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 *AMICI CURIAE* AMERICAN ACADEMY OF ASSISTED REPRODUCTIVE TECHNOLOGY ATTORNEYS, PUBLIC JUSTICE CENTER, AND AMERICAN ACADEMY OF ADOPTION ATTORNEYS IN SUPPORT OF PETITIONER

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INTRODUCTION

In 2000, the United States Supreme Court observed that, "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality). With the Court's subsequent recognition of the constitutionality of same-sex marriage in *United States v. Windsor*, 133 S.Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), this statement is no less true today. Same-sex partnerships have expanded this country's cultural understanding of family and kinship. No longer is the social construct of "family" limited to those who share blood. When a same-sex couple brings a child into being through the use of Assisted Reproductive Technology ("ART"), only one parent—or, possibly, neither—may share genetic material with the child. In such a family's day-to-day reality, parentage is not, and cannot be, determined by mere genetic relationship. In assigning legal parentage, then, courts should not simply resort to biology and thus exclude non-biological parents from the law's recognition and protection.

Maryland has simplified the task of determining the legal parentage of a child conceived through donor insemination by creating a presumption of parentage for the husbands of women who conceive through these means. This statutory presumption, importantly, allows for a couple's intentions regarding who will and who will not be the child's parent to trump the biological facts of the child's parentage. A gender-neutral—and thus constitutional—understanding of this presumption requires that it be extended to members of same-sex couples, so that when a child is born, through donor insemination,

to such a couple, the individual in the couple who lacks genetic ties to the child is legally automatically recognized as the child's other parent.

In deciding the parentage rights and obligations of individuals in unmarried same-sex relationships who are the intended but not genetic parents of children conceived through donor insemination, this Court should adopt the intended parentage doctrine developed by a number of other state supreme courts. The intended parentage doctrine assigns parentage to a non-genetic parent if the parties intended that he or she act as a parent to the child. The intended parentage doctrine ensures that the public policy interests underlying Maryland's statutory presumption of parentage—maintaining family integrity and respecting the best interests of the child—are fulfilled, by giving families created by same-sex partnerships the fullest protection and recognition of the law.

INTERESTS OF AMICI

The **American Academy of Assisted Reproductive Technology Attorneys** (AAARTA) is a specialty division of the American Academy of Adoption Attorneys, a non-profit professional organization of over 330 attorneys, law professors and judges from throughout the United States and Canada, which created AAARTA in recognition of the growing use of assisted reproductive technology. AAARTA is a credentialed professional organization, with a binding Code of Ethics, dedicated to the best legal practices in the area of assisted reproduction and to the advancement and protection of the interests of all parties, including children, involved in assisted reproductive technology. AAARTA attorneys are committed to ensuring that the intended parents

secure a legal relationship with the children born as a result of these arrangements. This brief was reviewed and approved to be filed by the Board of Trustees of the Academy.

The **Public Justice Center** (PJC) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the under-represented. Established in 1985, the PJC uses impact litigation, public education, and legislative advocacy to accomplish law reform for its clients and has established an Appellate Advocacy Project to expand and improve the representation of indigent and disadvantaged persons and civil rights issues before the Maryland state and federal appellate courts. The PJC has a longstanding commitment to protecting the legal rights of parents in relation to their children. The Appellate Advocacy Project represented Deborah Frase in *Frase v. Barnhart*, 379 Md. 100 (2003), and has submitted or joined in a number of briefs of *amici curiae* filed in this Court in cases involving the protection of parents' ability to raise their own children. *See, e.g.*, *Koshko v. Haining*, 398 Md. 404 (2007); *In re: Adoption of Victor A.*, 383 Md. 211, 857 A.2d 1129 (2004); *In re: Adoption/Guardianship of Andrew B. and Joshua B.*, 377 Md. 113, 882 A.2d 205 (2003); *In re: Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666, 796 A.2d 778 (2002); *In re: Marcello K.*, 370 Md. 249, 805 A.2d 254 (2002). The PJC has also provided legal support to gay and lesbian couples in their quest for full legal recognition as spouses and parents, filing an *amicus* brief on the historical nature and evolution of marriage in *Conaway v. Deane*, 401 Md. 219 (2007), and an *amicus* brief on parentage in *Janice M. v. Margaret K.*, 404 Md. 661 (2008).

