distinctions between the cases makes a cognizable difference.

First, the child in *Sieglein* was conceived and born during the parties' marriage, while in this case the parties married after the child's birth. But, although the Court of Special Appeals discussed the timing of Michelle and Brittany's marriage, it ultimately seemed to reject this as a ground for its decision, holding that "marriage in and of itself

alone does not confer parental status to contest child access opposed by a biological parent," Ex. A, maj. op. at 11, and that a "non-biological, non-adoptive spouse ... is still a 'third party' for child access purposes." *Id.* at 12. More importantly, statutory presumptions of parentage apply in both this case and *Sieglein*—indeed, presumptions *based on marriage* apply in both cases. The majority never explained why the presumptions of parentage for a child born during a marriage codified in E.T. § 1-206 establish the child's legal parentage for custody purposes, but the presumptions codified two statutory sections away in E.T. § 1-208(b), for children born outside of marriage, do not—especially E.T. § 1-208(b)(4), which is also based on the parents' marriage. As discussed, *infra*, this Court's jurisprudence has not treated these presumptions differently.

Second, the child in *Sieglein* was born to an opposite-sex couple, while the child in this case was born to a same-sex couple. But Maryland's courts, legislature, and electorate have repudiated distinctions on the basis of sexual orientation in the family law context.[12] Moreover, distinguishing these scenarios based on the sexual orientation of the couples involved cannot be justified by the biology of human reproduction. Even where opposite-sex couples are involved, the only cases where E.T. §§ 1-206 or 1-208 make any difference are cases where the presumption of parentage that they establish is contrary to the biological facts of parentage. This is particularly true of E.T. § 1-206(b), at issue in *Sieglein*: that statute deals *only* with children conceived though assisted reproductive technology. Although the parents in *Sieglein* were an opposite-sex couple and the parents in this case were of the same sex, it is equally factually impossible for either Michelle or the husband in *Sieglein* to have been the biological fathers of their respective children.

A final possible distinction between this case and *Sieglein* is that the father in *Sieglein* denied his parentage so that he could evade the responsibility of child support, while Michelle actively sought the responsibilities of legal parentage in order to care for and visit with her child. But if this distinction perversely explains the different results in

[12] *See Boswell v. Boswell*, 352 Md. 204 (1998) (holding that a parent's sexual orientation is not a relevant consideration in deciding custody and visitation); Civil Marriage Protection Act, 2012 Md. Laws ch. 2 (eff. Jan. 1, 2013) (giving legal recognition to marriage for same-sex couples; passed by referendum in November 2012).

Sieglein and this case, it signals the unprecedented result that parentage has a different legal meaning for child support than it does for child custody and visitation.[13]

So long as both this decision and *Sieglein* remain the law, in any future child custody case in which a presumption of parentage applies and would make a difference—a case where, *by definition*, the presumptive parent will not be the biological or adoptive parent of their child—a court will have no principled basis to determine whether to treat the presumptive parent as a legal parent or as a legal stranger to their child.

2. The lower court's decision conflicts with this Court's parentage cases.

There is a clear way out of the morass the lower court's decision creates, because the decision is built on a faulty premise. The lower court's view that a person who qualifies as a parent under E.T. § 1-208 "is still a 'third party' for child access purposes," Ex. A, maj. op. at 12, is wrong. This Court has repeatedly held that legal parentage in child custody and visitation cases must be determined under the presumptions of parentage contained in the Estates & Trusts Article, where those presumptions apply. Moreover, the Court has utilized the same analytic framework in parentage presumption cases regardless of whether the presumption at issue is in E.T. § 1-206 or § 1-208.[14]

The lower court was led to its erroneous conclusion by a statement in this Court's

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[13] *Cf. Walter v. Gunter*, 367 Md. 386, 398 (2002) ("In the absence of 'parenthood' status, the duty that is normally cast upon parents, e.g. the duty of child support, can no longer exist."); *Brown v. Brown*, 287 Md. 273 (1980) (holding that husband of mother of child from prior relationship had no extra-contractual duty to pay child support). The Court has recognized in theory that in some circumstances a non-parent could be estopped to deny a duty of child support, *see Markov v. Markov*, 360 Md. 296 (2000); *Knill v. Knill*, 306 Md. 527 (1985), but these cases have not involved custody or visitation, and all parties in each case agreed that the alleged obligor was not a parent.

