In the Court of Appeals of Maryland

No. 79

September Term, 2015

MICHELLE L. CONOVER,

Petitioner,

v.

BRITTANY D. CONOVER,

Respondent.

On Writ of Certiorari to the Court of Special Appeals

Brief of Petitioner

JER WELTER
Deputy Director & Managing Attorney
FREESTATE LEGAL PROJECT, INC.
231 East Baltimore Street, Suite 1100
Baltimore, MD 21202
t: (410) 625-5428
f: (410) 625-7423
e: jwelter@freestatelegal.org
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS – RECORD EXTRACT *

###

* The record extract in the Court of Special Appeals in this matter was produced as an appendix to the appellant's brief, as allowed by Md. Rule 8-501(a). Therefore, the table of contents for the record extract was included in the table of contents for appellant's brief. *See* Md. Rule 8-501(h). Because the record extract submitted in this Court is an exact copy of the record extract submitted in the Court of Special Appeals, *see* Md. Rule 8-501(k), it does not contain a table of contents, and so a table of contents for the record extract is provided here.

† Due to an inadvertent pagination error in the record extract as filed in the Court of Special Appeals, there is no page numbered E150 in the record extract.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

Michelle and Brittany Conover, Petitioner and Respondent, were in a committed relationship for over nine years.[1] E14, E54. They conceived a son, Jaxon, via anonymous-donor insemination of Brittany, and married a few months after Jaxon was born. Although they later separated, they continued to raise Jaxon together until he was two years old. But then, Brittany abruptly cut off Michelle's access to Jaxon.

Brittany and Michelle sued each other for divorce in the Circuit Court for Washington County. Michelle sought visitation with Jaxon and presented evidence that she is Jaxon's parent under §1-208(b)(4) of the Maryland Code, Estates & Trusts Article ("E.T.").[2] That statute provides that when a woman who is not married gives birth to a child, a person who subsequently marries the child's mother and acknowledges parentage of the child is considered the child's "father." But Brittany denied that Michelle is Jaxon's parent.

---

[1] Petitioner is a transgender man, but the record does not reflect his gender identity because he transitioned to living as a man (and changed his first name by judicial decree from Michelle to Michael) after the contested hearing in this case occurred. For consistency with the record, this brief refers to Petitioner, outside of this footnote, using female pronouns and his former name, Michelle. Petitioner does not contend that his gender identity is material to any legal issue in this appeal, including whether he qualifies as a legal parent under §1-208(b) of the Estates & Trusts Article.

[2] Unless otherwise specified, statutory citations are to the Estates & Trusts Article.

After holding an evidentiary hearing on "parental standing," E36, the circuit court issued an opinion rejecting Michelle's visitation claim. E14-20. The circuit court opined that §1-208(b)(4) does not "establish standing for visitation and custody of a child," and further, that the statute did not apply to Jaxon and Michelle's relationship in any event because Michelle was not a man and so could not be a "father," in the wording of the statute. E17.

The circuit court also rejected any claim by Michelle to visitation as a non-parent. E19. The court found expressly that Michelle was Jaxon's "*de facto* parent." E19. But the court observed that "de facto parent status is not recognized" in Maryland, E17, and is "not sufficient to establish exceptional circumstances," E19, under this Court's decision in *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 "exceptional circumstances" standard that applies generally to child custody or visitation claims by non-parents (so-called "third parties")—*i.e.* that a third party must demonstrate "exceptional circumstances" before a court can consider whether a child's best interests would be served by granting custody or visitation to the third party over a fit parent's objection.

Michelle appealed following the circuit court's subsequent judgment of absolute divorce. E10. The Court of Special Appeals affirmed in a reported

decision. *See Conover v. Conover*, 224 Md. App. 366 (2015). Although the *Janice M.* case did not involve or address §1-208(b)(4) or any similar statute governing legal parentage, the majority believed that *Janice M.* nevertheless controlled this entire case, giving the intermediate appellate court "no choice," 224 Md. App. at 385, but to consider Michelle a legal stranger to Jaxon. The appellate court did not resolve whether Michelle could qualify as a "father" under §1-208(b) despite being female; even assuming that she could, the court reasoned, that status would not make her a legal parent. It held:

> 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.

Id. at 380. This Court granted Michelle's petition for certiorari.

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?

STATEMENT OF THE FACTS

Michelle and Brittany decided to have a child together in mid-2009, E54, when neither Maryland (where they lived) nor any nearby jurisdiction recognized marriage between same-sex couples.[3] Brittany was artificially inseminated with sperm from an anonymous donor, with the services of a fertility clinic. E14. Michelle testified that she and Brittany "looked through different donors and came up with a handful of the ones that had qualities that we both agreed on. But ultimately, it was my decision based on ones that I felt would look the most like me." E56. Michelle chose the donor based on physical resemblance to herself because Michelle and Brittany intended for Michelle "to be the other parent." E56.

Michelle and Brittany's son was born in early April 2010. E14. Michelle was present at the birth and cut the umbilical cord. E72, E80.

Brittany and Michelle named their son Jaxon William Lee Eckel Conover. Notably, they gave him Michelle's last name, Conover, even though they were not yet married when Jaxon was born. (Brittany's family name is Eckel, and that was her last name when Jaxon was born, although she took Michelle's last

[3] Both the majority and concurrence below incorrectly state that the parties lived in the District of Columbia. *See* 224 Md. App. at 370 & 389. In fact, although they later married in D.C., they lived in Maryland at all times relevant. *See* E14 ("Both parties are residents of Maryland…."); E29 (counter-complaint listing Maryland residences since Jaxon's birth).

name when they later married. E65.)

Brittany returned to work soon after Jaxon was born, and Michelle became Jaxon's primary caregiver, taking on "the stay at home family position." E56. In July 2010, when Jaxon was three months old, Brittany and Michelle both signed a document, *see* E151, identifying Brittany and Michelle as "Parental Guardian[s]" of Jaxon and agreeing 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.[4]

On September 28, 2010, when Jaxon was about six months old, Michelle and Brittany married in the District of Columbia. E57-58.[5]

---

[4] Brittany claimed that she drafted and signed this document under some form of duress from Michelle. At one point, she asserted that she signed the document because she "didn't want to get beat," E85; later in the hearing, she claimed that Michelle refused to take care of Jaxon on the night in question unless she drafted the document, E99. Michelle denied each of these allegations. E115-16. Brittany's claims surrounding the "parental guardian" agreement were of a piece with assertions she made throughout the hearing that Michelle was regularly abusive to her during their relationship, allegations which she repeated in her opposition to certiorari. *See* Opp. Pet. Cert. at 3. However, the circuit court did not credit Brittany's unsupported allegations in its opinion, and it expressly ruled at the hearing that the claims are not relevant to the legal issue of whether Michelle is Jaxon's parent. E141-42, E145.

[5] D.C.'s marriage equality legislation had taken effect in early March 2010 (when Brittany was nine months pregnant). *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Law 18-110 (Dec. 18, 2009); *see also* 57 D.C. Reg. 1833 (Mar. 5, 2010) (memorializing effective date).

As Jaxon began to speak, he called Michelle "da-da" or "daddy"; in fact, "da-da," in reference to Michelle, was Jaxon's first word. E57, E81-82. Michelle and Brittany both held themselves out to their families and community as Jaxon's parents. E59-60, E84.[6] They considered initiating a proceeding for Michelle to adopt Jaxon, but they could not afford the cost of an adoption. E61. Michelle "thought that the money would be better spent on things for Jaxon," and believed that by virtue of her marriage to Brittany, Jaxon "would legally be [her] son." E63.

However, Michelle and Brittany separated in September 2011, about a year after they married. E15. Michelle continued to have visitation with Jaxon despite the separation, including regular weekend and weekday overnight visitation periods for two and three overnights at a time. E59, E87. Brittany also continued to treat Michelle as Jaxon's parent, including sending Michelle a Father's Day gift "from" Jaxon in June 2012. E59-60.