The **American Academy of Adoption Attorneys, Inc.** (the "Academy") is an association of attorneys, judges, and law professors in the United States and Canada dedicated to the highest standards of practice in the field of adoption law. The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to ensure appropriate consideration of the interests of all parties to adoptions, and to facilitate the orderly and legal process of adoption. The Academy also supports the protection and security of children by affirming the right of individuals and couples to become legal parents of children born through the use of assisted reproductive technology, regardless of sex, sexual orientation, gender identity or expression, marital status, race, color, age, religion, national origin, political belief, or disability. To fulfill its mission, the Academy engages in legislative and administrative advocacy, policy development, and provides *pro bono* assistance in litigation addressing issues of significance to children and adults whose lives are touched by adoption.

ARGUMENT

I. BY PRESUMING PARENTAGE FOR A HUSBAND OR WIFE WHO CONSENTS TO DONOR INSEMINATION OF HIS OR HER WIFE, ESTATES & TRUSTS § 1-206(B) SEVERS PARENTAGE FROM BIOLOGY.

A. Estates & Trusts § 1-206(b), when given the gender-neutral reading the Maryland Declaration of Rights requires, establishes parentage for same-sex couples who elect to conceive via donor insemination.

Recognizing the need for a definitive and efficient means of determining parentage for a child conceived through donor insemination, Maryland enacted § 1-

206(b) of the Estates and Trusts Article of the Maryland Code ("ET"), which provides that:

> A child conceived by artificial insemination[1] 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.

ET § 1-206(b). Thus, when a couple conceives a child through donor insemination, the husband is presumed to have consented to this means of conception and is deemed the father of the child. ET § 1-206(b)'s assignment of parentage rests on two critical, if unspoken, departures from the default of parentage based on biology. First, a father need not have a genetic relationship to his child in order to be his child's "legal father"; instead, by decoupling parentage from genetic ties, ET § 1-206(b) rejects the notion that a "legal" parent can only be a biological parent. Second, the father of a child conceived through donor insemination is only presumed to be the father if he consents to the insemination; when donor insemination successfully conceives a child, then, parentage, with all its rights and obligations, attaches to the spouse who did not carry the child, if and only if he intentionally acts to bring the child into being.[2]

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[1] "Artificial insemination," as used in Estates & Trusts § 1-206(b) is equivalent to "donor insemination," the term preferred by most ART users and advocates.

[2] § 1-206(b)'s parentage presumption also, significantly, establishes that a non-biological parent who conceives his or her child through donor insemination need not adopt the child in order to be recognized as a parent under the law. Thus, Respondent's assertion that Michelle Conover should be deprived of all of Maryland's statutory presumptions of parentage because she did not adopt Jaxon, *see* Resp't's Opp. Br. at 6-7, is contrary to law. Maryland has expressly refused to impose the burden of adoption on non-biological parents who conceive through donor insemination for good reason: Adoption in cases of donor insemination is neither practicable nor rational under the existing law governing adoption. Because an adoption cannot be filed until after the child is born, requiring non-

Under Article 46 of the Declaration of Rights, also known as the Equal Rights Amendment ("ERA"), and Maryland principles of statutory construction, ET § 1-206(b)'s parentage presumption must be read gender-neutrally. *See* General Provisions § 1-201 ("Except as otherwise provided, a reference to one gender includes and applies to the other gender."); *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 64 (1985) (holding that the ERA "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."); *see also In re Roberto d.B.*, 399 Md. 267, 283 (2007) (construing Maryland's paternity statutes to apply equally to men and women in conformance with the ERA).