[14] *See, e.g.*, *Mulligan*, *supra*, 426 Md. at 678 (holding, in suit for visitation, "we have interpreted ET §§ 1-206(a) and 1-208 as providing the framework through which the court, in equity, may adjudicate paternity"); *Monroe*, *supra*, 329 Md. at 766 (holding E.T. § 1-208 standard applied in "child custody dispute between the mother of a child born out of wedlock and the man who has, both before and after their marriage, acknowledged that child as his own and maintained a fatherly relationship with her"); *Thomas v. Solis*, 263 Md. 536, 538 (1971) (holding E.T. § 1-208 applied where father of children born outside of marriage sought declaration of his legal paternity "to protect his visitation rights and those of the children").

decision in *In re Victoria C.*, 437 Md. 567, 591 (2014), that anyone "who is not a biological or adoptive parent is a third party." This statement was classic dictum as applied to the context of parentage determinations: *Victoria C.* did not involve anyone claiming parentage, whether through biology, adoption, or otherwise; it involved whether *siblings* were legal third parties. The statement from *Victoria C.* cannot be read as a statement about legal presumptions of parentage.

Similarly, *Janice M.* does not speak to whether a presumptive parent is a third party, because no parentage presumption was argued or could possibly have applied in that case. *Neither party* was a biological parent of the child in *Janice M.*—the child had been adopted by one (but not both) of the parties. The Estates & Trusts Article makes clear that an "adopted child shall be treated as a natural child of his adopting parent or parents." E.T. § 1-207(a). The *de facto* parent in *Janice M.* had no claim to legal parentage under the presumptions in the Estates & Trusts Article, and so the case simply does not address presumptions of parentage. Thus, regardless of whether *Janice M.* remains good law (discussed *infra*), the lower court's reliance on it here was misplaced.

The Court of Special Appeals did not cite or analyze any of this Court's parentage presumption cases except *Monroe, supra*, 329 Md. 758, and it misread *Monroe* egregiously. The salient facts of *Monroe* are nearly identical to the facts here, except that *Monroe* involved an opposite-sex couple. The spouse in *Monroe*, like Michelle here, relied on E.T. § 1-208(b)(4) to establish that he was the legal father of a child born to his wife during their relationship but before their marriage. Without considering the child's best interests, the circuit court allowed the mother to obtain DNA testing in order to rebut the E.T. § 1-208(b)(4) presumption, *see* 329 Md. at 773; and it admitted the test results, which excluded the spouse as the father, into evidence over the spouse's objection. *See id.* at 762. Then, the circuit court applied the exceptional circumstances standard to determine whether to grant custody to the spouse as a "third party." *See id.* at 762-63.

This Court's decision in *Monroe* proceeded in two distinct parts, which the lower court in this case erroneously conflated. *First*, the *Monroe* Court held that the circuit court erred by 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 blood test results into evidence." *Id.* at 773. Because E.T. § 1-208(b)(4) applied, the spouse should have been considered the child's legal parent, and that presumption should not have been rebutted unless it was in the child's best interests to do so. But, despite holding that the circuit court had erred in admitting evidence of the spouse's non-paternity, the *Monroe* Court observed that "the cat is now out of the bag." *Monroe*, 329 Md. at 773. And so, in the <u>*second*</u> part of *Monroe*, the Court proceeded to analyze the facts under the exceptional circumstances standard (because it had by then been established, albeit inappropriately, that the spouse was not the child's biological father), and held that there was "ample evidence to support [a] determination that exceptional circumstances existed." *Id.* at 777. Later, however, in *Kamp*, *supra*, 410 Md. 645, this Court rejected the "cat is out of the bag" approach, and held that evidence rebutting a presumption of parentage "shall not be considered until doing so is determined to be in the child's best interests." *Id.* at 672.

Monroe emphatically does not stand for the proposition for which the lower court here cited it: that even if a party qualifies under a statutory presumption of parentage, the party is still a "third party," not a legal parent, and an exceptional circumstances analysis must be conducted. *See* Ex A., maj. op. at 11-12 (analyzing *Monroe*). Especially in conjunction with *Kamp*, *Monroe* stands for the precise opposite proposition: when a party qualifies under a statutory presumption of parentage, the party is a legal parent, and not a "third party," unless and until the presumption of parentage is rebutted—and evidence that could rebut the presumption can only be admitted if rebutting the presumption of parentage is in the child's best interests. *See Monroe*, 329 Md. at 769-773.