---

[6] At the hearing, Brittany claimed that, during her pregnancy and Jaxon's infancy, she had secretly, "[i]n [her] heart and in [her] mind," seen Michelle as merely Jaxon's "babysitter." E96. But she acknowledged that she did not make this alleged secret intention known to Michelle, even after they separated, "because that would have hurt [Michelle's] feelings." E93. According to Brittany, she "changed [her] position" on whether Michelle was Jaxon's parent after their separation because she "realized that this was never what I wanted" and that she "should have never ever, ever let it get this far." E86-87. Michelle testified that the first time Brittany ever denied to her that she was Jaxon's parent was when she received Brittany's complaint for divorce stating that the parties had no children together. E68; *see* E21 (complaint).

But in July 2012, Brittany abruptly cut off Michelle's visitation. E15, E69. Michelle testified that she did not immediately seek legal recourse because she thought that Brittany would "cool down" if she waited a few weeks. E119. But then Brittany moved without providing Michelle her new address, and blocked Michelle from contacting her by phone, email, or social media. E69. Michelle did not receive Brittany's new address until she was served with Brittany's complaint for divorce in February 2013. E69.

Michelle timely filed a counter-complaint for divorce and visitation. E28. The circuit court set in a hearing on "parental standing," which was held on April 30, 2013, and it issued its opinion denying Michelle's claim for visitation on June 4, 2013. E14. After an additional hearing on the uncontested grounds for divorce, the circuit court issued a final judgment of absolute divorce in October 2013, E9, from which Michelle noted a timely appeal. The Court of Special Appeals' opinion issued on August 26, 2015; Michelle filed a timely petition for certiorari, which this Court granted.

STANDARD OF REVIEW

Petitioner does not challenge the factual findings of the circuit court. All of the issues raised are pure issues of law, which this Court reviews *de novo*, without deference to the legal determinations of the trial court or the Court of Special Appeals. *See, e.g.*, *Bontempo v. Lare*, 444 Md. 344, 363 (2015).

ARGUMENT

Michelle is Jaxon's parent. She is his legal parent, because she married Brittany after Jaxon was born and acknowledged Jaxon as her child. Under §1-208(b)(4), those actions established a presumption of her parentage, which has not been rebutted. And, although this Court rejected the doctrine of *de facto* parentage in *Janice M. v. Margaret K.*, Michelle is also Jaxon's *de facto* parent, because she has formed a bonded parent-child relationship with him that Brittany encouraged and fostered. Michelle's parent-child relationship with Jaxon, both as his presumptive legal parent and his *de facto* parent, should be recognized and protected—and should not be extinguished without considering Jaxon's best interests.

Section 1-208(b), the provision that establishes Michelle's presumptive legal parentage, is one of Maryland's legitimation statutes. Under this Court's case law, when a person legitimates a child via a legitimation statute, a legal presumption of the child's parentage is established. The presumptive parent is considered the 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.[7]

[7] In this brief, Petitioner describes the legitimation statutes codified in

To be sure, §1-208(b) is phrased in gender-specific language—it governs who will be considered a child's "father." On account of this phrasing, the circuit court believed that Michelle could not qualify as a "father" because she is not male. But, consistent with established principles of statutory interpretation, §1-208(b)'s reference to "father" must be given a gender-neutral construction.

Although this Court rejected the doctrine of *de facto* parentage in *Janice M.*, it should reconsider that decision. A *de facto* parent-child relationship only arises, as it did here, under narrow factual circumstances where a truly bonded parent-child relationship has been formed with the consent and cultivation of a legal parent. When the legal parent who has fostered that bond turns around and tries to terminate it, a court should not be barred from considering whether the parent's actions are detrimental to the child's best interest.

---

§1-206 and §1-208 as creating "presumptions of parentage," although not all of the statutes use language of presumption. The Court has sometimes avoided describing §1-208(b) as establishing "presumptive" parentage. *See, e.g.*, *Monroe v. Monroe*, 329 Md. 758, 768 (1993) (stating that, because child was conceived before marriage, "respondent is not, presumptively, [child's] father"). But even then, the Court has described persons who satisfy §1-208(b) as "in a position comparable to that of a presumptive father," *id.* at 772; and, more importantly, has held that the same method of adjudicating disputes about legal parentage applies to all provisions in §1-206 and §1-208. Therefore, this brief uses the term "presumptions of parentage" as a convenient descriptor under both statutes.

I. Michelle is presumed to be Jaxon's parent as a matter of law, because she married Jaxon's mother and acknowledged Jaxon as her son.

Under §1-208(b)(4), Michelle is Jaxon's legal parent, because she has done what the statute requires in order to legitimate him—she married Jaxon's mother and acknowledged Jaxon as her son—and the resulting presumption of her parentage has never been rebutted.

The circuit court rejected Michelle's claim to parentage under §1-208(b), because it believed that Michelle's sex disqualified her from being a "father"; the circuit court's interpretation of the statute was flawed, for reasons discussed in Part II below.

But the Court of Special Appeals made an even more fundamental error: it ruled that even if Michelle qualified as a "father" under §1-208(b) despite her sex, the statute did not establish parentage for purposes of child custody and visitation. Disregarding this Court's developed body of case law regarding presumptions of parentage, the Court of Special Appeals opined, instead, that parentage in child custody and visitation cases is governed by this Court's "third party" custody jurisprudence—a body of law that deals, not with establishing who are a child's parents, but with demarking the rights of people who are *not* legal parents.

A. The question of who is a parent is determined by statutory presumptions of parentage.

The third-party custody cases extend from a basic principle, founded in constitutional principles of substantive due process: that a parent has a fundamental right to custody of his or her child that is ordinarily superior to the rights of persons who are not parents of the child. The Maryland cases standing for this principle are legion; they include *Ross v. Hoffman*, 280 Md. 172 (1977); *McDermott v. Dougherty*, 385 Md. 320 (2005); and *Koshko v. Haining*, 398 Md. 404 (2007), among many others. Under Maryland law, this fundamental parental right is safeguarded by a requirement that, in a child custody or visitation dispute between a fit parent and a non-parent, "only if . . . 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.

But the cases applying this exceptional circumstances test all involve non-parents—such as the child's grandparents, *see Koshko*, 398 Md. 404; or siblings, *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). Indeed, although Petitioner contends in Part III below that *Janice M.* should be reconsidered, *Janice M.* also involved a person who was not recognized as a

legal parent (despite having been so thoroughly involved in the child's care and upbringing as to be considered the child's "*de facto* parent"). None of the "third party" custody and visitation cases just cited—including *Janice M.*—answers the antecedent question: who is a legal parent of a child?

That question is answered, in Maryland as in other states, by statutes and associated case law that specify who is considered a parent of a child and how legal 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 (not directly at issue here), and in the legitimation statutes codified in §1-206 and §1-208.

Section 1-206 provides that a "child born or conceived during a marriage is presumed to be the legitimate child of both spouses." §1-206(a).[8] Section 1-208 deals with children born to unmarried parents: §1-208(a) provides that a child born to unmarried parents "shall be considered the child of his mother"; and §1-208(b), which is most relevant here, provides:

---

[8] Section 1-206(b), which is at issue in another case pending in this Court (*Sieglein v. Schmidt*, No. 76, Sept. Term 2015), provides that 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 for all purposes." Notably, §1-206(b) would have applied to Michelle and Brittany if they had been able to marry when Jaxon was conceived by artificial insemination.