When made gender-inclusive, ET § 1-206(b) must read:

> A child conceived by artificial insemination of a married woman with the consent of her [spouse] is the legitimate child of both of them for all purposes. Consent of the [spouse] is presumed.

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biological parents who conceive their child via donor insemination to adopt can cause significant delay for these parents in meeting the needs of their children. An adoption can take months, and requires substantial paperwork, court appearances, time, and expense, as well as unnecessary use of court resources, leaving the child, as the adoption request is processed, effectively parentless. Furthermore, adoption in the context of donor insemination leads to absurd results under the existing legal framework for adoption. Who consents to an adoption in this context? The donor cannot because he is not the parent. Must the non-biological parents who conceive via donor insemination consent to adopt their own child? Adoption law does not rationally apply to families created by donor insemination, because adoptions are designed to address situations where the biological or non-biological legal parents are unable or unwilling to parent their child. Adoptions do not fit situations like Michelle Conover's, where a non-biological parent intentionally take steps to bring the child into being. When non-biological parents take these steps, and conceive their children through donor insemination, those children are best served by having the rights of their parents—whether they are biologically related or not—confirmed upon birth.

ET § 1-206(b), then, recognizes that when a same-sex couple conceives through donor insemination, the spouse that is not biologically related to the child is nonetheless the child's legal parent.

B. ET § 1-206(b)'s underlying public policy elevates the preservation of family integrity over biological ties.

By assigning parentage to the spouse of the donor-inseminated wife rather than the sperm donor, ET § 1-206(b) creates an exception to the traditional rule that assumes parentage from a genetic relationship. The presumptive parentage afforded by ET § 1-206(b) is necessary to protect the integrity and legal stability of a family made from a couple's choice to conceive through donor insemination. As Michelle Conover[3] emphasizes in her opening brief, "[i]n 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.'" (Pet.'s Br. at 19-20 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 119-20 (1989) (plurality)). *See also Turner v. Whisted*, 327 Md. 106, 116 (1992) (in considering the best interests of the child, balancing the putative father's interest in establishing his status as the natural father with the interest of the mother and the presumptive father in "protecting the integrity of the familial relationships already formed.").

[3] As noted in Petitioner's opening brief, 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." Pet.'s Br. at 1 n.1. As in Petitioner's brief, for consistency with the record, outside of this footnote this brief refers to Petitioner using female pronouns and his former name, Michelle.

The statutory parentage presumption recognizes that, in certain defined instances such as when a couple chooses to conceive through donor insemination, the strength of that family's bond and the right of the non-biological parent to parent do not rest on shared blood. "Parental rights," the United States Supreme Court has observed, "do not spring full-blown from the biological connections between parent and child. They require relationships more enduring." *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1982) (internal quotation marks omitted)). The stability of such a family rests, at least in part, on the existence of parentage laws that validate the choice to create a family from ties other than the biological. ET § 1-206(b) accomplishes this by automatically assigning parentage to the individual who chooses to conceive a child to whom she will not be genetically related, and by implicitly excluding the genetic father of said child from a claim to paternity.

C. That the Conovers were legally prohibited from marrying at the time of their child's conception should not deprive Michelle Conover of ET § 1-206(b)'s parental presumption.

Although ET § 1-206(b) safeguards the choices of couples who elect to conceive through donor insemination, it does so only for married couples. Because parentage under ET § 1-206(b) is premised on marital status, when an unmarried couple conceives a child through donor insemination, the parental rights and obligations of the non-biological parent—as well as the right of a child born to unmarried parents to receive the same legal protections as a child born to married parents[4]—remain undefined. Non-

[4] The Supreme Court has repeatedly struck down laws that disadvantage children of unmarried parents. *See Gomez v. Perez*, 409 U.S. 535, 538 (1973) (law denying right to

biological parents like Michelle Conover who, because of unconstitutionally discriminatory same-sex marriage bans, could not legally marry their same-sex partners before they conceived their children through donor insemination should not be deprived of ET § 1-206(b)'s parentage presumption.[5]

Obergefell v. Hodges, 135 S.Ct. 2584 (2015), which struck down all state same-sex marriage bans and statutes limiting marriage and marital benefits to opposite-sex

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parental support to children born outside of marriage violates equal protection); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (law denying children born outside of marriage right to bring suit based on wrongful death of their mother violates equal protection). Furthermore, when the government denies equal protection to a class of children on the basis of a suspect status like "illegitimacy," that discrimination is subject to strict scrutiny. *See Pickett v. Brown*, 462 U.S. 1, 8 (1983) (classification based on legitimacy must be substantially related to permissible state interests).