Michelle has maintained throughout this litigation that she qualifies as Jaxon's legal parent under E.T. § 1-208(b)(4). There is no doubt that she has acknowledged Jaxon as her child and that she married Brittany after Jaxon's birth. Under this Court's consistent case law regarding presumptions of parentage, the resulting legal presumption that Michelle is Jaxon's parent should only be rebutted if it is in Jaxon's best interests to deprive him of his parent-child relationship with Michelle. This Court's jurisprudence on statutory presumptions of parentage dictates that, unless and until Michelle's presumptive

parentage is disestablished, she is Jaxon's legal parent—not a "third party." The Court should grant certiorari to resolve this important point that affects all Maryland families to whom a statutory presumption of parentage potentially applies.

B. *Janice M. v. Margaret K.* should be reconsidered.

The Court of Special Appeals reluctantly concluded that this case is controlled by *Janice M.*—but both the majority and concurrence urged that *Janice M.* should be reconsidered. For the reasons explained in Part A above, Petitioner respectfully disagrees that *Janice M.* applies to this case. But regardless of whether the Court of Special Appeals was correct that *Janice M.* controls, the lower court rightly perceived that *Janice M.* should be reconsidered. This case is an appropriate vehicle for the Court to do so.

This Court will reconsider an earlier decision "when persuaded the prior decision is clearly wrong, or when the precedent has been rendered archaic and inapplicable to modern society through the passage of time and evolving events." *State v. Stachowski*, 440 Md. 504, 520 (2014) (internal citations omitted). The decision in *Janice M.* is clearly wrong because it failed to recognize the devastating harm caused by severing a child's relationship with someone who has been their parent, and because the standard *Janice M.* established has been interpreted to be so demanding as to be nearly impossible to meet. The passage of time and evolution of the law, including the legal recognition of marriage between same-sex couples both in Maryland and nationwide, as well as the recognition of *de facto* parentage in other states, makes the injustice of *Janice M.* starkly apparent.

As this case shows, *Janice M.* established a nearly impossible standard, especially where young children are concerned. In *Janice M.*, the Court rejected the argument that "once a court has determined that a person is a *de facto* parent, it has in fact, found the exceptional circumstances necessary to grant either visitation or custody." *Janice M.*, 404 Md. at 682. The Court said that, "while the psychological bond between a child and a third party is a factor in finding exceptional circumstances, it is not determinative." *Id.* at 695. And, crucially: "a finding that one meets the requirements that would give that person *de facto* parent status ... is a strong factor to be considered in assessing whether exceptional circumstances exist. It is not, however, determinative as a matter of law." *Id.*

Lower courts, like the circuit court below, have interpreted this to mean that more must be shown, over and above what would make someone a *de facto* parent, to establish exceptional circumstances. Here, the circuit court expressly found that Michelle is Jaxon's "*de facto* parent," but ruled: "that alone is not sufficient to establish exceptional circumstances." Ex. C at 6. As the circuit court saw it, there were no exceptional circumstances because "Jaxon is very young" and, due to Brittany cutting off Michelle's access to Jaxon, there had been "almost a year of no contact" between them during which Jaxon had been "in a stable environment." *Id.* According to the Court of Special Appeals, Michelle "developed a fairly extensive record" relevant to the issue of exceptional circumstances, such that it was "hard to imagine what [additional] relevant evidence" she might have put forward, especially given that this "was not a case where the child was old enough to testify or to communicate to an expert." Ex. A, maj. op. at 17 & n.15. If a person can be a full participant in the decision to bring a child into this world, and parent the child from birth, and still not be able to show "exceptional circumstances," then the exceptional circumstances standard is fundamentally flawed. This Court should recognize *de facto* parenthood as an independent legal status; or alternatively should recognize that, by demonstrating *de facto* parenthood, a person has *ipso facto* demonstrated exceptional circumstances, as other courts have held.[15]

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[15] *See, e.g.*, *Roth v. Weston*, 789 A.2d 431, 445 (Conn. 2002) ("[W]hen a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship. Thus, proof of a close and substantial relationship and proof of real and significant harm should visitation be denied are, in effect, two sides of the same coin."); *McAllister v. McAllister*, 779 N.W.2d 652, 660 (N.D. 2010) ("The existence of a psychological parent relationship can constitute exceptional circumstances justifying the placement of decisionmaking responsibility and primary residential responsibility with a third party.").