> (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.[9]

These statutes allow a child to be legitimated—in other words, they establish that a particular person will be considered a legal parent of the child—without the need to obtain a judicial decree establishing parentage, a finding of paternity via DNA testing, or an adoption.[10] Indeed, the Court has expressed

---

[9] In addition to legitimating Jaxon under §1-208(b)(4) by marrying Brittany after Jaxon was born and acknowledging parentage, Michelle also legitimated Jaxon through two of the three other methods of legitimation under §1-208(b): she "openly and notoriously" acknowledged her parentage of Jaxon, §1-208(b)(3), by holding herself out to family and the community as his parent; and she acknowledged her parentage of Jaxon "in writing," §1-208(b)(2), including by signing the "parental guardian" agreement, *see* E151, and by filing her counter-complaint for divorce, in which she identified Jaxon as her child. *See* E28. *See Thomas v. Solis*, 263 Md. 536, 544 & n.4 (1971) (holding "signing … the petition in the instant case" sufficient to acknowledge parentage "in writing" under §1-208(b)(2)). This Court has said that "any of the … methods set forth in § 1-208 of the Estates & Trusts Article [is] sufficient" to legitimate a child, *Turner v. Whisted*, 327 Md. 106, 112 (1992) (citing *Thomas*, 263 Md. at 544), and has declined to resolve "whether the disjunctive factors are of co-equal importance in establishing" parentage. *Monroe*, 329 Md. at 769 n.6. Although Michelle relies primarily on §1-208(b)(4), she is also Jaxon's legal parent pursuant to §1-208(b)(2) & (3).

[10] These provisions have been part of Maryland law for centuries. The

a strong preference for parentage to be established via the legitimation statutes, in circumstances where they apply. The Court has explained that establishment of legal parentage under the legitimation statutes is both "'more appropriate[ ]' and 'less traumatic'" than either a paternity suit or an adoption proceeding. *Mulligan v. Corbett*, 426 Md. 670, 678 (2012) (comparing to paternity suit); *see also Bridges v. Nicely*, 304 Md. 1, 7 (1985) (comparing to adoption). And, despite their placement in the Estates & Trusts Article, the legitimation statutes are "not limited to matters of inheritance only." *Bridges*, 304 Md. at 8 (discussing §1-208(b)). Rather, the presumptions of legal parentage that they establish are "of sufficient legal validity to establish other rights … arising from the relationship existing between parent and legitimate issue." *Thomas v. Solis*, 263 Md. 536, 542 (1971) (same).

The lower courts believed erroneously that the legitimation statutes do not apply to child custody and visitation cases. The Court of Special Appeals

---

marital presumption now codified in §1-206(a) traces to our English common law heritage. *See, e.g.*, *Scanlon v. Walshe*, 81 Md. 118, 130 (1895) ("This legal presumption has been characterized as the foundation of every man's birth and status, and of the whole fabric of human society….: 'A child born of a married woman is, in the first instance, presumed to be legitimate.'"). The provision on which Michelle primarily relies, now codified in §1-208(b)(4), has been part of Maryland law since before the Constitution was ratified. *See Hawbecker v. Hawbecker*, 43 Md. 516, 518 (1876) ("'If any man shall have a child or children by any woman, whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated….'") (quoting 1786 Md. Laws, ch. 45, §7).

held that, even if a "non-biological, non-adoptive spouse … meets one, two or even three tests under ET § 1-208(b)," they are "still a 'third party' for child access purposes." 224 Md. App. at 380. This holding was simply wrong. In the specific context of child custody and visitation, this Court has held repeatedly and consistently that disputes as to legal parentage must be determined pursuant to §1-206 and §1-208, where those statutes apply. *See, e.g.*, *Mulligan*, 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"); *Evans v. Wilson*, 382 Md. 614, 629 (2004) (holding that "the provisions of the Estates and Trusts Article set forth the appropriate procedures for analyzing the question of a child's paternity" in suit brought by alleged father of child, seeking visitation with child born during mother's marriage to someone else); *Monroe v. Monroe*, 329 Md. 758, 766 (1993) (holding that §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*, 263 Md. at 538 (holding that §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").

Disregarding all of this case law (with one exception, discussed below), the Court of Special Appeals opined that this case is controlled by third-party custody jurisprudence. But the third-party custody cases do not speak to the issue of who qualifies as a parent. For instance, the Court of Special Appeals quoted *Victoria C.*, 437 Md. at 591, for the proposition that anyone "'who is not a biological or adoptive parent is a third party.'" *Conover*, 224 Md. App. at 378. But this statement from *Victoria C.* was dictum. It was not, and could not be, a holding of the Court on the issue of determining a child's legal parentage, because *Victoria C.* did not involve anyone claiming parentage, whether through biology, adoption, or otherwise; it involved whether *siblings* were legal third parties.

The Court of Special Appeals' reliance on *Janice M.* was similarly misplaced. To be sure, *Janice M.* contains language describing *de facto* parentage as a relationship with a "non-biologically related or non-adopted child." 404 Md. at 683. But the case does not speak to whether a person who has established presumptive parentage under a legitimation statute is a third party, because that issue was not present in the case. Neither the §1-206 presumption nor the §1-208 presumption was argued or could possibly have applied, because the child in *Janice M.* had been adopted (by one, but not both, of the parties). There is a separate legitimation statute applicable to adoption,

E.T. §1-207, which makes clear that an "adopted child shall be treated as a natural child of his adopting parent or parents." Because the child in *Janice M.* was adopted, her legal parentage was defined by §1-207 and the adoption decree, not §1-206 or §1-208. Thus, the *de facto* parent in *Janice M.* had no possible claim to legal parentage under those statutes (nor did she assert one). Regardless of whether *Janice M.* remains good law on the issue of *de facto* parentage (discussed in Part III), the case does not address the parentage presumptions.

B. A person who is not a biological parent of a child can be the child's legal parent under a statutory parentage presumption.

Although the third-party cases like *Janice M.* and *Victoria C.* do not focus on who qualifies as a legal parent, they do occasionally describe legal parents as "biological or adoptive parents." But the term "biological parent" elides a critical nuance that is not at issue in third-party cases, but which the cases construing §1-206 and §1-208 make abundantly clear: although one could describe the legitimation statutes as establishing presumptions of "biological" parentage, the parentage presumptions that these statutes create are not evidentiary presumptions that can be overcome simply by producing evidence of biological paternity. It is entirely possible—indeed, it is a *central feature* of the parentage presumptions—that a person who indisputably is *not* the

biological parent of a child can nevertheless be conclusively established by a legitimation statute as the child's legal parent.

To illustrate, the §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*. 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. 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 made it quite clear that Mulligan's husband was not the child's biological father. But that did not negate the legal presumption that "Mr. Mulligan was [the child's] presumed father under the Estates and Trusts Article." *Id.* at 684. This Court held that the trial court properly concluded that Mulligan's husband was "'the legal father of the minor child.'" *Id.* (quoting trial court); *see id.* at 700 ("the circuit court did not err").

For this reason (as well as others, discussed in Part II below), the retort that, because Michelle is not a man, she obviously can't be Jaxon's biological "father," misses the mark. It is unremarkable (if perhaps infrequent) that a

person who is not the biological parent of a child can be established as the child's legal parent under a presumption of parentage. Indeed, the *only* cases where §1-206 or §1-208 ultimately make a difference are cases where the presumption of parentage that they establish is contrary to the biological facts of parentage.

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

To be sure, it is possible to rebut the presumptions of parentage under §1-206 and §1-208. *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 the ability to rebut the presumptions of parentage is carefully circumscribed, because 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*, 327 Md. 106, 114-15 (1992). In Maryland and elsewhere, a statutory 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., 491 U.S. 110, 119-20 (1989) (plurality). If a party could rebut the presumption by introducing evidence of genetic parentage (such as blood or DNA tests) at will, "[w]ithout regard to the child's best interests," the "consequences to intact families could be devastating." *Evans*, 382 Md. at 636.

Therefore, this Court has consistently held that, if a party seeks "to delegitimate a presumptively legitimate child," by introducing evidence that the presumptive legal parent is not the biological parent, the party "must first show" that introduction of such evidence "is in the best interests of the child." *Mulligan*, 426 Md. at 699. In *Turner v. Whisted*, the Court elucidated the factors that inform a court's best-interests analysis of 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 should be considered in connection with the court's paramount concern of protecting [the child's] best interests.