[5] Michelle Conover preserved the argument that she is entitled to ET § 1-206(b)'s parentage presumption because she could not legally marry Brittany Conover when their child was conceived. *See* E. 156-57 (post-hearing memorandum arguing that the court "should give due weight to the fact that Michelle and Brittany Conover were not legally *allowed* to be married, in Maryland or in the District of Columbia, as a result of their sex at the time that Jaxon was conceived and in doing so should broadly construe the statues [sic] that address children born out of wedlock in order to afford Jaxon the same benefits that he was denied as a matter of law."); Appellant's COSA Br. at 24-26 (making same argument). If the Court determines that this argument was not preserved, the Court should nonetheless exercise its discretion to clarify the applicability of ET § 1-206(b) to non-genetic parents who were in same-sex relationships and barred from marriage at the time their child was conceived through donor insemination. *See* Rule 8-131(b)(1); *see also State Ctr. v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 495 (2014) (noting that "the applicable Maryland Rules and our case law governing consideration of unpreserved issues . . . grant [the Court of Appeals] the discretion to address" such issues). Given the non-negligible number of unmarried same-sex couples raising children, *see* Section II, *infra*, it is highly likely that many non-biological parents may be at risk of the same denial of their parental rights as Michelle Conover has experienced. Furthermore, that Michelle Conover was technically unable to avail herself of the protections of ET § 1-206(b)'s parentage presumption when her child was conceived because she could not legally marry Brittany Conover is an additional basis for this Court to broadly construe ET § 1-208(b), as Michelle Conover urges in her opening brief. *See* Pet.'s Br. at 12 n.8, 35-38.

couples, must be applied retroactively to cases like this one, where an individual was deprived of her entitlement to presumptive parentage solely because of laws unconstitutionally discriminating against her. *See Obergefell*, 135 S.Ct. at 2601 ("[B]y virtue of their exclusion from [the marital] institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. . . . Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."); *Conaway v. Deane*, 401 Md. 219, 345 (2007) (Raker, J., dissenting in part) (acknowledging that, "[a]lthough a child conceived by artificial insemination of a married woman can automatically be the legitimate child of both individuals in the marriage, a same-sex couple must go through the process of second-parent adoption, which necessarily involves a period of some delay."). The general rule of retroactivity for constitutional decisions issued by the Supreme Court in non-criminal cases dictates that, "[w]hen [that] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [its] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94, 97 (1993). Because the same-sex marriage ban and all statutes limiting benefits to opposite-sex married couples at the time the Conovers conceived their child are void under *Obergefell*, this Court should not deny Michelle Conover ET § 1-206(b)'s parentage presumption.[6]

[6] The Court of Special Appeals erred in disposing of Michelle Conover's claim for parentage under ET § 1-206(a)—which presumes that a child born or conceived during a

II. GIVEN THE INCREASING INCIDENCE IN MARYLAND OF SAME-SEX COUPLES USING DONOR INSEMINATION TO CONCEIVE, CLEAR DELINEATION BY THIS COURT OF THESE COUPLES' PARENTAL RIGHTS AND OBLIGATIONS IS OF UTMOST IMPORTANCE.