The states that recognize *de facto* parentage or its equivalent (*e.g.*, "psychological parent," "in loco parentis," or "child-parent relationship") have used somewhat different formulations and elements to articulate the core concept of a relationship with a child that is significant and longstanding, parental in nature, and fostered by a biological or adoptive parent. Petitioner does not insist in this petition on a particular formulation for the Court to adopt. Any conceivable formulation of *de facto* parentage would include

If the Court does not do so, the consequence is continued, devastating harm to children in Maryland born to same-sex couples (or into other non-traditional family arrangements). According to 2010 census data, an estimated 12,500 households in Maryland are headed by same-sex couples,[16] and an estimated 20% of same-sex couples in Maryland are raising one or more children.[17] Thus, thousands of children in Maryland are vulnerable to the harmful effects of *Janice M.* Under *Janice M.*, unless exceptional circumstances are shown, a court may not even inquire into the best interests of the child, based on a presumption that a fit parent acts in the child's best interests. But it blinks reality to presume that a parent is acting in their child's best interests—or to insist upon a somehow more concrete showing of harm to a child—when the parent is openly intent upon severing the child's relationship with the only other parent the child has known.

The damage done to the children of same-sex couples by the legal system's failure to recognize the lived reality of their families was one of the grounds that compelled the Supreme Court to rule that same-sex couples must be included in the institution of marriage and in the protection of the family unit that marriage entails.[18] If the Court of Special Appeals is correct that *Janice M.* prevents the lower courts from giving effect to Michelle and Brittany's marriage and to the resulting marital presumption of parentage in E.T. § 1-208(b)(4), then *Janice M.* stands as an impediment to the full and equal access to the protections of marriage promised by *Obergefell* and by the democratic decision of the people of Maryland nearly three years ago to extend marriage to same-sex couples. As Judge Nazarian argued below, "the premise underlying *Janice M.*'s rejection of *de facto*

Michelle, who was a co-equal participant in the decision to bring Jaxon into the world, and who raised Jaxon as his acknowledged parent for years after his birth.

[16] *See* Williams Inst., "U.S. Census Snapshot: 2010" at 5 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

[17] *See* Movement Advancement Project, "Same-Sex Couples Raising Children," *available at* http://www.lgbtmap.org/equality-maps/same_sex_couples_raising_children.

[18] *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) ("Without the recognition, stability, and predictability marriage offers, the[ ] children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser …, relegated through no fault of their own to a more difficult and uncertain family life.").

parenthood … no longer holds" in the era of marriage equality. Ex. A, con. op. at 7.

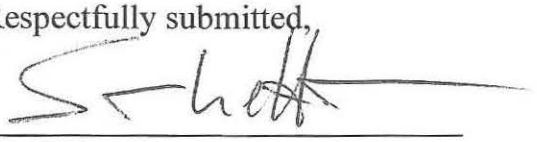
Refusing to admit any exception to the stringent exceptional circumstances test for any person who is not a biological or adoptive parent—even a *de facto* parent, or a person who qualifies under a statutory presumption of parentage—makes our state increasingly an outlier. Attached as Exhibit F is a survey of legal rights to child custody and visitation for non-biological/non-adoptive parents in the fifty states plus D.C. More than twenty states recognize *de facto* parentage or an equivalent doctrine (*e.g.* "psychological parent, "in loco parentis," or "child-parent relationship")—eight of those under decisions post-dating *Janice M.* At least another ten states, even if they have not adopted the *de facto* parentage doctrine, would require an inquiry into a child's best interests under the facts presented here, for various reasons: because Michelle's legal parentage would be presumed; because the facts here would qualify as exceptional circumstances as a matter of law; due to Michelle's participation in the decision to conceive Jaxon by artificial insemination; based on enforcement of the parties' parenting agreement; because Brittany fostered Michelle and Jaxon's parent-child relationship and thereby waived her superior parental right or is estopped from asserting it; or due to the parties' marriage. Thus, courts in a clear majority of other states would not deem Michelle a legal stranger to Jaxon, as the lower courts here believed *Janice M.* requires.

As both the majority and concurrence in the Court of Special Appeals recognized, this case is an appropriate vehicle for this Court to reconsider *Janice M.* The circuit court found expressly that Michelle is a *de facto* parent of Jaxon. But, believing themselves constrained by *Janice M.*, both the circuit court and the Court of Special Appeals ruled that Michelle's *de facto* parenthood is not enough to justify an inquiry into whether Jaxon's best interests are served by severing his relationship with Michelle. The case thus squarely presents the issue of whether *Janice M.* should remain good law. The Court should grant certiorari to decide that important issue.

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to issue a writ of certiorari to the Court of Special Appeals to consider the questions presented herein.

Respectfully submitted,



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Certificate of Service

I hereby certify that, on this 14th day of October, 2015, I caused a copy of the foregoing Petition for Writ of Certiorari to be served upon counsel for the respondent via first-class mail, postage prepaid, and email to the following addresses:

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