This Court has applied this doctrine, requiring the best interests of the child to be satisfied before a presumption of parentage can be rebutted, in a multitude of cases—many of which are custody and visitation cases and none of which were cited by the Court of Special Appeals below. *See, e.g.*, *Mulligan*, 426 Md. at 698-700; *Kamp*, 410 Md. at 658-72; *Evans*, 382 Md. at 624-36; *Sider v. Sider*, 334 Md. 512, 527-28 (1994); *Turner*, 327 Md. at 113-17.[11]

Mulligan (already discussed) and *Kamp* are particularly noteworthy because they 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 *Kamp*, the wife became pregnant five years after her husband underwent a vasectomy. *Kamp*, 410 Md. at 648. At the time of conception, the couple were separated, and the husband was living in another state. *Id.* The husband and wife both knew during the pregnancy that the husband was not the father and knew the biological father's identity. *See id.* at 649-50. The child learned her biological father's identity when she was

[11] The Court has held that the best-interests threshold does not apply in paternity proceedings under the Family Law Article when the child is born out of wedlock and a putative parent seeks genetic testing in order to prove that he or she is <u>not</u> the parent of the child. *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).

eight years old. *Id.* at 651. In subsequent litigation, circuit court granted the husband's motion for DNA testing, 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. But on appeal, this Court 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).

Yet the case that is most squarely on all fours with this case, albeit in the context of an opposite-sex couple, is *Monroe v. Monroe*, 329 Md. 758 (1993). The Court of Special Appeals did discuss *Monroe*, but grossly misread it. The spouse in *Monroe*, like Michelle here, relied on §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. And the mother in *Monroe*, like Brittany here, sought to rebut the §1-208(b) presumption and show that her spouse, "who has acted as the child's father, who has acknowledged the child, and who is married to the child's mother" was "in fact, not the child's father," 329 Md. at 771, solely to

gain a superior position over her spouse in their custody dispute; she did "not propose to establish who the biological father actually is." *Id.* at 766. Without considering the child's best interests, the circuit court in *Monroe* allowed the mother to obtain DNA testing in order to rebut the §1-208(b) 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. The first part of the decision dealt with the husband's claim to legal parentage under §1-208(b). The 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 §1-208(b) applied, the spouse should have been considered the child's legal parent, and his parentage should not have been rebutted unless to do so was in the child's best interests. The Court stated that the necessity of a best-interests showing was particularly acute "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.

Indeed, in language that is readily applicable here, the *Monroe* Court strongly hinted that a child's best interests in this scenario will not favor rebutting the presumption of parentage, stating, *id.* at 772-73 (emphasis added):

> [T]he [mother's] interest in obtaining sole custody must be considered and balanced against those of the [spouse] **in protecting the relationship he has formed, and maintained, with the child.** In addition, the [mother]'s motive in seeking to disestablish, after prior acquiescence in, the [spouse]'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…. 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.

The *Monroe* Court explained that it "ordinarily" would have remanded due to the circuit court's error in allowing parentage to be rebutted without considering the child's best interests. *Id.* at 773. But the Court opted not to do so in that case "because the cat is now out of the bag and cannot now be stuffed back in." *Id.* 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 ruled that there was "ample evidence to support [a] determination that exceptional circumstances existed." *Id.* at 777.

In this case, the Court of Special Appeals completely disregarded the first part of *Monroe* and seized on the discussion of third-party custody in the second part, erroneously describing *Monroe* as standing for the proposition that, even if a person establishes a presumption of parentage under §1-208(b), a "circuit court still ha[s] 'to determine whether there exists sufficient exceptional circumstances to rebut the [unrelated] presumption that custody should be awarded to the biological parent.'" 224 Md. App. at 379-80 (quoting *Monroe*, 329 Md. at 774). This distorts *Monroe* beyond recognition.

The Court of Special Appeals' error is compounded by the fact that in *Kamp*, 410 Md. at 672, this Court subsequently repudiated the "cat is out of the bag" approach that led to the discussion of third-party case law in *Monroe*, and held that, where a circuit court erroneously allows a presumption of parentage to be rebutted, "remand ... is required," and evidence rebutting a presumption of parentage "shall not be considered until doing so is determined to be in the child's best interests."

This Court's case law thus makes clear that the lower court's holding in this case—that a "non-biological, non-adoptive spouse who [qualifies] under ET §1-208(b) is still a 'third party' for child access purposes," 229 Md. App. at

380—was flatly incorrect. A person who has legitimated a child under §1-208(b) is the child's legal parent, and an inquiry into whether they are in fact a "biological" parent of the child, where a determination of biological parentage would not serve the child's best interests, is precisely the inquiry that the presumption of parentage is intended to prevent.

No analysis of Jaxon's best interests has ever been conducted. If the circuit court were to decide on remand that it is somehow in Jaxon's best interests to deprive him of his parent-child relationship with Michelle and rebut the legal presumption of her parentage in favor of determining biological parentage, the court could, *at that point*, take judicial notice of the fact that Michelle cannot possibly be Jaxon's biological parent. But the case law contains several examples of men whose biological paternity of the children at issue was also obviously impossible, and who nevertheless continued to be their children's legal parents under a presumption of parentage. *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); *see also Ashley v. Mattingly*, 176 Md. App. 38, 42 (2007) (upholding presumption of husband's parentage despite privately obtained DNA test "reveal[ing] that there was a 0.0% probability" of paternity). If Michelle meets the qualifications of

§1-208(b), then until and unless it is shown on remand that Jaxon's best interests favor rebutting the presumption of parentage, Michelle is Jaxon's legal parent.

II. Statutory presumptions of parentage must be given a gender-neutral construction.

Some of the legitimation statutes are phrased in gender-specific language. Section 1-208(b), in particular, specifies who will be considered a child's "father."[12] Although the Court of Special Appeals did not reach this issue, the circuit court ruled that Michelle could not be a "father" under §1-208(b) because she "is in fact a female." E17. This reasoning, if perhaps appealingly straightforward at first glance, disregards established principles of statutory construction and is particularly untenable following the enactment of marriage equality for same-sex couples. Correctly construed, §1-208(b)'s reference to "father" should be read in a gender-neutral manner (effectively meaning "non-birth parent"). Under that construction, there is no question that Michelle qualifies as Jaxon's presumptive parent under the statute.

A. Gender-specific terms in statutes ordinarily must be given a gender-neutral interpretation, and statutes must be construed to avoid doubt as to their constitutionality.

As a rule of statutory construction, the legislature has provided: "Except

[12] Similarly, §1-206(b) establishes presumptive parentage of a "husband." In contrast, §1-206(a) is phrased in gender-neutral language, stating that a child "born or conceived during a marriage is presumed to be the legitimate child of both spouses."

as otherwise provided, a reference to one gender includes and applies to the other gender." Md. Code, §1-201 of the General Provisions Article ("G.P.").

Moreover, under the "canon of constitutional avoidance," Maryland courts "construe a statute to avoid conflict with the Constitution whenever it is reasonably possible to do so, even to the extent of applying a judicial gloss to interpretation that skirts a constitutional confrontation." *Harris-Solomon v. State*, 442 Md. 254, 287 (2015) (citing *Koshko*, 398 Md. at 425-26); *accord Nationsbank v. Stine*, 379 Md. 76, 86 (2003) ("[T]his Court will prefer a[statutory] interpretation that allows us to avoid reaching a constitutional question.").

As its name indicates, the canon is a method of avoiding constitutional questions—not of adjudicating them. By applying the canon, the Court "'avoids the determination of constitutionality.'" *Md. State Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 519 n.12 (2012). The canon is an outgrowth of "the Court's 'strong and established policy … to decide constitutional issues only when necessary.'" *VNA Hospice of Md. v. Dept. of Health & Mental Hygiene*, 406 Md. 584, 604 (2008); *see also id.* at 606-09 (distinguishing, in context of issue preservation, between claims that statute is unconstitutional and claims that statute should be interpreted to avoid constitutional doubt).