An exact figure for the number of same-sex or different-sex couples that conceive via donor insemination, or the number of births that result from donor insemination, is difficult to find because the use of donor sperm is not subject to any reporting requirements. *See* Naomi Cahn, *The New Kinship*, 100 GEO. L. J. 367, 375 (2012). Over the past fifty years, approximately one million families have been created through the use of donor sperm or eggs. *Id.* at 368-69. In 1987, a survey of physicians conducted to

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marriage is the legitimate child of both spouses—because she and Brittany did not attempt to marry in one of the three states where same-sex marriage was not outlawed before they conceived Jaxon in 2009, because they did not get married when same-sex marriage became legal in the District of Columbia one month before Jaxon was born, and because they did not place on the record the reason they chose 2009 for the conception of Jaxon. *Conover v. Conover*, 224 Md. App. 366, 380 (2015). First, to have married in 2009, Michelle and Brittany Conover would have had to incur significant expense to travel to one of the few states that did not prohibit same-sex marriage. And if they had married in D.C. as soon as same-sex was legalized there, they would have had to have done so while Brittany was very near term in her pregnancy. Second, even if they had married elsewhere, they had no way of knowing whether Maryland would recognize their out-of-state marriage and extend any benefits of marital status to them. Maryland only did so on January 1, 2013. Civil Marriage Protection Act, H.B. 438, 2012 Leg. 429th Sess. (Md. 2012); Family Law § 2-201. Lastly, Michelle Conover should not now be denied her rights and obligations as a parent because she did not predict in 2009 that four years later Maryland's same-sex marriage ban would be overturned and, presumably by the logic of the Court of Special Appeals's majority opinion, defer having a child until then. Notably, Judge Nazarian in his concurrence pointedly refused to join the majority in criticizing Michelle Conover for her lack of talent for prognostication. *See id.* at 389-90 n.4 (Nazarian, J., concurring) ("The majority holds the couple's failure to marry in another state before conception against them, but I wouldn't. Michelle and Brittany had long been a couple when they decided to conceive and bring Jaxon into their home, and they could not have known with any confidence in 2009 whether the District of Columbia (or Maryland) ever would allow them to get married or recognize an out-of-state same-sex wedding from elsewhere.").

determine the prevalence and distribution of donor insemination found that, during a 12-month period in 1986-87, "approximately 172,000 women underwent at least one cycle of artificial insemination," resulting in 30,000 births from donor sperm. U.S. Cong., Ofc. Of Tech. Assessment, *Artificial Insemination: Practice in the United States, Summary of a 1987 Survey* 3, 15 (Aug. 1988). More recently, it has been estimated that "30,000-40,000 children are born each year from donated sperm." Cahn, *supra*, at 375.

In 2010, there were 12,538 same-sex couples in Maryland. THE WILLIAMS INSTITUTE, MARYLAND CENSUS SNAPSHOT: 2010 at 1 (2010).[7] 10,217 of these couples were unmarried; only 2,321 were married. *Id.* In a sample of 1,000 unmarried partner couples in Maryland, 78 of them were same-sex couples, but of 1,000 *married* couples, only about 2 were same-sex couples. *Id.* 20 percent of same-sex couples in Maryland were raising children who were under 18 and the child of one partner or spouse by birth, marriage, or adoption. 36 percent of married same-sex couples and 17 percent of unmarried same-sex couples were raising children. *Id.* at 3.

Given the significant number of unmarried same-sex couples in Maryland creating families with the use of donor insemination, it is critical that this Court define the rights and obligations of the non-biological parents in these relationships. Even if, in the wake of *Obergefell*, the number of same-sex couples who conceive via donor insemination while unmarried begins to decrease, there are undoubtedly many same-sex couples in Maryland who had children through donor insemination before same-sex marriage was

[7] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Maryland_v2.pdf.

legalized in Maryland. For the non-biological parent in these couples, their status as legal parents rests on unstable ground, as Michelle Conover's case unfortunately illustrates. Discriminatory marriage laws that destabilized the family for parents and children alike and treated the children of same-sex parents "as if they had only one parent," were precisely what *Obergefell* deemed unconstitutional. 135 S.Ct. at 2595, 2600-01. The lack of clarity regarding the rights and obligations under ET § 1-206(b) of non-biological parents who are or were in same-sex relationships perpetuates the very instability and uncertainty that *Obergefell* intended to end.

III. LEGAL PARENTAGE FOR SAME-SEX COUPLES WHO CONCEIVE THROUGH DONOR INSEMINATION SHOULD BE DETERMINED BY THE INTENT OF THE COUPLE TO PARENT.

A. When a couple uses ART to conceive, the "intended parentage" doctrine assigns parentage to each individual based on the couple's intentions to parent.

In *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993), *cert. dismissed sub. nom. Baby Boy J. v. Johnson*, 510 U.S. 938 (1993), the California Supreme Court identified a gender-neutral, intention-based standard for establishing the parentage of children conceived through ART. In determining the legal parentage of a child conceived by an embryo created by two opposite-sex parents' gametes and carried by a surrogate, the court ruled that those who make use of surrogacy to bring a child into the world are the "prime movers" of the child's conception and birth and should be assigned the rights and responsibilities that go along with that action. *Id.* at 782 (internal quotation marks omitted). It reasoned that, in such circumstances, the intended parents' "mental concept of the child" is a "but for" condition of birth, and as

such, legitimately gives rise to "expectations in society for adequate performance on the part of the initiators as parents of the child." *Id*. at 783 (internal quotation marks omitted).

A trilogy of cases in the California appellate courts has further elucidated and expanded the doctrine. In *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998), the California Court of Appeals concluded that *Johnson* is not limited to intended parents who have a genetic link to the children. *Johnson*, the court determined, governed "any situation where a child would not have been born but for the efforts of the intended parents." 72 Cal. Reptr. 2d at 291 (internal quotation marks and citations omitted). Because the couple in *Buzzanca*—a different-sex married couple who conceived their child by having an embryo genetically unrelated to them implanted in a surrogate—caused and intended the child's conception, birth, and gestation, the court held that they were the natural and lawful parents, despite their lack of biological connection to the child. *Id.* at 293.

In *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 55-58 (Cal. Ct. App. 2000), the Court of Appeals extended *Johnson* and *Buzzanca* to unmarried couples (as well as to all forms of ART). Finding that an agreement between parties to grant paternity rights to a child conceived by donor insemination was binding, the court observed that the appellant, though unmarried to the respondent, "ha[d] the elements of those of a lawful father . . . by virtue of his written consent to the artificial insemination of respondent and voluntary consequent assumption of fatherhood duties." *Dunkin*, 98 Cal. Rptr. at 55, 58.

Lastly, in *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), faced with the question of whether a woman was the legal parent of a child born to her partner in a lesbian relationship, the California Supreme Court determined that she was. 117 P.3d at 670. "In the present case," the Court recounted, "Elisa did not meet Emily after she was pregnant, but rather was in a committed relationship with her when they decided to have children together. Elisa actively assisted Emily in becoming pregnant, with the understanding that they would raise the resulting children together. Having helped cause the children to be born, and having raised them as her own, Elisa should not be permitted to later abandon the [children] simply because her relationship with Emily dissolved." *Id.*.

B. Other states have recognized the intent of parties engaged in conception via donor insemination and other forms of ART as critical to determining legal parentage.

A number of state supreme courts, faced with the task of determining parentage in cases involving same-sex couples, donor insemination, and individuals who may be parents in every sense but the biological, have turned to the intended parentage doctrine for guidance.[8] Most recently, the Oklahoma Supreme Court in *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015) considered a challenge to parentage strikingly similar to Michelle Conover's. *Ramey* concerned a same-sex couple who had conceived a child via donor

[8] The intended parentage doctrine has even been used to override a statute extinguishing a sperm donor's parentage rights. *See In Interest of R.C.*, 775 P.2d 27, 34-55 (Colo. 1989) (favorably citing commentators who have "concluded that the intent of the known [sperm] donor and unmarried recipient is relevant to a determination of parental rights," and holding that, where unmarried recipient and donor agreed, at time of insemination, that donor would be the father, donor's parental rights were preserved despite statute extinguishing them).