Nevertheless, the canon cannot be applied where "any result short of deciding the constitutional issues would produce a strained construction of the

statute." *Md. State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496, 505 (1973). And the canon "'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*.'" *Waterkeeper Alliance, Inc. v. Md. Dept. of Agric.*, 439 Md. 262, 284 n.20 (2014) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)) (emphasis in *Clark*).

B. The term "father" in §1-208(b) is susceptible of more than one interpretation.

The statutory term "father" can be interpreted in more than one way. In ordinary English usage, of course, "father" is a gender-specific term, meaning "[a] male parent." BLACK'S LAW DICTIONARY (10th ed. 2014). However, pursuant to G.P. §1-201, gender-specific references in statutes, such as §1-208(b)'s reference to a child's "father," may be construed—indeed, absent a clear provision to the contrary, must be construed—on a gender-neutral basis, so as to "include[ ] and appl[y] to the other gender." There is no provision in §1-208(b) expressly exempting it from G.P. §1-201's rule of gender-neutral construction. If the term "father" in §1-208(b) is construed according to G.P. §1-201, both men and women could qualify as "fathers." Thus, the statute is susceptible of more than one construction.

C. Unless the term "father" in §1-208(b) is given a gender-neutral construction, the statute's constitutionality under the Equal Rights Amendment is doubtful.

Under the canon of constitutional avoidance, a gender-neutral construction of the term "father" in §1-208(b) should be preferred because construing §1-208(b) such that only men can qualify as "fathers" would raise grave constitutional doubts under Article 46 of the Declaration of Rights, also known as the Equal Rights Amendment ("ERA").

The ERA provides: "Equality of rights under the law shall not be abridged or denied because of sex." It "flatly prohibits gender-based classifications, either under legislative enactments … 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.*, 399 Md. 267, 279 n.13 (2007).

The ERA "subject[s] to closer scrutiny any governmental action which single[s] out for disparate treatment men or women as discrete classes." *Conaway v. Deane*, 401 Md. 219, 260 (2007). In other words, the ERA "invalid-ate[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, as construed by the circuit court, §1-208(b) would grant a benefit to one sex as a class but not to the other. The circuit court held that §1-208(b) does not apply to Michelle because she is a woman. Under that reading, men can be presumptive parents under §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 a gender-specific construction 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 does not depend on the biology of human reproduction. The reason the presumptions have existed in our law for centuries is not biology, but society's interests in protecting the "integrity of the marital family unit," *Turner*, 327 Md. at 114-15, and in "secur[ing] for children born out of wedlock, 'as nearly as practicable, the same rights to support, care, and education as children born in wedlock.'" *Monroe*, 329 Md. at 767 (quoting *Taxiera v. Malkus*, 320 Md. 471, 479 (1990)).

Thus, a literal interpretation of the word "father" in §1-208(b) would "'raise[ ] doubts'"—at minimum—"'as to [the] legislative enactment's

constitutionality,'" *VNA Hospice*, 404 Md. at 605, and so the canon of constitutional avoidance is in play.

A strikingly similar issue of constitutional avoidance, in a closely related statutory context, was presented in *In re Roberto d.B.* That case also involved doubts as to the constitutionality under the ERA of gender-specific statutes—specifically, the paternity provisions of the Family Law Article, a set of statutes that are close cousins to the statutory presumptions of parentage. In *Roberto d.B.*, 399 Md. at 270-71, a man who wished to become a father contracted with a woman to serve as his gestational surrogate: she gave birth to twins conceived through implantation of eggs from an anonymous donor that were fertilized *in vitro* with the intended father's sperm. Once the twins were born, she and the father jointly sought in a paternity proceeding under the Family Law Article to disestablish her *maternity*, in the same way that a putative father could disestablish his paternity—by showing that she had no "genetic connection" to the children. *Id.* at 277.

This 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. So, relying on the canon of constitutional avoidance, *see id.*

at 283-84, the Court "construe[ed] the parentage statutes in a way that affords women the same opportunity to deny parentage as men have." *Id.* at 279.

Like the statutes in *Roberto d.B.*, §1-208(b) "as written, provides an opportunity for genetically unlinked males …, while genetically unlinked females do not have the same option," *id.* at 279—*i.e.*, an opportunity to establish presumptive legal parentage. 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. The same holding should apply to §1-208(b).

Courts in several other states have similarly construed their statutory presumptions of parentage to be gender neutral, permitting women to be established as legal parents in circumstances where the presumptions would apply to similarly-situated men.[13] The New Hampshire Supreme Court's

---

[13] *See Elisa B. v. Sup. Ct. of El Dorado Co.*, 117 P.3d 660, 666-72 (Cal. 2005); *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 584-88 (Colo. App. Div. IV 2013); *In re S.N.V.*, 284 P.3d 147, 150-51 (Colo. App. Div. V 2011); *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); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 498-501 (N.H. 2014); *Chatterjee v. 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 (Wis. App. 2010); *White v. White*, 293 S.W. 3d 1 (Mo. App. 2009); *In*

reasoning in *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014), is particularly instructive and consonant with Maryland parentage law. The *Madelyn B.* court gave a gender-neutral construction to a legitimation statute similar to Maryland's §1-208(b)(3), which provided that "'a man is presumed to be the father of a child if … [w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his child.'" 98 A.3d at 498 (quoting statute). The court explained, *id.* at 500-01 (internal citations omitted):

> The policy goals of ensuring legitimacy and support would be thwarted if our interpretation of [the legitimation statute] failed to recognize that a child's second parent under that statute can be a woman. Without that recognition, a child in a situation similar to Madelyn's could be entitled to support from, and be the legitimate child of, only her birth mother. Two adults—Melissa and Susan—intentionally brought Madelyn into the world and held her out as their child; we cannot read [the legitimation statute] so narrowly as to deny Madelyn the legitimacy of her parentage by, and her entitlement to support from, both of them….
>
> Consistent with the above-noted policy goals is the recognition that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."….
>
> Accordingly, in some cases, we have refused to allow a presumption of paternity to be rebutted by proof of biological paternity…. Similarly, we have allowed a determination of paternity to stand despite a confirmed lack of biological connection…. Accordingly, we conclude that the lack of a biological connection between Susan and Madelyn is not a bar to application of the holding out presumption.

---

re Clifford K., 619 S.E.2d 138 (W. Va. 2005).

* * *

> For all of the foregoing reasons, we hold that [the legitimation statute] applies equally to women and men.

D. Only a gender-neutral construction of §1-208(b) is consistent with marriage equality for same-sex couples.

Because the presumption in §1-208(b)(4) in particular hinges on the parents' marriage after the birth of the child, Maryland's recognition of marriage equality for same-sex couples demands a gender-neutral construction of the statute. Indeed, the decision of Maryland's legislature and electorate to eliminate gender-based distinctions in the marriage statute weighs strongly in favor of a gender-neutral construction of all gender-specific statutory terms that concern marital status. Earlier this term, the Court said as much, albeit in dicta. In *Wagner v. State*, ___ Md. ___, No. 11, Sept. Term 2015 (Dec. 17, 2015), discussing the interspousal exception to criminal liability for theft, the Court observed that, although the statute "has not been amended or updated to reflect the legality of same-sex marriages in Maryland since 2013, and still refers to married couples as those couples 'living together as husband and wife,'" nevertheless "from [the Court's] perspective [the statute] would apply to married same-sex couples." *Id.*, slip op. at 34 n.21

The legislative history of the Civil Marriage Protection Act, 2012 Md. Laws ch. 2 (H.B. 438), confirms that the legislature intended for the marriage

equality legislation to cause gender-specific statutory provisions tied to marital status to be given a gender-neutral construction. On the Senate floor, during debate on final passage of the marriage legislation, Senator Simonaire proposed an amendment to alter a section of the Family Law Article addressing spouses' liabilities for each other's debts, such that references to "husband" and "wife" in that section would be replaced by the gender-neutral term "spouse." *See* H.B. 438, Amend. No. 473824/1, 2012 Reg. Sess. (Md. 2012). The bill's floor sponsor, Senator Madaleno, responded that the amendment was "unnecessary," because the rule of gender-neutral construction (now codified in G.P. §1-201) and the canon of constitutional avoidance would ensure that statutory references to "husband" and "wife" would "be interpreted … in a gender-neutral way" without need for additional legislation; on that understanding, Senator Simonaire withdrew the amendment. H.B. 438, S. Debate, 3d Reader, S. Proc. #30 at 11:40–15:30 (Md. 2012 Reg. Sess., Feb. 23, 2012), *available at* http://mgaleg.maryland.gov/webmga/frmAudioVideo.aspx?ys=2012RS&clip=sen_02232012_2.mp4.