insemination following a decision both had made to have a child and jointly parent; the couple could not legally marry at the time, and broke up before the marriage ban was lifted. 362 P.3d at 219, 220. Finding that, "at the time of the conception of their child," the parties, "as competent adults, entered into an intentional intimate relationship and made a conscious decision to have a child and co-parent as a family," and noting that, "[t]he uncertainty facing [the non-biological parent], as reflected in this litigation" was the "exact peril identified in *Obergefell*," the court held that the non-biological intended parent was entitled to standing to pursue hearings on custody and visitation. *Id.* at 221. The court extended its holding to all "unmarried same sex couples who, prior to . . . *Obergefell,* entered into committed relationships, engaged in family planning with the intent to parent jointly and then shared in those responsibilities after the child was born." *Id.*

The Connecticut Supreme Court reached a similar result in *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011), albeit in a slightly different context. In *Raftopol*, a same-sex couple in a domestic partnership entered into a gestational contract with a third-party, who agreed to carry donor eggs fertilized with the sperm of one of the partners. 12 A.3d at 787. Connecticut had a statutory presumption for children conceived via donor insemination very similar to Maryland's—in Connecticut, parentage was based on marriage, making the husband who requested and consented to donor insemination the father. *Id.* at 789. The statute, however, did not apply in *Raftopol* because none of the parties was married. Despite the limited statutory avenues for establishing parentage—*i.e.*, only through biology, adoption, or donor insemination—the court concluded that

parental status could be conferred on the non-biological intended parent, irrespective of his lack of genetic ties with his child. *Id.* at 785-86, 789, 799.

The intended parentage doctrine is as necessary for respecting the rights of non-biological parents as it is for ensuring that the non-biological parents respect their obligations to their children. *In re Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2003), a case involving a different-sex unmarried couple who agreed to have a child through donor insemination, resulted in the Colorado Supreme Court holding that the mother could seek child support because her partner had consented to the child's birth and participated in raising him.[9] 787 N.E.2d at 152. "[I]f an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child," the court observed, "then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law." *Id.*

Maryland should follow the direction of these courts in recognizing that the intentions regarding parentage of couples who conceive a child through donor insemination should control. Doing so will ensure that parents like Michelle Conover—who was intimately involved the conception, birth, and, until the dissolution of her

[9] In a decision issued just a day before it issued *Conover v. Conover*, 224 Md. App. 366 (2015), the Court of Special Appeals similarly held that a father who, during his marriage, willingly and voluntarily agreed to conceive a child with his wife through in vitro fertilization with a donated egg and donated sperm, was equally responsible for his child's support, care, nurture, welfare, and education. *Sieglein v. Schmidt*, 224 Md. App. 222, 244 (2015). This Court granted a writ of *certiorari* in *Sieglein* on December 18, 2015.

relationship with Brittany Conover, day-to-day parenting of her son—are not later ignored by the law and excluded from their children's lives.

CONCLUSION

By presuming parentage from marital status rather than biology, ET § 1-206(b) entitles the non-biological parent of a child conceived by donor insemination to automatic recognition by the law as the parent of that child. This Court should extend ET § 1-206(b)'s protection of non-biological parents, and thus of families formed through donor insemination, to non-biological parents who were unable to marry their same-sex partners at the time of their children's conception because of unconstitutionally discriminatory marriage bans. In keeping with ET § 1-206(b)'s investment in preserving the integrity of families created by use of donor insemination, this Court should adopt the intended parentage doctrine accepted by other state supreme courts and affirm that the intentions of the couple in conceiving a child through donor insemination dictate that child's legal parentage. Accordingly, *amici curiae* respectfully request that this Court hold that, under ET § 1-206(b) and the intended parentage doctrine, Michelle Conover, who fully intended at the time of her son's conception via donor insemination to be his parent and who fulfilled that intention after his birth, is the legal parent of Jaxon.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,520 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2016, I caused to be mailed first class, postage prepaid, two copies each of the foregoing brief to:

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