Indeed, the legislative history of the marriage legislation confirms that legislators specifically intended that marriage equality would confer on the children of same-sex married couples the legal protections of the parentage presumptions associated with marriage. *See* H.B. 438, H. Debate, 3d Reader, H.

Proc. #28 at 15:40, 23:10 (Md. 2012 Reg. Sess., Feb. 17, 2012) (floor statement of Del. McIntosh) (stating that Maryland same-sex couples "have kids that [they] need to raise and know that they're protected. That's what today is about…. All of them want the protection that all of us want for our children."), *available at* http://mgaleg.maryland.gov/webmga/frmAudioVideo.aspx?ys=2012RS&clip=hse_02172012_2.mp4; *id.* at 1:40:34 (floor statement of Del. Clippinger) ("I ask you to vote yes because the joy felt by two parents raising children shouldn't be overshadowed by the fear that the other parent might not be able to care for that child at a time of crisis."). These statements presage the Supreme Court's explanation, in its landmark ruling that same-sex couples nationwide cannot constitutionally be denied the fundamental right to marry, that its decision was grounded in part on "the recognition, stability, and predictability marriage offers" to the children of same-sex couples, without which children are "relegated through no fault of their own to a more difficult and uncertain family life." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

In sum, the parentage presumptions exist to protect the "integrity of the marital family unit." *Turner*, 327 Md. at 114-15. With the enactment of the Civil Marriage Protection Act in Maryland (and marriage equality nationwide), same-sex couples are legally able to establish marital family units—as Michelle

and Brittany did—and the integrity of their families is entitled to the same legal protection that the families of opposite-sex couples enjoy.

* * *

For all of these reasons, a gender-neutral construction of the statutory parentage presumptions is required. Under that construction, it is indisputable that Michelle qualifies under §1-208(b)(4) as Jaxon's legal parent.

III. Michelle's *de facto* parent-child relationship with Jaxon should be given legal protection.

Although, for all the reasons explained in Part I above, *Janice M.* does not bar recognizing Michelle as Jaxon's legal parent under §1-208(b), *Janice M.* should nevertheless be reconsidered. Regardless of whether Michelle is Jaxon's legal parent, the circuit court correctly found that she is Jaxon's *de facto* parent. And that relationship—grounded in the daily reality of Michelle's care for Jaxon, and Brittany's fostering of the parent-child bond between them—should be protected by the law.[14]

---

[14] The Court must reach the issue of *de facto* parentage even if it rules in Michelle's favor regarding the statutory parentage presumption, unless the Court holds that Jaxon's best interests cannot support rebuttal of Michelle's presumptive parentage as a matter of law. Otherwise, it will be possible (if unlikely) that the circuit court on remand could find that it is in Jaxon's best interests to rebut Michelle's presumptive parentage. In that event, the circuit court still should be required to consider whether Jaxon's best interests would be served by granting Michelle visitation, because Michelle is his *de facto* parent.

A. The de facto *parentage doctrine, the* In re Custody of H.S.H.-K. *factors, and* Janice M. v. Margaret K.

The Wisconsin Supreme Court's decision in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), is a germinal case for the *de facto* parentage doctrine. As in this case, "two women who shared a close, committed relationship" for over a decade jointly decided, before marriage equality for same-sex couples, to have a child by artificial insemination of one of them. *Id.* at 421-22.

Recognizing that "the best interest of a child may override a parent's right when a parent consents to and fosters another person's establishing a parent-like relationship with a child and then substantially interferes with that relationship," *id.* at 436, the Wisconsin court identified four elements that define the "parent-like relationship with the child," *id.* at 435, that is the hallmark of *de facto* parenthood, *id.* at 435-36 (carriage returns added):

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing [either monetarily or non-monetarily] towards the child's support, without expectation of financial compensation;[ ] and
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded,

dependent relationship parental in nature.[15]

For eight years, Maryland was among the states that adopted the *H.S.H.-K.* factors, or functionally identical formulations, in recognition of *de facto* parentage (or equivalents such as "psychological parent" or "*in loco parentis*").[16]

---

[15] *H.S.H.-K.* also requires a *de facto* parent to show that the child's parent had "interfered substantially with the petitioner's parent-like relationship with the child" and that the *de facto* parent had sought judicial relief "within a reasonable time after the parent's interference." 533 N.W.2d at 436.

[16] Today, eight states have judicially adopted the *H.S.H.-K.* elements or functionally identical elements. *See E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (adopting definition of *de facto* parentage proposed in draft version of American Law Institute, *Principles of the Law of Family Dissolution*, functionally identical to *H.S.H.-K.* definition); *V.C. v. M.J.B.*, 748 A.2d 539, 223 (N.J. 2000) (adopting *H.S.H.-K.* definition under title "psychological parent"); *In re Guardianship of Victoria R.*, 201 P.3d 169, 176 n.6 (N.M. App. 2008) (endorsing *H.S.H.-K.* elements under title "psychological parent"), *cert. denied sub nom. Debbie L. v. Galadriel R.*, 203 P.3d 102 (N.M. 2008); *T.B. v. L.R.M.*, 786 A.2d 913, 916-19 (Pa. 2001) (reaffirming definition of "*in loco parentis*" functionally identical to *H.S.H.-K.* standard); *Rubano v. DiCenzo*, 759 A.2d 959, 975-75 (R.I. 2000) (adopting *H.S.H.-K.* elements); *Marquez v. Caudill*, 656 S.E.2d 737, 743-44 (S.C. 2008) (adopting *H.S.H.-K.* elements under title "psychological parent"); *In re Parentage of L.B.*, 122 P.3d 161, 176-77 (Wash. 2005) (adopting *H.S.H.-K.* elements), *cert. denied sub nom Britain v. Carvin*, 547 U.S. 1143 (2006); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (adopting definition of "psychological parent" functionally identical to *H.S.H.-K.* standard).

In addition, Delaware, Maine, and D.C. have adopted *de facto* parentage by statute using definitions that closely track the *H.S.H.-K.* elements. *See* 13 Del. Code §8-201(c); 2015 Maine Laws, LD 1017, subch. 5 (127th Leg., 1st Reg. Sess. 2015) (eff. July 1, 2016); D.C. Code §16-831.01(1); *see also Smith v. Guest*, 968 A.2d 1 (Del. 2009) (upholding Delaware *de facto* parentage statute against constitutional challenge). The Maine statute will take effect later this year; Maine's Supreme Court previously recognized *de facto* parentage but had not specifically endorsed the *H.S.H.-K.* factors. *See Pitts v. Moore*, 90 A.3d 1169 (Me. 2014); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

In *S.F. v. M.D.*, 132 Md. App. 99 (2000), another case involving a same-sex couple who conceived a child by artificial insemination, the Court of Special Appeals adopted the *H.S.H.-K.* standard, holding that a person who qualified as a *de facto* parent was not required to show other "exceptional circumstances" before a court could consider whether granting the *de facto* parent visitation was in the child's best interests. *See id.* at 111; *id.* at 114. *See also Gestl v. Frederick*, 133 Md. App. 216, 244-45 (2000) (holding that Maryland, rather than Tennessee, was proper jurisdiction for same-sex couple's child custody and visitation dispute because Maryland permitted *de facto* parents to seek visitation under *S.F. v. M.D.* and Tennessee did not; thus, Tennessee was not an "available alternative forum for appellant's claim for visitation").

But in *Janice M.*, the Court rejected "*de facto* parent status, as set forth in *S.F.*, as a legal status in Maryland." 404 Md. at 685. Although acknowledging that "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," the Court held that *de facto* parentage is not "determinative as a matter of law." *Id.* at 695.

***B. Continued adherence to* Janice M. *is not required by* stare decisis.**

Time and experience have proved *Janice M.* wrong, and it should be reconsidered. To be sure, under the doctrine of *stare decisis* this Court ordinarily

refrains from revisiting past decisions. But *stare decisis* "'is not an inexorable command.'" *Kimble v. Marvel Ent'mt, LLC*, 135 S. Ct. 2401, 2409 (2015). Notwithstanding *stare decisis*, it is "appropriate for this Court to overrule its own precedent" in two circumstances: where the prior precedent is "'clearly wrong and contrary to established principles,'" such that "'it is plainly seen that a glaring injustice has been done or some egregious blunder committed'"; or where "the precedent has been superseded by significant changes in the law or facts." *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 64 (2010). *Janice M.* should be reconsidered on both grounds.

Janice M. is clearly wrong because it failed to appreciate key features of the *de facto* parentage doctrine that limit who can qualify as a *de facto* parent and that vitiate the notion that it invades fundamental parental rights. Moreover, the passage of time and evolution of the law have made apparent that third parties who the *Janice M.* majority believed would have "strong" cases for exceptional circumstances without the doctrine are instead hamstrung by the rejection of *de facto* parentage, unable to demonstrate sufficiently exceptional circumstances to show that their children suffer from lack of visitation. In the meantime, *de facto* parentage has been recognized more widely in other states, making Maryland increasingly an outlier in refusing to recognize it.

C. **Janice M.** *was clearly wrong because it failed to appreciate key aspects of the* **de facto** *parentage doctrine.*

In insisting that Maryland third-party custody and visitation law should be unified under a one-size-fits-all standard, *Janice M.* articulated one major reason to reject *de facto* parentage: a fear that recognizing *de facto* parentage would open the floodgates to interference with parental rights from a motley array of non-parents. The majority worried that recognition of *de facto* parentage would "short-circuit[ ] the requirement to show unfitness or exceptional circumstances," 404 Md. at 685, thereby "'encroach[ing]'" upon "'parental autonomy.'" *Id.* at 679. It was "not persuaded" that "a third party, non-biological, non-adoptive parent, who satisfies the test necessary to show de facto parenthood should be treated differently from other third parties." *Id.* And it feared *de facto* parentage could not be "limited to same-sex couples and could arise in a myriad of other circumstances, including disputes involving step-parents, grandparents, and parties in a relationship with 'a significant other.'" *Id.* at 686.

These concerns are overcome by key features of the *de facto* parent doctrine that the *Janice M.* Court failed to recognize. In particular, the stringent definition of *de facto* parentage established in *H.S.H.-K.* narrowly limits who can qualify as a *de facto* parent, obviating the *Janice M.* majority's floodgates concerns. And recognition of a person as a *de facto* parent does not impinge a

legal parent's constitutional rights because a necessary element of *de facto* parent status is that the legal parent "consented to, and fostered" the relationship between the *de facto* parent and the child. *H.S.H.-K.*, 533 N.W.2d at 658. Judge Raker identified these flaws in *Janice M.* in her dissent, but the majority did not respond to the dissent's critique.[17]

Appellate courts in other states around the country that have adopted *de facto* parentage, both before and after *Janice M.*, have also refuted the concerns that the *Janice M.* Court expressed. They have recognized that the *H.S.H.-K.* factors "preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends" from qualifying as *de facto* parents. *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000). Experience in these other states has shown that "step-parents, grandparents, and … 'significant other[s],'" *Janice M.*, 404 Md. at 686, who have not formed truly parental relationships with children cannot meet the

[17] *See Janice M.*, 404 Md. at 698 (Raker, J., dissenting) ("The [*H.S.H.-K.*] test set forth a high bar for establishing *de facto* parent status, minimizing concerns that it could be applied too broadly. The first factor, that the biological parent consented to and fostered the formation of a parent-like relationship, eliminates the majority's fear that recognition of *de facto* parenthood will open the floodgates for litigation by babysitters, foster parents and the like."); *id.* at 700 ("The requirement that the legal parent consent to the formation of a parent-child relationship … again assuages any fear that the standard conflicts with the liberty interest of parents in the custody and care of their children….").

demanding *de facto* parent standard.[18]

And the *Janice M.* Court was overly solicitous of the constitutional rights of parents who voluntarily cultivate their child's relationship with a *de facto* parent and then seek to extinguish it. Other courts have recognized that when a "natural parent create[s] along with [a] nonparent a family unit in which the two act[ ] as parents, share[s] decision-making authority with the nonparent, and manifest[s] an intent that the arrangement exist indefinitely," that "parent has acted inconsistently with his or her paramount parental status." *Boseman v. Jarrell*, 704 S.E.2d 494, 504 (N.C. 2010). As the South Carolina Supreme Court explained in *Marquez*, 656 S.E.2d at 744:

> [T]he first factor [of the *H.S.H.-K.* standard] is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. This factor recognizes that when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced.

---

[18] *See, e.g.*, *W.H. v. D.W.*, 78 A.3d 327, 340 (D.C. 2013) (holding that grandmother was not *de facto* parent because she did not live with child and did not hold herself out as child's parent with agreement of child's legal parent); *Philbrook v. Theriault*, 957 A.2d 74, 79 (Me. 2008) (holding that grandmother was not *de facto* parent and stating: "We have never extended the de facto parent concept to include an individual who has not been understood to be the child's parent but who intermittently assumes parental duties at certain points of time in a child's life."); *Marquez*, 656 S.E.2d at 245 ("Grandmother cannot meet the test of whether she is a psychological parent because she does not meet the [*H.S.H.-K.*] prongs….").

Put simply (and aptly here): "[A] biological parent's rights 'do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so.'" *T.B.*, 786 A.2d at 919.

As Judge Raker observed in dissent, "[t]he rationale underlying the *de facto* parent test is not inconsistent with *Troxel v. Granville*, 530 U.S. 57 (2000), nor does it contradict the Supreme Court's jurisprudence … addressing the liberty interest of parents in the care, custody, and control of their children." 404 Md. at 703. Indeed, the majority was careful to frame its decision as a matter of "Maryland jurisprudence." *Id.* at 685 (majority op.); *see also id.* at 679 n.7 (acknowledging that Maryland third-party jurisprudence exceeds requirements of Supreme Court due process case law); *see also Smith v. Guest*, 16 A.3d 920, 932 & nn.68-70 (Del. 2011) (observing that *Janice M.* failed to address whether "permitting a *de facto* parent to seek custody of a minor child violates the due process rights of the child's other legal parent"). The constitutional rights of parents, fundamental as they are, do not bar recognition of *de facto* parentage.

D. The existence of a **de facto** *parental relationship constitutes exceptional circumstances as a matter of law, and when a legal parent significantly interferes with the relationship between a* **de facto** *parent and a child, courts should presume the child will suffer harm.*

Under current third-party case law, unless exceptional circumstances are shown, a trial court may not even inquire into the best interests of the child, under the legal presumption "that fit parents act in the best interests of their children." *McDermott*, 385 Md. at 422. *Janice M.* missed a central insight of the *de facto* parentage doctrine: it defies sense to presume that a parent is acting in their child's best interests when the parent is openly intent upon ending the child's relationship with the only other parent the child has known. One of the "principal concern[s] motivating courts and legislatures to give legal recognition to psychological parent-child relationships is the belief that, apart from heart-wrenching short-term emotional loss, depriving a child of an established, nurturing psychological parent-child relationship is seriously detrimental to the child's long-term emotional health and development." *Victoria R.*, 201 P.3d at 176.

This Court's third-party custody jurisprudence specifies that the "exceptional circumstances" that will support granting custody or visitation to a third party are "exceptional circumstances which make custody in the parent *detrimental to the best interest of the child*." *Ross v. Hoffman*, 280 Md. 172, 179

(1977) (emphasis added). Thus, when a third party seeks visitation, to show exceptional circumstances one must demonstrate that "the lack of visitation 'has a *significant deleterious effect* upon the children who are the subject of the petition.'" *Victoria C.*, 437 Md. at 592 (quoting *Koshko*, 398 Md. at 441) (emphasis altered); *see Tedesco v. Tedesco*, 111 Md. App. 648, 660 (1996) ("third parties must adduce evidence that demonstrates that the child will be affected detrimentally"). "While it is possible for a trial court to find exceptional circumstances based on future detriment to the child, such a finding must be based on solid evidence in the record, and speculation will not suffice…. [S]peculative evidence of future harm … does not overcome this high evidentiary hurdle." *Aumiller v. Aumiller*, 183 Md. App. 71, 81-82 (2008).

At the core of the *de facto* parent doctrine is the recognition that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should that relationship be significantly curtailed or terminated." *In re E.L.M.C.*, 100 P.3d 546, 560 (Colo. App. 2004). In other words, when a *de facto* parent relationship exists, a court can infer the child will likely be harmed by denial of third-party custody or visitation. That likelihood of harm is the *sine qua non* of exceptional circumstances. By rejecting 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," 404 Md. at 682, *Janice M.* deprived Maryland law of that crucial inference.

Janice M. states that "a finding that one meets the requirements [of] *de facto* parent status … is a strong factor" supporting exceptional circumstances, 404 Md. at 695—seeming to suggest that true *de facto* parents ordinarily could establish exceptional circumstances with little difficulty. But in the next breath, the Court declared repeatedly that, although a "strong factor," *de facto* parentage "is not … determinative as a matter of law." *Id.*

Lower courts have interpreted this to mean that something 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…." E19. 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." E19. 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. 224 Md. App. at 385.

But there is little testimony in the transcript going to the core issue in the exceptional circumstances test—harm to Jaxon from Brittany's denial of visitation. This lack of evidence is not surprising. Brittany had withheld Jaxon from Michelle for months, so Michelle could not testify to what Jaxon was experiencing. No representative of Jaxon's best interests had been appointed. As the Court of Special Appeals recognized, Jaxon was not "old enough to testify or to communicate to an expert." *Id.* at 385 n.15. All Michelle could show were the facts that demonstrated her bonded *de facto* parent-child relationship with Jaxon, Brittany's consent to and cultivation of that relationship, and Brittany's capricious decision to extinguish it. But *Janice M.* instructs that those are merely a "strong factor," "not determinative" without more. 404 Md. at 695. Without recognizing *de facto* parentage, the court could not infer that severing Jaxon's relationship with Michelle would harm him.

The Court should reconsider *Janice M.* and hold that the existence of a *de facto* parental relationship constitutes exceptional circumstances as a matter of law. And, where a parent "interfere[s] substantially with [a *de facto* parent's] relationship with [a] child," *H.S.H.-K.*, 533 N.W.2d at 436, courts should presume that this interference "has a significant deleterious effect" on the child. *Koshko*, 398 Md. at 441. Unless and until *de facto* parentage is recognized, children in Maryland (particularly children of same-sex couples) will continue

to be harmed by the failure of our child custody law to recognize the lived reality of their families.

* * *

When *Janice M.* was decided, fewer than ten states recognized *de facto* parentage. Today, over twenty states recognize a version of *de facto* parentage or a similar doctrine.[19] For all of the foregoing reasons, Maryland should join those states, and *Janice M.* should be reconsidered.

---

[19] In addition to the eleven states identified in note 16 that have adopted the *H.S.H.-K.* formulation by case law or statute, at least ten other states have adopted other definitions of *de facto* parentage, psychological parentage, or *in loco parentis* by judicial decision, or have adopted other doctrines that have the effect of recognizing custody or visitation rights for persons in situations akin to *de facto* parenthood. *See Kinnard v. Kinnard*, 43 P.3d 150 (Alaska 2002) ("psychological parent"); *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011) ("*in loco parentis*"); *Frazier v. Goudschall*, 295 P.3d 542 (Kan. 2013) (enforcement of co-parenting agreement); *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) (waiver of superior parental right by conduct); *Van v. Zahorik*, 597 N.W.2d 15 (Mich. 1999) ("equitable parent"); *Latham v. Schwertdfeger*, 802 N.W.2d 66 (Neb. 2011) ("*in loco parentis*"); *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010) ("parent-child relationship"); *McAllister v. McAllister*, 779 N.W.2d 652 (N.D. 2010) ("psychological parent"); *In re Mullen*, 953 N.E.2d 302 (Ohio 2011) (enforcement of shared legal custody agreement); *Eldredge v.Taylor*, 339 P.3d 888 (Okla. 2014) (enforcement of co-parenting agreement).

Another four states recognize statuses similar to *de facto* parentage by statute, although with different elements than the *H.S.H.-K.* test. *See* Minn. Stat. §257C.08, subd. 4 ("parent and child relationship"); Mont. Code §40-4-211(4)(b), (6) ("parent-child relationship"); Nev. Rev. Stat. §125C.050(2) ("meaningful relationship"); Or. Rev. Stat. §109.119 ("parent-child relationship"); Tex. Fam. Code Ann. §1002.003(9) ("actual care, control and possession"); *see also SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (upholding Minnesota statute against constitutional challenge); *Kulstad v.*

CONCLUSION

For these reasons, the decision of the Court of Special Appeals should be reversed.

Respectfully submitted,

FREESTATE LEGAL PROJECT, INC.

Jer Welter
Deputy Director & Managing Attorney
Counsel for Petitioner

Dated: January 26, 2016

Maniaci, 220 P.3d 595 (Mont. 2009) (upholding Montana statute against constitutional challenge).

In addition, many *de facto* parents would be considered legal parents in states identified in note 13 that construe their presumptions of parentage as gender-neutral, because facts that would establish *de facto* parentage are sufficient to establish a parentage presumption in many states.

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, GENERAL PROVISIONS ARTICLE

§1-201. Gender.

Except as otherwise provided, a reference to one gender includes and applies to the other gender.

§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.

§1-207. Rights of adopted children.

Adopted child treated as natural child of parents

(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, except that upon adoption by the spouse of a natural parent, the child shall still be considered the child of that natural parent.

Multiple adoptions

(b) A child who has been adopted more than once shall be considered to be a child of the parent or parents who have adopted him most recently and shall cease to be considered a child of his previous parents.

§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.

Statement of Font & Type Size

This brief is printed in Book Antiqua font, with 13-point type.

Certification of Word Count & Compliance with Rule 8-112

1. This brief contains 12,998 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Jer Welter

Certificate of Service

Pursuant to Md. Rules 1-321 and 8-502(c), I hereby certify that, on this 26th day of January, 2016, two copies of the Brief of Petitioner were served on Respondent by first-class mail, postage prepaid, to her counsel of record at the following address:

R. MARTIN PALMER
LAW OFFICES OF MARTIN PALMER & ASSOCIATES
21 Summit Avenue
Hagerstown, MD 21740

Jer Welter